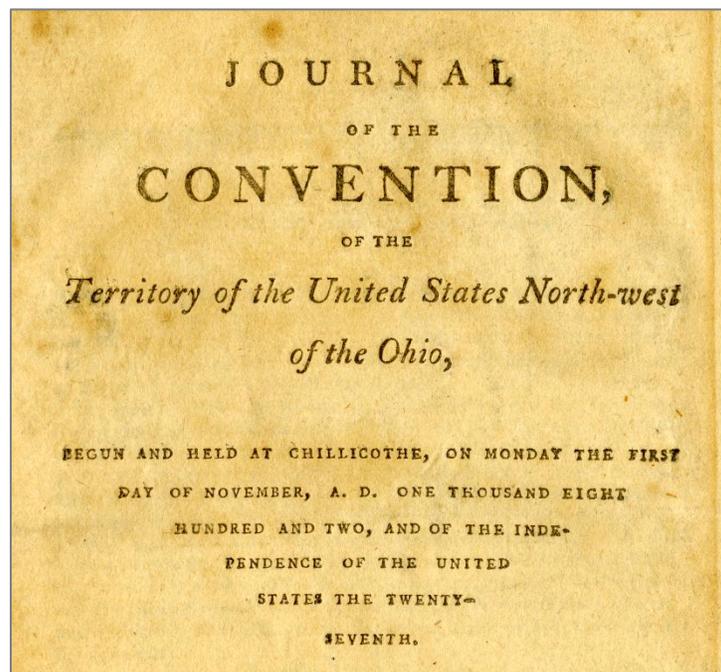




# OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

## FINAL REPORT PART 2: Commission Recommendations



Issued July 1, 2017

Cover photo shows the top of the title page of the journal from the 1802 Constitutional Convention.  
Courtesy of the Ohio History Connection (AL06905).

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## Letter from the Co-Chairs



### OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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June 30, 2017

TO: The General Assembly of the State of Ohio

On behalf of the members of the Ohio Constitutional Modernization Commission, we present to you this Final Report, in two parts, summarizing and documenting the work of the Commission's six subject matter committees, and providing the final work product of both the committees and the Commission.

The Commission's 20 public members, chosen from over 250 applicants, represented some of the most accomplished and talented of Ohio's citizens. They also demonstrated the highest ideals of dedication, diligence, and integrity as they donated a significant portion of their time each month to reviewing and recommending ideas that, if adopted, would serve to prepare Ohio's historic and comprehensive foundational document for the demands of the 21<sup>st</sup> century.

The Commission also benefited greatly from the contributions of its 12 legislative members who faithfully participated in the work of the Commission and contributed their legislative experience and political acumen to the process.

This Final Report contains all of the recommendations that were adopted by the Commission, as well as some recommendations issued by the committees but that, for various reasons, were not approved by the full Commission. Additional reports for each committee also describe proposals that were considered extensively by the committees but did not culminate in a recommendation to the Commission. Included with each recommendation is the history of the constitutional provisions, descriptions of relevant case law, outlines of presentations that informed the committees, and detailed summaries of committee discussion. This background is provided to assist the General Assembly in understanding the meaning of the constitutional provisions, and the rationale behind the Commission's recommendations.

Many others also contributed to this project. Over the years, the Commission heard from legal scholars and practitioners, educators, trade associations, public interest groups, representatives of state and local government agencies, and many others, all of whom provided insight and guidance as the committees delved into the various topics under review. The Commission is ever grateful for the participation of these individuals.

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The Commission was assisted by an able staff, including Executive Director Steven C. Hollon; Counsel and, later, Interim Executive Director and Counsel Shari L. O'Neill; Communications Director Shaunte S. Russell; and Administrative Assistant Jennie Long.

The Commission also relied on the advice and research support of Steven H. Steinglass, professor and dean emeritus of the Cleveland-Marshall College of Law, who served both as an early consultant as the Commission was organized and, later, as its senior policy advisor.

Student interns provided invaluable assistance with the Commission's research needs. Each semester the Commission hosted students from the Ohio State University Moritz College of Law, Ohio Northern University Pettit College of Law, or the Kent State University Columbus Program in Intergovernmental Issues.

The phrase "we stand on the shoulders of giants" is certainly true in relation to the benefit bestowed on this Commission by the significant, comprehensive work of the Ohio Constitutional Revision Commission in the 1970s. The documentation of the 1970s Commission's work was an unflinching resource, often lighting the path as this Commission found its way through some challenging topics. It is hoped that the work of the Constitutional Modernization Commission may be preserved for a future commission or convention to consider when the Ohio Constitution again comes under review. Of the 1970s Commission's effort, Chair Richard H. Carter wrote in 1977:

All members of the Commission, past and present, should be recognized for their dedication toward achieving its goals in a constructive, cooperative, and non-partisan spirit. This entire effort has been an outstanding example of how citizen involvement can make the democratic process truly meaningful and effective.

Those words are as true of the Modernization Commission as they were of the Revision Commission. In a world increasingly defined by partisanship and rancor, the need for civil discourse has never been greater. The Ohio Constitutional Modernization Commission, conceived with a goal of fostering bipartisan cooperation and open dialog, aspired to help the state constitution provide the foundational support for a better government and, by extension, a better society. Its members came together, in good faith and with sincere dedication, to leave a legacy and light a path for future Ohioans. As a result of the efforts of all of those who participated in this endeavor, we are now able to present this Final Report.

Respectfully submitted,

  
\_\_\_\_\_  
Senator Charleta B. Favares, Co-chair

  
\_\_\_\_\_  
Representative Jonathan Dever, Co-chair

## **I. Introduction**

This Final Report (“Report”) of the Ohio Constitutional Modernization Commission (“Commission”) is issued pursuant to the conclusion of the Commission. It is issued in two parts. Part 1 contains a summary of the Commission’s organization and outputs, including topics discussed and recommendations made to the General Assembly. Previously, three biennial reports on the work of the Commission were issued in December 2012, December 2014, and December 2016. Part 2 contains the full recommendations, with accompanying reports, issued by the Commission

The Commission was established in 2011 by enactment of Am. House Bill 188 by the 129th Ohio General Assembly. The Commission was charged with:

- Studying the Ohio Constitution;
- Promoting an exchange of experiences and suggestions respecting desired changes in the constitution;
- Considering the problems pertaining to the amendment of the constitution;
- Making recommendations from time to time to the General Assembly for the amendment of the constitution.

The Commission used six subject matter committees for the purpose of reviewing constitutional provisions: Education, Public Institutions, and Local Government Committee; Finance, Taxation, and Economic Development Committee; Judicial Branch and Administration of Justice Committee; Bill of Rights and Voting Committee; Constitutional Revision and Updating Committee; and Legislative Branch and Executive Branch Committee. There is a separate report for each committee providing a summary of its work and recommendations to the Commission.

The Commission also had three standing committees for the purpose of managing Commission operations: Organization and Administration Committee; Coordinating Committee; and Public Information and Liaisons with Public Offices Committee. With the exception of the Coordinating Committee, the standing committees conducted work pertaining only to the operation of the Commission and have not produced a final report. The Coordinating Committee has a final report providing a summary of the work pertaining to its one constitutional recommendation.

Originally, the Commission was set to expire on July 1, 2021. Under Amended Substitute House Bill 64 (131st GA), the expiration date was changed to January 1, 2018. In June 2017, House Bill 49 (132nd GA) changed the expiration date to July 1, 2017. The statutory language governing the Commission is available in Part 1 of the Final Report.

## II. Recommendations of the Commission

In total, the Commission made twenty-eight recommendations to the General Assembly regarding provisions of the Ohio Constitution. Table 1 summarizes the recommendations including when the recommendations were made and the vote by which they passed.

Under Rule 10.3 of the Rules of Procedure and Conduct, a Commission recommendation to retain an existing section of the Ohio Constitution, without change, required the affirmative vote of seventeen Commission members. A Commission recommendation to revise an existing section or adopt a new section required the affirmative vote of twenty-two Commission members.

These recommendations were presented in twenty-five separate reports and one addendum containing the background and discussion regarding the affected constitutional provisions. The complete reports for the recommendations are available in Appendix 1.

A few topics were the subject of recommendations by committees, but the recommendations were not endorsed by the Commission for various reasons. Table 2 summarizes these committee-only recommendations and any action taken by the Commission. Although not formal recommendations of the Commission, these topics represent issues that received significant discussion and for which recommendations were made by subject matter committees. In order that the General Assembly and other readers may know the full range of topics recommended to the Commission, the reports for these committee-only recommendations are presented separately in Appendix 2. Additional information about each of these topics may be found in the final report of the appropriate committee.

In the tables, committees are indicated with their initials as shown in the following list.

### Committee Name Abbreviations

BRV	Bill of Rights and Voting Committee
CC	Coordinating Committee
CRU	Constitutional Revision and Updating Committee
EPILG	Education, Public Institutions, and Local Government Committee
FTED	Finance, Taxation, and Economic Development Committee
JBAJ	Judicial Branch and Administration of Justice Committee
LEB	Legislative Branch and Executive Branch Committee

Table 1: Commission Recommendations

Constitutional provision	Topic	Committee	Recommendation	Committee approval	Commission approval	Vote
Art. I, § 2	Right to Alter, Reform, or Abolish Government, and Repeal Special Privileges	BRV	Retain	Feb. 12, 2015	June 11, 2015	22-0
Art. I, § 3	Right to Assemble	BRV	Retain	Feb. 12, 2015	June 11, 2015	22-0
Art. I, § 4	Bearing Arms, Standing Armies, and Military Power	BRV	Retain	Feb. 12, 2015	June 11, 2015	22-0
Art. I, § 8	Writ of Habeas Corpus	JBAJ	Retain	Mar. 9, 2017	Apr. 13, 2017	25-0
Art. I, § 13	Quartering Troops	BRV	Retain	June 11, 2015	Oct. 8, 2015	23-0
Art. I, § 17	No Hereditary Privileges	BRV	Retain	June 11, 2015	Oct. 8, 2015	23-0
Art. I, § 20	Powers Reserved to the People	BRV	Retain	Nov. 12, 2015	Jan. 14, 2016	22-0
Art. II, §§ 3, 4, 5, 11	Member Qualifications and Vacancies in the General Assembly	LEB	Retain	Dec. 15, 2016	Apr. 13, 2017	25-0
Art. II, §§ 6–9, 13, 14	Conducting Business of the General Assembly	LEB	Retain	Dec. 15, 2016	Apr. 13, 2017	25-0
Art. II, §§ 10, 12	Rights and Privileges of Members of the General Assembly	LEB	Retain	Mar. 9, 2017	Apr. 13, 2017	25-0
Art. IV, § 19	Courts of Conciliation	JBAJ	<b>Repeal</b>	Jan. 15, 2015	Apr. 9, 2015	23-1
Art. IV, § 22	Supreme Court Commission	JBAJ	<b>Repeal</b>	Jan. 15, 2015	Apr. 9, 2015	24-0
Art. V, § 2	Election by Ballot	BRV	Retain	May 11, 2017	May 11, 2017	21-0-1
Art. V, § 2a	Names of Candidates on Ballot	BRV	Retain	Mar. 9, 2017	Apr. 13, 2017	25-0
Art. V, § 4	Exclusion from Franchise for Felony Conviction	BRV	Retain	Nov. 12, 2015	Jan. 14, 2016	20-2

Art. VI, § 1	Funds for Religious and Educational Purposes	EPILG	Retain	Oct. 8, 2015	Dec. 10, 2015	23-0
Art. VI, § 2	School Funds	EPILG	Retain	Oct. 8, 2015	Dec. 10, 2015	22-1
Art. VI, § 5	Loans for Higher Education	EPILG	Retain	Nov. 10, 2016	Mar. 9, 2017	21-0-1
Art. VI, § 6	Tuition Credits Program	EPILG	Retain	Nov. 10, 2016	Mar. 9, 2017	21-0-1
Art. VII, § 1	Support for Persons with Certain Disabilities	EPILG	<b>Revise</b>	May 11, 2017	June 8, 2017	24-0
Art. VII, §§ 2, 3	Directors of Public Institutions	EPILG	<b>Repeal</b>	May 11, 2017	June 8, 2017	23-0
Art. VIII, §§ 1, 2	State Debt	FTED	Retain	May 12, 2016	Sept. 8, 2016	25-0
Art. VIII, § 3	State Debt	FTED	<b>Revise</b>	May 12, 2016	Sept. 8, 2016	25-0
Art. VIII, §§ 2b–2h, 2j, 2k	Authorization of Debt Obligations	FTED	<b>Repeal</b>	Apr. 14, 2016	Sept. 8, 2016	26-0
Art. VIII, §§ 2l–2s	Additional Authorization of Debt Obligations	FTED	Retain	Nov. 10, 2016	Mar. 9, 2017	21-0-1
Art. VIII, § 2t	General Obligation Bonds for Certain Facility Costs	FTED	<b>Adopt</b>	Apr. 14, 2016	Sept. 8, 2016	26-0
Art. VIII, §§ 7–11	The Sinking Fund and Sinking Fund Commission	FTED	<b>Repeal</b>	May 12, 2016	Sept. 8, 2016	26-0
Art. VIII, § 18	Protection for Certain Bond Holders	FTED	<b>Adopt</b>	Apr. 14, 2016	Sept. 8, 2016	26-0

Table 2: Committee Recommendations Not Adopted by the Commission

Constitutional provision	Topic	Committee	Recommendation	Committee approval	Commission action	Vote
All	Gender Neutral Language	CC	<b>Revise</b>	May 11, 2017	No vote due to lack of quorum	None
Art. I, § 10	Grand Juries	JBAJ	<b>Revise</b>	May 11, 2017	Not considered	None
Art. II, §§ 1–1i, 15, 17	Initiative and Referendum	CRU	<b>Revise</b>	May 11, 2017	Tabled June 8, 2017	20-1
Art. II, § 2	State Legislator Term Limits	LEB	<b>Revise</b>	Apr. 9, 2015	Not considered	None
Art. V, § 6	Mental Capacity to Vote	BRV	<b>Revise</b>	Mar. 11, 2016	Not adopted May 12, 2016	18-8 (22 votes required)

# Appendix 1

## Ohio Constitutional Modernization Commission

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### Commission Recommendations

## Commission Recommendations

Constitutional provision	Topic
Art. I, § 2	Right to Alter, Reform, or Abolish Government, and Repeal Special Privileges
Art. I, § 3	Right to Assemble
Art. I, § 4	Bearing Arms, Standing Armies, and Military Power
Art. I, § 8	Writ of Habeas Corpus
Art. I, § 13	Quartering Troops
Art. I, § 17	No Hereditary Privileges
Art. I, § 20	Powers Reserved to the People
Art. II, §§ 3, 4, 5, 11	Member Qualifications and Vacancies in the General Assembly
Art. II, §§ 6–9, 13, 14	Conducting Business of the General Assembly
Art. II, §§ 10, 12	Rights and Privileges of Members of the General Assembly
Art. IV, § 19	Courts of Conciliation
Art. IV, § 22	Supreme Court Commission
Art. V, § 2	Election by Ballot
Art. V, § 2a	Names of Candidates on Ballot
Art. V, § 4	Exclusion from Franchise for Felony Conviction
Art. VI, § 1	Funds for Religious and Educational Purposes
Art. VI, § 2	School Funds
Art. VI, § 5	Loans for Higher Education
Art. VI, § 6	Tuition Credits Program
Art. VII, § 1	Support for Persons with Certain Disabilities
Art. VII, §§ 2, 3	Directors of Public Institutions
Art. VIII, §§ 1, 2	State Debt
Art. VIII, § 3	State Debt
Art. VIII, §§ 2b–2h, 2j, 2k	Authorization of Debt Obligations
Art. VIII, §§ 2l–2s	Additional Authorization of Debt Obligations
Art. VIII, § 2t	General Obligation Bonds for Certain Facility Costs
Art. VIII, §§ 7–11	The Sinking Fund and Sinking Fund Commission
Art. VIII, § 18	Protection for Certain Bond Holders



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION

#### OHIO CONSTITUTION ARTICLE I, SECTION 2

#### RIGHT TO ALTER, REFORM, OR ABOLISH GOVERNMENT, AND REPEAL SPECIAL PRIVILEGES

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The Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article I, Section 2 of the Ohio Constitution concerning the right of the people to alter, reform, or abolish government, the right of government to repeal special privileges, and equal protection. It is issued pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*The Commission recommends that no change be made to Article I, Section 2 of the Ohio Constitution and that the provision be retained in its current form.*

#### **Background**

Article I, Section 2 reads as follows:

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

The Bill of Rights as set forth in Article I is a declaration of rights and liberties similar to those contained in the United States Constitution.

Although original to the 1851 Ohio Constitution, a portion of Article I, Section 2 derives from Article VIII, Section 1 of the 1802 constitution, which stated, in part that: "every free republican government, being founded on their sole authority, and organized for the great purpose of protecting their rights and liberties, and securing their independence; to effect these ends, they have at all times a complete power to alter, reform or abolish their government, whenever they deem it necessary."<sup>1</sup>

Article I, Section 2 contains provisions that address different, but related, topics: inherent political power of the people and their right to alter government; equal protection; and special privileges or immunities. Most of Section 2 has no direct corollary in the U.S. Constitution, but the section contains political principles that reflect the influence of the Declaration of Independence.

### *Inherent political power and the right to alter government*

The recognition that “[a]ll political power is inherent in the people” and the further statement that the people “have the right to alter, reform, or abolish \*\*\* [government] whenever they may deem it necessary” are derived from the Article VIII, Section 1 of the 1802 constitution. These statements reflect the Jeffersonian principle contained in the Declaration of Independence that all political power is derived from the people.<sup>2</sup>

### *Equal protection and benefits*

Adopted as part of the 1851 Constitution, the “Equal Protection Clause” in Article I, Section 2 provides that “government is instituted for [the people’s] equal protection and benefit.” That phrase predates, yet corresponds to, the Fourteenth Amendment of the U.S. Constitution with its prohibition against states denying any person the “equal protection of the laws.” Although federal equal protection analysis has focused on issues of race, gender, or other immutable characteristics, “there is no indication from the little discussion of the equal protection clause at the 1850-51 convention that it was understood to end or ameliorate racial or gender discrimination \*\*\*.”<sup>3</sup>

### *Special privileges and immunities*

Adopted as part of the 1851 constitution, this section’s requirement that special privileges and immunities, where granted, are subject to General Assembly alteration has no counterpart in the Declaration of Independence, the Ohio Constitution of 1802, or the U.S. Constitution.

Allowing the General Assembly control over the granting of special privileges or immunities was the part of this section that was heavily debated during the Constitutional Convention of 1850-51. The debate concerned the General Assembly’s practice of granting corporate charters containing special privileges and immunities, such as exemptions from future taxation and monopolies on toll roads and canal companies.<sup>4</sup> Ultimately, the provision barred the alteration, revocation, or repeal of previously granted charters (as was required under the Contracts Clause of Article I, Section 10 of the U.S. Constitution), but permitted changes by the General Assembly in future charters. Thus, this clause ultimately was seen as subjecting corporate charters to the will of the General Assembly.

## **Amendments, Proposed Amendments, and Other Review**

Article I, Section 2 has not been amended since its adoption as part of the 1851 Ohio Constitution. The 1970s Ohio Constitutional Revision Commission did not recommend any changes to this section.<sup>5</sup>

## **Litigation Involving the Provision**

Those portions of Article I, Section 2 addressing the inherent political power of the people and their right to alter government have not been the subject of significant litigation, and the provision concerning “special privileges or immunities” has been the subject of little modern litigation.

Addressing the equal protection guarantee in this section, the Ohio Supreme Court has taken the position that the equal protection guarantee in Article I, Section 2 is “functionally equivalent” to the federal equal protection guarantee<sup>6</sup> and “is to be construed and analyzed identically” to its federal counterpart.<sup>7</sup>

## **Presentations and Resources Considered**

There were no presentations to the Bill of Rights and Voting Committee on this provision, but the committee did rely on the Report of the 1970s Ohio Constitutional Revision Commission and on Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution* (2nd prtg. 2011), pp.84-88.

## **Action by the Bill of Rights and Voting Committee**

After formal consideration by the Bill of Rights and Voting Committee on December 11, 2014, and February 12, 2015, the committee voted unanimously to adopt a report and recommendation recommending that Article I, Section 2 be retained in its current form on February 12, 2015.

## **Presentation to the Commission**

On April 9, 2015, on behalf of the Bill of Rights and Voting Committee, committee Chair Richard Saphire appeared before the Commission to present the committee’s report and recommendation, by which it recommended retention of Article I, Section 2. Chair Saphire explained the history and purpose of the provision, indicating that the committee had determined that it would be appropriate to retain Article I, Section 2 in its current form.

## **Action by the Commission**

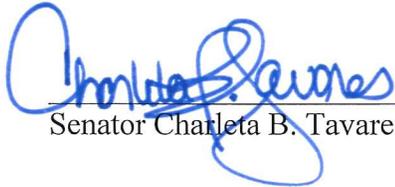
At the Commission meeting held June 11, 2015, Sen. Larry Obhof moved to adopt the report and recommendation for Article I, Section 2, a motion that was seconded by Dennis Mulvihill. A roll call vote was taken, and the motion passed by a unanimous affirmative vote of 22 members of the Commission.

## **Conclusion**

The Ohio Constitutional Modernization Commission concludes that Article I, Section 2 should be retained in its current form.

## Date Adopted

After formal consideration by the Ohio Constitutional Modernization Commission on April 9, 2015, and June 11, 2015, the Commission voted to adopt this report and recommendation on June 11, 2015.



Senator Charleta B. Tavares, Co-Chair



Representative Ron Amstutz, Co-Chair

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## Endnotes

<sup>1</sup> Steinglass, Steven H. and Gino J. Scarselli. *The Ohio State Constitution*. New York: Oxford UP (2nd printing), 2011. 85. Print.

<sup>2</sup> The Declaration of Independence states as follows:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.-- That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

<sup>3</sup> Steinglass & Scarselli, at 85.

<sup>4</sup> *Id.* at 88.

<sup>5</sup> Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part 11, The Bill of Rights, pp. 16-18. Print. 15 Apr. 1976. Available at: <http://www.lsc.ohio.gov/ocrc/recommendations%20pt11%20bill%20of%20rights.pdf> (accessed Sept. 15, 2015).

See also Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Vol. 11, Final Report, Index to Proceedings and Research, Appendix K, pp. 444-46. Print. 30 June 1977. Available at: <http://www.lsc.ohio.gov/ocrc/final%20report%20index%20to%20proceedings%20and%20research.pdf> (accessed Sept. 15, 2015).

<sup>6</sup> See, e.g., *Pickaway Cty. Skilled Gaming, LLC v. Cordray*, 127 Ohio St.3d 104, 109, 2010-Ohio-4908, 936 N.E.2d 944, 951.

<sup>7</sup> *American Assn. of Univ. Professors v. Central State Univ.*, 87 Ohio St.3d 55, 59, 1999-Ohio-254, 717 N.E.2d 286, 291 (on remand from U.S. Supreme Court).



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION

#### OHIO CONSTITUTION ARTICLE I, SECTION 3

#### RIGHT TO ASSEMBLE

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The Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article I, Section 3 of the Ohio Constitution concerning the right to assemble and petition. The Commission issues this report pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*The Commission recommends that no change be made to Article I, Section 3 of the Ohio Constitution and that the provision be retained in its current form.*

#### **Background**

Article I, Section 3 reads as follows:

The people have the right to assemble together, in a peaceable manner, to consult for the common good; to instruct their representatives; and to petition the General Assembly for the redress of grievances.

The Bill of Rights as set forth in Article I is a declaration of rights and liberties similar to those contained in the United States Constitution.

This provision of the Ohio Constitution is original to the 1851 constitution.

Section 3 corresponds to the First Amendment of the United States Constitution, which, in addition to providing for freedom of religion, freedom of speech, and freedom of the press, protects the right of the people peaceably to assemble, and the right to petition the government for a redress of grievances.<sup>1</sup> While the Ohio Constitution also provides for freedom of religion and freedom of speech and the press, it does so in separate provisions, Article I, Sections 7 and 11.

The section directly traces its origins to similar language in Article VIII, Section 19 of the 1802 constitution, which followed the 1776 Pennsylvania Declaration of Rights.<sup>2</sup> Article VIII, Section 19 of the 1802 constitution provides: “That the people have a right to assemble together in a peaceable manner to consult for their common good, to instruct their Representatives, and to apply to the Legislature for redress of grievances.” Other state constitutions predating Ohio’s contain similar protections for the rights of assembly and petition, and all stem from similar declarations of rights in much earlier British documents, including the Bill of Rights of 1689, and, most notably, the Magna Carta in 1215.<sup>3</sup>

Ohio’s provision, unlike its First Amendment counterpart, is not phrased as a limitation on the power of government but as an affirmative recognition of the rights of the people. The First Amendment also does not contain a right of the people to “instruct their representatives.”<sup>4</sup>

### **Amendments, Proposed Amendments, and Other Review**

Article I, Section 3 has not been amended since its adoption as part of the 1851 Ohio Constitution.

In the 1970s, the Ohio Constitutional Revision Commission recognized the right to associate and to petition the government for redress of grievances to be fundamental to the concept of ordered liberty, and that it is circumscribed only by the legitimate exercise of police powers in order to protect the health and safety of the citizenry.<sup>5</sup> Thus, the 1970s Commission recommended that no change be made to the provision.<sup>6</sup>

### **Litigation Involving the Provision**

The Ohio Supreme Court recognizes the fundamental nature of the right of the people to assemble. See *State v. Schwing*, 42 Ohio St. 2d 295, 302, 328 N.E.2d 379, 384 (1975) (“Both the federal (Amendment I) and the state (Section 3, Article I) constitutions recognize the inherent right of the people to assemble together in meetings.”). Nonetheless, there are no significant Ohio cases construing the “right to assemble” clause of Article I, Section 3, and the court has rarely cited it. In the 1970s, the Ohio Constitutional Revision Commission noted that when the Ohio courts have failed to interpret this provision consistently with the First Amendment of the United States Constitution, they have been reversed. See *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (holding a city ordinance making it “unlawful for three or more persons to assemble \*\*\* on \*\*\* sidewalks and there conduct themselves in a manner annoying to persons passing by” as unconstitutionally vague), *rev’g* 21 Ohio St.2d 66 (1970).

There are no reported Ohio cases construing the instructions clause.

### **Presentations and Resources Considered**

There were no presentations to the Bill of Rights and Voting Committee on this provision.

### **Action by the Bill of Rights and Voting Committee**

After formal consideration by the Bill of Rights and Voting Committee on December 11, 2014, and February 12, 2015, the committee voted unanimously to adopt a report and recommendation recommending that Article I, Section 3 be retained in its current form on February 12, 2015.

### **Presentation to the Commission**

On April 9, 2015, on behalf of the Bill of Rights and Voting Committee, committee Chair Richard Saphire appeared before the Commission to present the committee's report and recommendation, by which it recommended retention of Article I, Section 3. Chair Saphire explained the history and purpose of the provision, indicating that the committee had determined that it would be appropriate to retain Article I, Section 3 in its current form.

### **Action by the Commission**

At the Commission meeting held June 11, 2015, Sen. Larry Obhof moved to adopt the report and recommendation for Article I, Section 3, a motion that was seconded by Dennis Mulvihill. A roll call vote was taken, and the motion passed by a unanimous affirmative vote of 22 members of the Commission.

### **Conclusion**

The Ohio Constitutional Modernization Commission concludes that Article I, Section 3 should be retained in its current form.

### **Date Adopted**

After formal consideration by the Ohio Constitutional Modernization Commission on April 9, 2015, and June 11, 2015, the Commission voted to adopt this report and recommendation on June 11, 2015.

  
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Senator Charleta B. Tavares, Co-Chair

  
\_\_\_\_\_  
Representative Ron Amstutz, Co-Chair

### **Endnotes**

<sup>1</sup> The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

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<sup>2</sup> Steinglass, Steven H. and Gino J. Scarselli. *The Ohio State Constitution*. New York: Oxford UP (2nd printing), 2011. 89. Print.

<sup>3</sup> Howard, A. E. Dick. *Magna Carta: Text and Commentary*. Revised ed. Charlottesville: Published for the Magna Carta Commission of Virginia, The UP of Virginia (Revised Ed.). 1964. 27. Print.

<sup>4</sup> Steinglass & Scarselli, *supra*.

<sup>5</sup> Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Vol. 9, Recommendations of the Education and Bill of Rights Committee, p. 4726. Print. 19 Nov. 1975. Available at: <http://www.lsc.ohio.gov/ocrc/v9%20pgs%204395-4813%20education-bill%20of%20rights%204814-4955%20whats%20left.pdf> (accessed Sept. 15, 2015).

<sup>6</sup> Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part 11, The Bill of Rights, p. 18. Print. 15 Apr. 1976. Available at: <http://www.lsc.ohio.gov/ocrc/recommendations%20pt11%20bill%20of%20rights.pdf> (accessed Sept. 15, 2015).

*See also* Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Vol. 11, Final Report, Index to Proceedings and Research, Appendix K, pp. 446. Print. 30 June 1977. Available at: <http://www.lsc.ohio.gov/ocrc/final%20report%20index%20to%20proceedings%20and%20research.pdf> (accessed Sept. 15, 2015).



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION

#### OHIO CONSTITUTION ARTICLE I, SECTION 4

#### BEARING ARMS; STANDING ARMIES; MILITARY POWER

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The Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article I, Section 4 of the Ohio Constitution concerning the right to bear arms, the prohibition against maintaining standing armies during peacetime, and the subordination of the military to the civil power. The Commission issues this report pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*The Commission recommends that no change be made to Article I, Section 4 of the Ohio Constitution and that the provision be retained in its current form.*

#### **Background**

Article I, Section 4 reads as follows:

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

The Bill of Rights as set forth in Article I is a declaration of rights and liberties similar to those contained in the United States Constitution.

This provision of the Ohio Constitution is original to the 1851 constitution, although Article VIII, Section 20 of the 1802 constitution contained a prior version providing "[t]hat the people have a right to bear arms for the defense of themselves and the State; and as standing armies in time of peace are dangerous to liberty, they shall not be kept up: and that the military shall be kept under strict subordination to the civil power."<sup>1</sup>

The Ohio Supreme Court analyzed this provision as follows:

The language of Section 4, Article I of the Ohio Constitution is clear. This provision is divided by two semicolons, coordinating three independent clauses. Rather than focusing merely on the preservation of a militia, as provided by the Second Amendment, the people of Ohio chose to go even further. Section 4, Article I not only suggests a preference for a militia over a standing army, and the deterrence of governmental oppression, it adds a third protection and secures to every person a fundamental *individual* right to bear arms for “their *defense and security* \*\*\*.” (Emphasis added.) This clause was obviously implemented to allow a person to possess certain firearms for defense of self and property. Accord *State v. Hogan* (1900), 63 Ohio St. 202, 218-19, 58 N.E. 572, 575.

*Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 43, 616 N.E.2d 163, 169 (1993).

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the United States Supreme Court construed the Second Amendment to the United States Constitution as providing an individual right to bear arms.

During the pre-*Heller* period, the Ohio Supreme Court interpreted the Ohio provision as conferring a greater right in the individual to possess firearms for self-protection than that afforded by the U.S. Constitution.<sup>2</sup> Significantly, the Court in *Arnold* clarified at paragraph one of its syllabus that the Ohio Constitution was a document of independent force that could provide greater protections than its federal counterpart:

The Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.

### **Amendments, Proposed Amendments, and Other Review**

Article I, Section 4 has not been amended since its adoption as part of the 1851 Ohio Constitution.

In the 1970s, the Ohio Constitutional Revision Commission noted the differences between the 1802 provision, which granted the right to bear arms to individuals both for self-protection and for protection of the state, and the 1851 provision, which only indicated the right to bear arms for self-defense and security. The 1970s Commission attributed the difference to the notion of the “citizen-soldier” that was prevalent in the early days of Ohio statehood. The 1970s Commission observed, however, that it was impossible to know if this change was significant because there was no record of a debate on the issue.<sup>3</sup>

The Ohio Constitutional Revision Commission recommended no change in this section.

## **Litigation Involving the Provision**

Article I, Section 4 has been the subject of litigation involving the regulation of the sale and ownership of assault weapons, *see Arnold, supra*, and the individual's ability to carry a firearm in a public place. *See Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779, 795 N.E.2d 633. The Ohio Supreme Court has ruled that, while fundamental, the right to bear arms is not absolute, and reasonably may be restricted in the interests of the health, safety, morals, or general welfare of the public.<sup>4</sup>

Issues concerning the right to bear arms under Article I, Section 4 also have arisen in the context of disputes concerning the scope of the home rule power under Article XVIII, Section 3, and the Ohio Supreme Court generally has deferred to state legislation. *See City of Cleveland v. State*, 128 Ohio St.3d 135, 2010-Ohio-6318, 942 N.E.2d 370 (R.C. 9.68 is a general law that displaces municipal firearm ordinances, is part of a comprehensive statewide legislative enactment and applies uniformly across the state; therefore it does not unconstitutionally infringe municipal home rule authority); *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 120 Ohio St.3d 96, 2008-Ohio-4605, 896 N.E.2d 967 (addressing the relationship between Ohio's concealed carry statutes, R.C. 2923.126 and R.C. 9.68, and Article XVIII, Section 3, and concluding that a city ordinance prohibiting firearms in municipal parks conflicted with a statewide comprehensive legislative enactment and thus was not enforceable). *But see City of Cincinnati v. Baskin*, 112 Ohio St.3d 279, 2006-Ohio-6422, 859 N.E.2d 514 (upholding city ordinance that prohibited the possession of semi-automatic rifles with a capacity of more than ten rounds, finding no conflict with state statutes that prohibited possession of semi-automatic firearm capable of firing more than thirty-one cartridges without reloading).

## **Presentations and Resources Considered**

There were no presentations to the Bill of Rights and Voting Committee on this provision. However, in considering Article I, Section 4, the committee reviewed a fifty-state survey of similar provisions that indicated nearly every state constitution protects the individual's right to bear arms, with some, like Ohio's, recognizing that the military is subordinate to the civil power.

## **Action by the Bill of Rights and Voting Committee**

After formal consideration by the Bill of Rights and Voting Committee on December 11, 2014, and February 12, 2015, the committee voted unanimously to adopt a report and recommendation recommending that Article I, Section 4 be retained in its current form on February 12, 2015.

## **Presentation to the Commission**

On April 9, 2015, on behalf of the Bill of Rights and Voting Committee, committee Chair Richard Saphire appeared before the Commission to present the committee's report and recommendation, by which it recommended retention of Article I, Section 4. Chair Saphire

explained the history and purpose of the provision, indicating that the committee had determined that it would be appropriate to retain Article I, Section 4 in its current form.

### **Action by the Commission**

At the Commission meeting held June 11, 2015, Sen. Larry Obhof moved to adopt the report and recommendation for Article I, Section 4, a motion that was seconded by Dennis Mulvihill. A roll call vote was taken, and the motion passed by a unanimous affirmative vote of 22 members of the Commission.

### **Conclusion**

The Ohio Constitutional Modernization Commission concludes that Article I, Section 4 should be retained in its current form.

### **Date Adopted**

After formal consideration by the Ohio Constitutional Modernization Commission on April 9, 2015, and June 11, 2015, the Commission voted to adopt this report and recommendation on June 11, 2015.



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Senator Charleta B. Tavares, Co-Chair



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Representative Ron Amstutz, Co-Chair

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### **Endnotes**

<sup>1</sup> Steinglass, Steven H. and Gino J. Scarselli. *The Ohio State Constitution*. New York: Oxford UP (2nd printing), 2011. 90. Print.

<sup>2</sup> *Id.*

<sup>3</sup> Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part 11, The Bill of Rights, p. 19. Print. 15 Apr. 1976. Available at: <http://www.lsc.ohio.gov/ocrc/recommendations%20pt11%20bill%20of%20rights.pdf> (accessed Sept. 15, 2015).

*See also* Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Vol. 11, Final Report, Index to Proceedings and Research, Appendix K, pp. 447. Print. 30 June 1977. Available at: <http://www.lsc.ohio.gov/ocrc/final%20report%20index%20to%20proceedings%20and%20research.pdf> (accessed Sept. 15, 2015).

<sup>4</sup> *See, e.g., Arnold, supra; Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779, 795 N.E.2d 633.



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION

#### OHIO CONSTITUTION ARTICLE I, SECTION 8

#### WRIT OF HABEAS CORPUS

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The Ohio Constitutional Modernization Commission adopts this report and recommendation regarding Article I, Section 8 of the Ohio Constitution concerning the writ of habeas corpus. It is adopted pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*The Commission recommends that Article I, Section 8 be retained in its present form.*

#### **Background**

Article I, Section 8 reads as follows:

The privilege of the writ of habeas corpus shall not be suspended, unless, in cases of rebellion or invasion, the public safety require it.

The Bill of Rights as set forth in Article I is a declaration of rights and liberties similar to those contained in the United States Constitution.

Habeas corpus, short for *habeas corpus ad subjiciendum*, is Latin for "that you may have the body."<sup>1</sup> Originating in early English common law, the concept that persons should not be imprisoned contrary to law was a key aspect of the Magna Carta.<sup>2</sup> Eventually, this principle was embodied in a provision for a formal writ, also called "The Great Writ," by which a person wrongfully imprisoned could petition the government for release.<sup>3</sup> As currently understood in American criminal law, the writ commands a person detaining someone to produce the prisoner or detainee.<sup>4</sup>

From its appearance in the Magna Carta, the writ was preserved in various parliamentary enactments, and most notably was memorialized in the Habeas Corpus Act of 1679.<sup>5</sup>

The writ was incorporated as part of the Northwest Ordinance of 1787, in which Article 2 stated:

The inhabitants of the said territory shall always be entitled to the benefits of the writ of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature; and of judicial proceedings according to the course of the common law. All persons shall beailable, unless for capital offenses, where the proof shall be evident or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land; and, should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, *bona fide*, and without fraud, previously formed.<sup>6</sup>

Given this history, it was natural that the writ found a home in the United States Constitution in 1789, albeit not as part of the Bill of Rights (which was added later as a set of amendments), but at Article I, Section 9.<sup>7</sup> It reads:

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

When the first Ohio Constitution was adopted in 1802, the writ was described in the Bill of Rights, then located in Article VIII. Section 12 of Article VIII of the first Ohio Constitution provides:

That all persons shall beailable by sufficient sureties, unless for capital offenses where the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended unless, when in case of rebellion or invasion, the public safety may require it.<sup>8</sup>

Like the U.S. Constitution, the 1802 Ohio Constitution used the phrase “may require,” a construction that initially survived the 1851 revision process.<sup>9</sup> However, when the provision was later reported by the convention’s Committee on Revision, Arrangement and Enrollment, the phrase was changed to remove the word “may.”<sup>10</sup> The proceedings of the convention do not reveal that there was debate on this change. As adopted, the original, signed 1851 constitution states: “The privilege of the writ of habeas corpus shall not be suspended, unless, in cases of rebellion or invasion, the public safety require it.”<sup>11</sup> This is the wording that now appears in the Ohio Constitution as published by the secretary of state and the General Assembly.<sup>12</sup>

In addition to changing the manner of reference to when the writ may be suspended, delegates to the Ohio Constitutional Convention of 1851 reorganized the Bill of Rights, placing it in Article I, separating the writ of habeas corpus from the requirement of bail, and placing provision for the writ in Section 8.<sup>13</sup>

The statutory procedure governing application for a writ of habeas corpus is set out in R.C. Chapter 2725, allowing, at R.C. 2725.01, anyone who is “unlawfully restrained of his liberty, or entitled to the custody of another, of which custody such person is unlawfully deprived” to prosecute a writ of habeas corpus to inquire into the cause of the imprisonment, restraint, or deprivation. The statutes also describe which courts may grant the writ, what an application for the writ must contain, when the writ either is not allowed or is properly granted, and the procedural rules for considering and granting a writ.

As described in the Ohio Constitution, original jurisdiction over petitions for a writ of habeas corpus is assigned to the Supreme Court of Ohio by Article IV, Section 2(B)(1)(c), and to the Ohio courts of appeals by Article IV, Section 3(B)(1)(c). Although no specific constitutional provision allows for the original jurisdiction of the state common pleas and probate courts, Article IV, Section 4(B) assigns to the General Assembly the ability to provide by law for “original jurisdiction over all justiciable matters,” while Section 4(C) creates and provides for a probate division, thus indicating that a writ of habeas corpus may also be entertained by those courts. In fact, R.C. 2725.02 provides that the writ “may be granted by the supreme court, court of appeals, court of common pleas, probate court, or by a judge of any such court.”

### **Amendments, Proposed Amendments, and Other Review**

The Constitutional Revision Commission in the 1970s (1970s Commission), in considering whether to recommend changes to Section 8, noted that the Constitutional Convention of 1874 unsuccessfully proposed adding language that would expressly permit the General Assembly to provide by law for suspension of the writ.<sup>14</sup> The 1970s Commission concluded that its review did not “disclose any significant differences between federal and state interpretations nor any reasons to recommend changes in the language,” and so recommended no changes.<sup>15</sup>

### **Litigation Involving the Provision**

Despite that myriad federal court cases address the writ as provided in the U.S. Constitution, relatively few Supreme Court of Ohio decisions address Article I, Section 8 of the Ohio Constitution, and still fewer hold a writ to be the appropriate remedy. The primary question for the reviewing court is whether the applicant possesses an adequate remedy in the ordinary course of law. Courts generally determine that petitioners for the writ of habeas corpus have an adequate remedy in the form of an appeal, and thus do not qualify for the writ. *See, e.g. Drake v. Tyson-Parker*, 101 Ohio St.3d 210, 2004-Ohio-711, 803 N.E.2d 811; *Jackson v. Wilson*, 100 Ohio St.3d 315, 2003-Ohio-6112, 798 N.E.2d 1086 (a writ of habeas corpus is not available to a petitioner having an adequate remedy at law by appeal to raise his claims of unlawful imprisonment). Nor is the writ available to test the validity of an indictment or other charging

instrument, or to raise claims of insufficient evidence. *Galloway v. Money*, 100 Ohio St.3d 74, 2003-Ohio-5060, 796 N.E.2d 528.

The writ is appropriate, however, to challenge the jurisdiction of the sentencing court. One example is *Johnson v. Timmerman-Cooper*, 93 Ohio St.3d 614, 2001-Ohio-1803, 757 N.E.2d 1153, in which the petitioner was an unarmed minor who was present during a robbery-homicide. After she was bound over for trial as an adult pursuant to the mandatory bindover provision in R.C. 2151.26, she petitioned for habeas corpus relief based on uncontroverted evidence that her circumstances did not meet the statutory bindover requirement that she be armed at the time of the incident. The Supreme Court of Ohio agreed, holding that the sentencing court “patently and unambiguously lacked jurisdiction to convict and sentence her on the charged offenses when she had not been lawfully transferred to that court,” and voiding the conviction and sentence. *Id.*, 100 Ohio St.3d at 617.

The writ also may provide a remedy in non-criminal cases, such as in involuntary commitment or child custody matters. *See, e.g., In re Fisher*, 39 Ohio St.2d 71, 313 N.E.2d 851; *Pegan v. Crawmer*, 76 Ohio St.3d 97, 1996-Ohio-419, 666 N.E.2d 1091.

### **Presentations and Resources Considered**

There were no presentations to the committee on this provision.

### **Discussion and Consideration**

At its meeting on January 12, 2017, the Judicial Branch and Administration of Justice Committee briefly discussed Article I, Section 8 before concluding that the long history of the writ of habeas corpus, as well as the similarities between Ohio’s provision and its counterpart in the U.S. Constitution and other states, indicates that no change should be recommended.

### **Action by the Judicial Branch and Administration of Justice Committee**

After formal consideration by the Judicial Branch and Administration of Justice Committee, the committee voted on March 9, 2017 to issue a report and recommendation recommending that Article I, Section 8 be retained in its present form.

### **Presentation to the Commission**

On April 13, 2017, Janet Gilligan Abaray, chair of the Judicial Branch and Administration of Justice Committee, presented a report and recommendation for Article I, Section 8, indicating that because the history and purpose of the section continue to support its relevance, the committee was not inclined to recommend a change.

## Action by the Commission

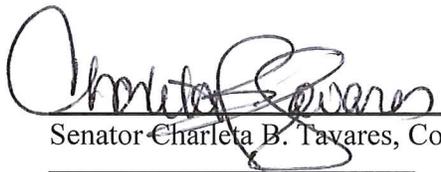
At the Commission meeting held April 13, 2017, Commission member Jeff Jacobson moved to adopt the report and recommendation for Article I, Section 8, a motion that was seconded by Representative Robert McColley. Upon a roll call vote, the motion passed unanimously, by a vote of 25 in favor, with none opposed, and five absent.

## Conclusion

The Ohio Constitutional Modernization Commission recommends that Article I, Section 8 be retained in its present form.

## Date Adopted

After formal consideration by the Ohio Constitutional Modernization Commission on April 13, 2017, the Commission voted to adopt the report and recommendation on April 13, 2017.

  
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Senator Charleta B. Tavares, Co-chair

  
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Representative Jonathan Dever, Co-chair

## Endnotes

<sup>1</sup> Bryan A. Garner, *A Dictionary of Modern Legal Usage* 395 (2d ed. 1995).

<sup>2</sup> Art. 39, in *Sources of Our Liberties* 17 (R. Perry & J. Cooper eds. 1959), as cited in *Boumediene v. Bush*, 553 U.S. 723, 739 (2008).

<sup>3</sup> Dallin H. Oaks, *Habeas Corpus in the States: 1776-1865*, 32 U. Chi. L.Rev. 243 (1965).

<sup>4</sup> *Habeas Corpus*, Black's Law Dictionary (10th ed. 2014).

<sup>5</sup> 31 Car. 2, c.2, 27 May 1679, available at: [http://press-pubs.uchicago.edu/founders/documents/a1\\_9\\_2s2.html](http://press-pubs.uchicago.edu/founders/documents/a1_9_2s2.html) (last visited Dec. 21, 2016).

<sup>6</sup> Northwest Ordinance of 1787, as reprinted in Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 et seq. It may be found online at: *Journals of the Continental Congress, 1774-1789*, 32:334 (Worthington C. Ford, et al., eds., 1904-37); Ordinance of 1787: The Northwest Territorial Government, Act of July 13, 1787, <http://uscode.house.gov/browse/frontmatter/organiclaws&edition=prelim> (last visited Dec. 21, 2016), and additionally is available at: The Avalon Project, *Northwest Ordinance; July 13, 1787*, Lillian Goldman Law Library, Yale Law School (2008), [http://avalon.law.yale.edu/18th\\_century/nworder.asp](http://avalon.law.yale.edu/18th_century/nworder.asp) (last visited Dec. 21, 2016).

<sup>7</sup> Additional history regarding the writ of habeas corpus may be found in *Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>8</sup> Isaac F. Patterson, *The Constitutions of Ohio: Amendments and Proposed Amendments* 92 (Cleveland, Arthur H. Clark Co. 1912).

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<sup>9</sup> *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio, 1850-51*, 2 vols. (Columbus: S. Medary, 1851), 231.

<sup>10</sup> *Id.* at 806, 826.

<sup>11</sup> Ohio History Connection Archives, Image of Original First Page of the Ohio Constitution of 1851. Available at: <http://cdm16007.contentdm.oclc.org/cdm/ref/collection/p267401coll32/id/16791> (last visited Dec. 21 2016).

<sup>12</sup> The Ohio General Assembly provides a copy of the current constitution at: <https://www.legislature.ohio.gov/laws/ohio-constitution> (last visited Dec. 21, 2016); the Ohio Secretary of State provides a copy of the current constitution at: <https://www.sos.state.oh.us/sos/upload/publications/election/Constitution.pdf> (last visited Dec. 21, 2016).

<sup>13</sup> A discussion of the history of the writ of habeas corpus in the Ohio Constitution may be found in Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution*, 97-98 (2nd prtg. 2011).

<sup>14</sup> Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Ohio Constitution, Part 11, The Bill of Rights, 25 (Apr. 15, 1976), available at: <http://www.lsc.ohio.gov/ocrc/recommendations%20pt11%20bill%20of%20rights.pdf>, (last visited Dec. 21, 2016).

<sup>15</sup> *Id.*



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION

#### OHIO CONSTITUTION ARTICLE I, SECTION 13

#### QUARTERING OF TROOPS

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The Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article I, Section 13 of the Ohio Constitution concerning the quartering of troops. It is issued pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*The Commission recommends that no change be made to Article I, Section 13 of the Ohio Constitution and that the provision be retained in its current form.*

#### **Background**

Article I, Section 13, reads as follows:

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor, in time of war, except in the manner prescribed by law.

The Bill of Rights as set forth in Article I is a declaration of rights and liberties similar to those contained in the United States Constitution. The Third Amendment to the U.S. Constitution reads: "No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."

Adopted as part of the 1851 Ohio Constitution, Article I, Section 13 is virtually identical to its predecessor, Article VIII, Section 22 of the 1802 Constitution, which reads:

That no soldier, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in the manner prescribed by law.

The concept of quartering troops in private homes arose out of English law and custom, and was the byproduct of a military system that had transitioned from reliance upon local citizen militias to standing armies comprised of professional soldiers.<sup>1</sup> Eventually, Parliament's Mutiny Act

protected private British citizens in England from being forced to house and feed British soldiers, requiring compensation to innkeepers and others who supplied traveling armies with food and shelter.<sup>2</sup> But the anti-quartering section of the Mutiny Act was not extended across the Atlantic, and the forced quartering of troops during the French and Indian War (1754-1763) angered colonists who felt they were being denied protections they understood to be their birthright as Englishmen.<sup>3</sup> Attempting to defuse colonial anger, Parliament amended the Mutiny Act to include The Quartering Act of 1765, authorizing British troops to shelter in public houses or vacant structures where barracks were unavailable and clarifying that quartering in private homes was to be avoided.<sup>4</sup>

From the Crown's point of view, standing armies were necessary even after the war to protect British supremacy in North America, including the securing of territorial and trading interests.<sup>5</sup> From the colonists' point of view, the end of the French and Indian War should have seen a reduction, rather than an increase, in troop numbers.<sup>6</sup> Eventually, the role of colonial standing armies evolved to that of containing the civil unrest that ensued as the British government imposed unpopular taxes and other restrictions.<sup>7</sup> Throughout this period, colonial governments were unwilling to concede the need for standing armies, the British control they symbolized, and the expense they represented.<sup>8</sup>

As the situation escalated, Parliament enacted a second Quartering Act in 1774 to require the quartering of troops in private homes.<sup>9</sup> Citizen outrage followed, based, in part, on the growing conviction that the real purpose of the military presence was to suppress colonists' resistance to British control.<sup>10</sup>

Thus, the quartering of troops issue became a symbol of British oppression, and helped to provide justification for the independence movement.<sup>11</sup> In fact, "Quartering large bodies of armed troops among us" was one of the rights violations cited in the Declaration of Independence.<sup>12</sup> In the 1800s, some historians characterized the Quartering Acts, along with other parliamentary decrees limiting and controlling economic and personal liberties during colonial times, as "Intolerable Acts," a historiographical term which continues to be used to describe the despotic actions of the British government in the years leading up to the Revolutionary War.<sup>13</sup>

This history inspired several former colonies to include anti-quartering provisions in their state constitutions, and led to adoption of the U.S. Constitution's Third Amendment.<sup>14</sup> It also influenced the drafters of the constitutions of Pennsylvania, Kentucky, and Tennessee, all three of which are recognized as primary sources for much of Ohio's 1802 Constitution.<sup>15 16</sup>

### **Amendments, Proposed Amendments, and Other Review**

Article I, Section 13 has not been amended since its adoption as part of the 1851 Ohio Constitution.<sup>17</sup> The 1970s Ohio Constitutional Revision Commission did not recommend any changes to this section.<sup>18</sup>

## **Litigation Involving the Provision**

Article I, Section 13 has not been the subject of significant litigation.

The Third Amendment to the United States Constitution has been cited in some litigation, not because it references the quartering of troops *per se*, but for its support of the concept that citizens have a constitutional right to privacy that must be protected from governmental intrusion. *See e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965); *Katz v. United States*, 389 U.S. 347 (1967).

## **Presentations and Resources Considered**

There were no presentations to the committee on this provision.

## **Action by the Bill of Rights and Voting Committee**

After formal consideration by the Bill of Rights and Voting Committee on April 9, 2015 and June 11, 2015, the committee voted unanimously to issue a report and recommendation recommending that Article I, Section 13 be retained in its current form on June 11, 2015.

## **Presentation to the Commission**

On September 10, 2015, on behalf of the Bill of Rights and Voting Committee, committee Vice-chair Jeff Jacobson appeared before the Commission to present the committee's report and recommendation, by which it recommended retention of Article I, Section 13. Vice-chair Jacobson explained the history and purpose of the provision, indicating that the committee had determined that it would be appropriate to retain Article I, Section 13 in its current form.

## **Action by the Commission**

At the Commission meeting held October 8, 2015, Doug Cole moved to adopt the report and recommendation for Article I, Section 13, a motion that was seconded by Sen. Larry Obhof. A roll call vote was taken, and the motion passed by a unanimous affirmative vote of 23 members of the Commission.

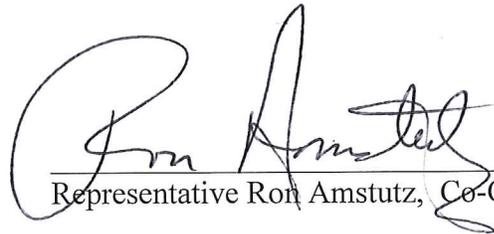
## **Conclusion**

The Ohio Constitutional Modernization Commission concludes that Article I, Section 13 should be retained in its current form.

## Date Adopted

After formal consideration by the Ohio Constitutional Modernization Commission on September 10, 2015, and October 8, 2015, the Commission voted to adopt this report and recommendation on October 8, 2015.

  
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Senator Charleta B. Tavares, Co-Chair

  
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Representative Ron Amstutz, Co-Chair

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## Endnotes

<sup>1</sup> William S. Fields & David T. Hardy, *The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History*, 35 Am. J. Legal Hist. 393 (1991).

<sup>2</sup> Alan Rogers, *Empire and Liberty: American Resistance to British Authority 1755-1763*, 76 (1974).

<sup>3</sup> *Id.*, at 83-84.

<sup>4</sup> *Id.*, at 88.

<sup>5</sup> Fields & Hardy, *supra*, at 414-415.

<sup>6</sup> *Id.*, at 416.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*, at 415.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*, at 416.

<sup>11</sup> Rogers, *supra*, at 89.

<sup>12</sup> Fields & Hardy, at 417-18.

<sup>13</sup> J.L. Bell, "Intolerable Acts," J. of the Amer. Revolution (June 25, 2013), <http://allthingsliberty.com/2013/06/intolerable-acts/> (last visited April 24, 2015).

<sup>14</sup> Note, *Does Five Equal Three? Reading the Takings Clause in Light of the Third Amendment's Protection of Houses*, 112 Columbia L.Rev. 112, 126-27 (2012).

<sup>15</sup> Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution*, 21-22 (2<sup>nd</sup> prtng. 2011).

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<sup>16</sup> The 1796 Constitution of Tennessee includes Article 11, Section 27, which reads: “That no Soldier shall in time of peace be quartered in any House without consent of the owner, nor in time of war but in a manner prescribed by Law.”

Article IX, Section 23 of the Pennsylvania Constitution of 1790 states: “That no soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.”

Article XII, Section 25 of the 1792 Kentucky Constitution provides: “That no soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.”

Only minor differences in punctuation distinguish these three provisions from Article VIII, Section 22 of Ohio’s 1802 Constitution.

For a discussion of the quartering provisions in the Kentucky Constitution, see Robert M. Ireland, *The Kentucky State Constitution* (2<sup>nd</sup> ed. 2012). A similar discussion regarding the Tennessee Constitution may be found at Lewis L. Laska, *The Tennessee State Constitution*, 64 (2011).

<sup>17</sup> Steinglass & Scarselli, *supra*, at 112.

<sup>18</sup> Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Ohio Constitution, Part 11, The Bill of Rights, 36-37 (Apr. 15, 1976), <http://www.lsc.ohio.gov/ocrc/recommendations%20pt11%20bill%20of%20rights.pdf> (last visited Sept. 15, 2015).

*See also* Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Ohio Constitution, Vol. 11, Final Report, Index to Proceedings and Research, Appendix K, 464-65 (June 30, 1977), <http://www.lsc.ohio.gov/ocrc/final%20report%20index%20to%20proceedings%20and%20research.pdf> (last visited Sept. 15, 2015).



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION

#### OHIO CONSTITUTION ARTICLE I, SECTION 17

#### NO HEREDITARY PRIVILEGES

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The Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article I, Section 17 of the Ohio Constitution concerning the granting or conferring of hereditary privileges. It is issued pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*The Commission recommends that no change be made to Article I, Section 17 of the Ohio Constitution and that the provision be retained in its current form.*

#### **Background**

Article I, Section 17, reads as follows:

No hereditary emoluments, honors, or privileges, shall ever be granted or conferred by this State.

The Bill of Rights as set forth in Article I is a declaration of rights and liberties similar to those contained in the United States Constitution. Article I, Sections 9 and 10 of the U.S. Constitution similarly prohibit the granting of titles of nobility.<sup>1</sup>

That hereditary titles and privileges had no place in the emerging egalitarian ideals of the American colonies is a concept reflected in the writings of prominent statesmen, political theorists, and constitutional framers of the time. As observed by Alexander Hamilton, "Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the corner-stone of republican government; for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people."<sup>2</sup>

The prohibition of such titles and distinctions also was seen as necessary to the survival of the young republic, when the hard-won gains of the Revolutionary War were threatened by both British and French trade interference and other acts of aggression in the period leading up to the War of 1812. Out of the fear that foreign influence, bought with hereditary titles and aristocratic privileges, could weaken nationalistic resolve, constitutional framers both at the federal and state levels included prohibitions against such “titles of nobility” in their constitutions.<sup>3</sup> Hereditary titles were seen as the antithesis of a societal aspiration that rejected Old World notions of birthright and a fixed social status in favor of liberty, equality, and economic opportunity. As Thomas Jefferson wrote on the occasion of the fiftieth anniversary of the signing of the Declaration of Independence, and near the end of his life:

That form which we have substituted, restores the free right to the unbounded exercise of reason and freedom of opinion. All eyes are opened, or opening, to the rights of man. The general spread of the light of science has already laid open to every view the palpable truth, that the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of God.<sup>4</sup>

Article I, Section 17, adopted as part of the 1851 Ohio Constitution, is virtually identical to Section 24 of Article VIII of the 1802 Constitution, which reads: “That no hereditary emoluments, privileges, or honors shall ever be granted or conferred by this state.”<sup>5</sup> The record of the 1802 Constitutional Convention does not reflect the provision’s source, but it is identical to the analogous provision in Article II, Section 30 of the Tennessee Constitution of 1796.

### **Amendments, Proposed Amendments, and Other Review**

Article I, Section 17 has not been amended since its adoption as part of the 1851 Ohio Constitution.<sup>6</sup> The 1970s Ohio Constitutional Revision Commission did not recommend any changes to this section.<sup>7</sup>

### **Litigation Involving the Provision**

Article I, Section 17 has not been the subject of significant litigation.

### **Presentations and Resources Considered**

There were no presentations to the committee on this provision.

### **Action by the Bill of Rights and Voting Committee**

After formal consideration by the Bill of Rights and Voting Committee on April 9, 2015 and June 11, 2015, the committee voted unanimously to issue a report and recommendation recommending that Article I, Section 17 be retained in its current form on June 11, 2015.

## Presentation to the Commission

On September 10, 2015, on behalf of the Bill of Rights and Voting Committee, committee Vice-chair Jeff Jacobson appeared before the Commission to present the committee's report and recommendation, by which it recommended retention of Article I, Section 17. Vice-chair Jacobson explained the history and purpose of the provision, indicating that the committee had determined that it would be appropriate to retain Article I, Section 17 in its current form.

## Action by the Commission

At the Commission meeting held October 8, 2015, Patrick Fischer moved to adopt the report and recommendation for Article I, Section 17, a motion that was seconded by Jo Ann Davidson. A roll call vote was taken, and the motion passed by a unanimous affirmative vote of 23 members of the Commission.

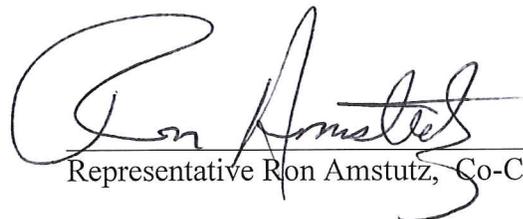
## Conclusion

The Ohio Constitutional Modernization Commission concludes that Article I, Section 17 should be retained in its current form.

## Date Adopted

After formal consideration by the Ohio Constitutional Modernization Commission on September 10, 2015, and October 8, 2015, the Commission voted to adopt this report and recommendation on October 8, 2015.

  
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Senator Charleta B. Tavares, Co-Chair

  
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Representative Ron Amstutz, Co-Chair

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## Endnotes

<sup>1</sup> U.S. Const. Art. I, Section 9 reads, in part: "No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state." Section 10 reads, in part: "No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

<sup>2</sup> The Federalist No. 84, (Alexander Hamilton). Available online at: [http://www.gutenberg.org/files/1404/1404-h/1404-h.htm#link2H\\_4\\_0084](http://www.gutenberg.org/files/1404/1404-h/1404-h.htm#link2H_4_0084) (last visited Apr. 24, 2015).

<sup>3</sup> See, e.g., Gideon M. Hart, *The "Original" Thirteenth Amendment: the Misunderstood Titles of Nobility Amendment*, 94 Marq. L. Rev. 311, 335-47 (2010-2011).

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<sup>4</sup> Letter to Roger C. Weightman, June 24, 1826 (Thomas Jefferson), as reprinted in *50 Core American Documents*, 136-37 (Christopher Burkett, ed., 2013).

<sup>5</sup> Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution*, 123 (2<sup>nd</sup> prtg. 2011).

<sup>6</sup> *Id.*

<sup>7</sup> Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Ohio Constitution, Part 11, The Bill of Rights, 42-43 (Apr. 15, 1976), <http://www.lsc.ohio.gov/ocrc/recommendations%20pt11%20bill%20of%20rights.pdf> (last visited Sept. 15, 2015).

*See also* Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Ohio Constitution, Vol. 11, Final Report, Index to Proceedings and Research, Appendix K, 470-71 (June 30, 1977), <http://www.lsc.ohio.gov/ocrc/final%20report%20index%20to%20proceedings%20and%20research.pdf> (last visited Sept. 15, 2015).



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION

#### OHIO CONSTITUTION ARTICLE I, SECTION 20

#### POWERS RESERVED TO THE PEOPLE

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The Ohio Constitutional Modernization Commission adopts this report and recommendation regarding Article I, Section 20 of the Ohio Constitution concerning powers that are reserved to or retained by the people. It is issued pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*The Commission recommends that no change be made to Article I, Section 20 of the Ohio Constitution and that the provision be retained in its current form.*

#### **Background**

Article I, Section 20 reads as follows:

This enumeration of rights shall not be construed to impair or deny others retained by the people, and all powers, not herein delegated, remain with the people.

Adopted as part of the 1851 Ohio Constitution, the provision was preceded by Article VIII, Section 28 of the 1802 constitution, which reads:

To guard against the transgressions of the high powers which we have delegated, we declare that all powers not hereby delegated remain with the people.

The Bill of Rights as set forth in Article I is a declaration of rights and liberties similar to those contained in the United States Constitution.

Mirroring language from both the Ninth and Tenth Amendments to the United States Constitution, Section 20 has been viewed as lacking much legal force other than expressing the view that the powers of the government are derived from the people.<sup>1</sup> Despite the textual similarities to the federal amendments, Ohio courts have generally not looked to federal law in

interpreting Section 20. In part, this is because there is little United States Supreme Court guidance on the meaning of the Ninth Amendment and because the Tenth Amendment does not address the relationship between the individual and the state.

The Ninth Amendment states:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The Ninth Amendment has been the subject of much scholarly commentary but little judicial construction. For example, constitutional scholars have variously interpreted the Ninth Amendment as preserving natural rights that were recognized in 1791 or that changed over time, as incorporating rights contained in state constitutions and the common law, and as supporting federalism and the autonomy of local government.<sup>2</sup> More importantly, the U.S. Supreme Court has been reluctant to offer much guidance as to the meaning of the Amendment. For example, the most noteworthy reliance on the Ninth Amendment by the Court was in a concurring opinion by Justice Goldberg in *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). In agreeing with the decision striking down the Connecticut limitation on birth control, Justice Goldberg concluded that a right of privacy in a marital relationship is a right retained by the people because the Ninth Amendment was meant to protect individual rights that otherwise were not listed in the Bill of Rights. However, despite Justice Goldberg's concurrence, the Court has not provided an authoritative construction of the amendment.<sup>3</sup> Instead, the Court has preferred to rely on the liberty provision of the Fourteenth Amendment when dealing with unenumerated rights.<sup>4</sup> As a result, Ohio courts are unable to rely on Ninth Amendment jurisprudence to give meaning to Section 20.

The Tenth Amendment provides:

The powers not delegated to the United States by the Constitution, nor prohibited by the States, are reserved to the States respectively, or to the people.

The Tenth Amendment initially addresses the relationship between federal and state power. The Court once famously noted that “[t]he amendment states but a truism that all is retained which has not been surrendered.” *United States v. Darby*, 312 U.S. 100, 124 (1941). In more recent years, however, the Court has utilized the Tenth Amendment to limit federal actions that commandeered state institutions. For example, the Court has held that Congress cannot require a state to choose between expanding Medicaid or losing all Medicaid-related federal funding (*Natl. Fedn. of Indep. Business v. Sebelius*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 2566 (2012)); cannot require a state to choose between storing toxic waste or passing a regulatory scheme designed by Congress (*New York v. United States*, 505 U.S. 144 (1992)); and cannot require state police officers to perform background checks of prospective handgun purchasers (*Printz v. United States*, 521 U.S. 898 (1997)).

Although the Court has given some meaning to the first portion of the Tenth Amendment, it has not done the same for the final “reserved to the people” language of the amendment. Thus, the Tenth Amendment does not provide guidance as to the proper construction of Section 20.

Despite the absence of guidance from the federal constitution, a source of guidance could come from the constitutions of other states. Some state constitutions adopted prior to the federal constitution contained inherent or natural rights clauses,<sup>5</sup> and today a majority of states have unenumerated powers clauses. State courts have adopted a variety of approaches when interpreting these provisions, with decisions ranging from those assigning little significance to them to those concluding that they protect a variety of unenumerated rights.

### **Amendments, Proposed Amendments, and Other Review**

Article I, Section 20 has not been amended since its adoption as part of the 1851 Ohio Constitution.<sup>6</sup> The 1970s Ohio Constitutional Revision Commission did not recommend any changes to this section.<sup>7</sup>

### **Litigation Involving the Provision**

Ohio courts generally have not dealt with Section 20, with the major decision construing it being over 100 years old. In 1876, the Ohio Supreme Court stated that the section “only declares that powers not delegated remain with the people. It does not purport to limit or modify delegated powers.” *State ex rel. Atty. Gen. v. Covington*, 29 Ohio St. 102, 112 (1876). In that case, the General Assembly passed a law calling for the state to select the police commissioners of Cincinnati. Arguing the law was unconstitutional under Section 20, respondents argued that at the time of adoption of the 1851 constitution, the power to appoint a police board was local. Thus, because the power had not been delegated to the General Assembly, it was to remain with the people. The Court rejected this argument, stating:

By such interpretation of the constitution, the body of law in force at the time of its adoption would have become as permanent and unchangeable as the constitution itself. For such argument would apply with equal force to every subject of legislation concerning which no special direction is contained in the constitution. Indeed, the true rule for ascertaining the powers of the legislature is to assume its power under the general grant ample for any enactment within the scope of legislation, unless restrained by the terms or the reason of some express inhibition.

*Id.* at 113-14.

Other Ohio Supreme Court decisions generally cite Section 20 only in conjunction with other sections of the Bill of Rights. *See, e.g., Mirick v. Gims*, 79 Ohio St. 174, 86 N.E. 880 (1908)(applying Section 20 and Article II, Section 28 to conclude that the police powers of the state are limited by the Declaration of Rights such that they may not be exercised in an unreasonable or arbitrary manner). As such, Section 20 has not been considered as containing any particular rights not otherwise found in the Ohio Constitution.

Currently, Section 20 generally is only raised in death penalty *habeas corpus* cases in which the defendant argues his or her trial violated multiple state and federal constitutional rights. However, no court has relied on Section 20 to overturn a conviction. *See, e.g., State v. Mack*, 8<sup>th</sup>

Dist. No. 101261, 2015-Ohio-2149, 2015 Ohio App. LEXIS 2075, 2015 WL 3560451; *Lang v. Bobby*, 2015 U.S. Dist. LEXIS 39365, 2015 WL 1423490 (N.D. Ohio).

### **Presentations and Resources Considered**

There were no presentations to the committee on this provision.

### **Action by the Bill of Rights and Voting Committee**

After formal consideration by the Bill of Rights and Voting Committee on November 12, 2015, the committee voted on November 12, 2015 to issue a report and recommendation recommending that Article V, Section 20 be retained in its current form.

### **Presentation to the Commission**

On December 10, 2015, on behalf of the Bill of Rights and Voting Committee, committee Chair Richard Saphire appeared before the Commission to present the committee's report and recommendation, by which it recommended retention of Article I, Section 20. Chair Saphire explained the history and purpose of the provision, indicating that the committee had determined that it would be appropriate to retain Article I, Section 20 in its current form.

### **Action by the Commission**

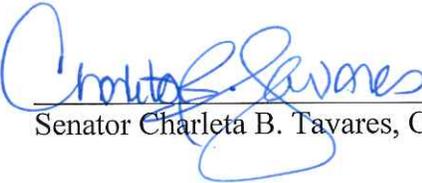
At the Commission meeting held January 14, 2016, Jeff Jacobson moved to adopt the report and recommendation for Article I, Section 20, a motion that was seconded by Mark Wagoner. A roll call vote was taken, and the motion passed by a unanimous affirmative vote of 22 members of the Commission.

### **Conclusion**

The Ohio Constitutional Modernization Commission concludes that Article I, Section 20 should be retained in its current form.

### **Date Adopted**

After formal consideration by the Ohio Constitutional Modernization Commission on December 10, 2015, and January 14, 2016, the Commission voted to adopt this report and recommendation on January 14, 2016.

  
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Senator Charleta B. Tavares, Co-Chair

  
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Representative Ron Amstutz, Co-Chair

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## Endnotes

<sup>1</sup> Steven H. Steinglass and Gino J. Scarselli, *The Ohio State Constitution* 125 (2nd prtg. 2011).

<sup>2</sup> Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 *Columbia L. Rev.* 498, 500 (2011).

<sup>3</sup> *See, e.g.*, Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 *Texas L.Rev.* 597, 708-709 (2005).

<sup>4</sup> *Id.* at 714.

<sup>5</sup> *See, e.g.*, Pa. Const. of 1776, Art. I, Declaration of Rights (“That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending of life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.”); Va. Bill of Rights of 1776, Section 1 (“That all men \* \* \* have certain inherent rights [that] cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property and pursuing and obtaining happiness and safety.”).

<sup>6</sup> Steinglass & Scarselli, *supra*.

<sup>7</sup> Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Ohio Constitution, Part 11, The Bill of Rights, 50-51 (Apr. 15, 1976), <http://www.lsc.ohio.gov/ocrc/recommendations%20pt11%20bill%20of%20rights.pdf>, (last visited Oct. 5, 2015).

*See also* Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report, Index to Proceedings and Research, Appendix K, 478-79 (June 30, 1977), <http://www.lsc.ohio.gov/ocrc/final%20report%20index%20to%20proceedings%20and%20research.pdf> (last visited Oct. 5, 2015).



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION

#### OHIO CONSTITUTION ARTICLE II SECTIONS 3, 4, 5, AND 11

#### MEMBER QUALIFICATIONS AND VACANCIES IN THE GENERAL ASSEMBLY

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The Ohio Constitutional Modernization Commission adopts this report and recommendation regarding Sections 3, 4, 5, and 11 of Article II of the Ohio Constitution concerning member qualifications and filling vacancies in the General Assembly. It is adopted pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*The Commission recommends that Article II, Sections 3, 4, 5, and 11 of the Ohio Constitution be retained in their current form.*

#### **Background**

Article II generally concerns the Legislative Branch, providing the organizational structure and membership requirements of the General Assembly and the method for it conducting its business.

Article II, Sections 3, 4, 5, and 11 address the qualifications of members of the General Assembly, as well as providing for filling vacancies in legislative seats. Originally adopted as part of the 1851 constitution, the sections specifically describe residency requirements and restrictions on those who serve in the General Assembly, and the method for filling a vacancy in the General Assembly. While subject to several proposals for change since 1851, only some amendments have been approved by the electorate.

Section 3, adopted in 1851 and amended in 1967, states that senators and representatives shall have lived in their districts for one year prior to their election:

Senators and representatives shall have resided in their respective districts one year next preceding their election, unless they shall have been absent on the public business of the United States, or of this State.

Delegates at the Constitutional Convention of 1851 addressed a concern, raised by Charles Reemelin of Hamilton County, that legislators were not always residents of the communities they represented. As Reemelin observed, “under a fair and equal representation,” it would be more ideal for representatives to live closer so as to have interests “more identical with [their constituents]”.<sup>1</sup> Thus, as adopted in 1851, the provision required legislators to live in their respective counties or districts for at least a year before their election, with the 1967 amendment only removing the reference to “counties” in order to satisfy legislative apportionment requirements.

Section 4, adopted in 1851 and amended in 1973, restricts members of the General Assembly, while serving, from holding any other public office, except as specified. The section additionally acknowledges the ethical concerns raised by legislators creating future employment for themselves, preventing General Assembly members from later being appointed to offices created or enhanced during their term of office:

No member of the general assembly shall, during the term for which he was elected, unless during such term he resigns therefrom, hold any public office under the United States, or this state, or a political subdivision thereof; but this provision does not extend to officers of a political party, notaries public, or officers of the militia or of the United States armed forces.

No member of the general assembly shall, during the term for which he was elected, or for one year thereafter, be appointed to any public office under this state, which office was created or the compensation of which was increased, during the term for which he was elected.

Section 5, unchanged since 1851, prohibits persons convicted of embezzlement from serving in the General Assembly, and prevents persons holding money for public disbursement from serving until they account for and pay that money into the treasury:

No person hereafter convicted of an embezzlement of the public funds, shall hold any office in this State; nor shall any person, holding public money for disbursement, or otherwise, have a seat in the General Assembly, until he shall have accounted for, and paid such money into the treasury.

Delegates to the 1851 convention addressed the matter of convicted or disbursement-holding individuals being able to gain seats in the General Assembly. As originally proposed, the amendment would have read: “No person who shall be convicted of a defalcation or embezzlement of the public funds, shall be capable of holding any office of trust, honor or profit; nor shall any person holding any public money for disbursement, or otherwise, have a seat in either house of the General Assembly, until such person shall have accounted for and paid into

the Treasury all money for which he may be accountable or liable.”<sup>2</sup> However, when the discussion of the section came up, many delegates were unclear on the intended application and purpose of the proposed amendment, with delegate Peter Hitchcock of Geauga County supposing that the goal was to “disqualify any person who had been guilty of criminally appropriating the public funds” for personal intentions. Ultimately, the convention agreed to add the word “hereafter” to make the phrase “no person who shall hereafter be,” and to remove the word “defalcation.”<sup>3</sup>

Section 11, adopted in 1851 and amended in 1961, 1968, and 1973, defines how vacancies shall be filled in the Senate and House of Representatives:

A vacancy in the Senate or in the House of Representatives for any cause, including the failure of a member-elect to qualify for office, shall be filled by election by the members of the Senate or the members of the House of Representatives, as the case may be, who are affiliated with the same political party as the person last elected by the electors to the seat which has become vacant. A vacancy occurring before or during the first twenty months of a Senatorial term shall be filled temporarily by election as provided in this section, for only that portion of the term which will expire on the thirty-first day of December following the next general election occurring in an even-numbered year after the vacancy occurs, at which election the seat shall be filled by the electors as provided by law for the remaining, unexpired portion of the term, the member-elect so chosen to take office on the first day in January next following such election. No person shall be elected to fill a vacancy in the Senate or House of Representatives, as the case may be, unless he meets the qualifications set forth in this Constitution and the laws of this state for the seat in which the vacancy occurs. An election to fill a vacancy shall be accomplished, notwithstanding the provisions of section 27, Article II of this Constitution, by the adoption of a resolution, while the Senate or the House of Representatives, as the case may be, is in session, with the taking of the yeas and nays of the members of the Senate or the House of Representatives, as the case may be, affiliated with the same political party as the person last elected to the seat in which the vacancy occurs. The adoption of such resolution shall require the affirmative vote of a majority of the members elected to the Senate or the House of Representatives, as the case may be, entitled to vote thereon. Such vote shall be spread upon the journal of the Senate or the House of Representatives, as the case may be, and certified to the Secretary of State by the clerk thereof. The Secretary of State shall, upon receipt of such certification, issue a certificate of election to the person so elected and upon presentation of such certificate to the Senate or the House of Representatives, as the case may be, the person so elected shall take the oath of office and become a member of the Senate or the House of Representatives, as the case may be, for the term for which he was so elected.

As initially proposed by a committee of the 1851 convention, Section 11 read “All vacancies which may happen in either House, shall as soon as possible, be filled by an election, and the

Governor shall issue the necessary writs of election according to law.”<sup>4</sup> But delegate John L. Green of Ross County expressed a concern that handling the matter in this way would cause delay in the legislature’s consideration of important matters while waiting for an election to fill the vacancy.<sup>5</sup> Another delegate, George Collings of Adams County, proposed to strike the words “as soon as possible,” which was approved, as well as a proposal by A. G. Brown of Athens County to eliminate the word “an” before “election.” Motions to add “prescribed by law” and a policy relating to the governor issuing “a writ of election” to fill legislative vacancies were declined.<sup>6</sup> Some delegates desired to give the governor a role in filling vacancies, while others emphasized that the General Assembly should have the ability to create law to address vacancies. As adopted by voters in 1851, the provision read: “All vacancies which may happen in either house shall, for the unexpired term, be filled by election, as shall be directed by law.”

### **Amendments, Proposed Amendments, and Other Review**

Sections 3, 4, 5, and 11 all date to the 1851 constitution. As discussed below, Sections 3 and 11 were amended in the 1960s before undergoing revision in the 1970s. During that era, the Ohio Constitutional Revision Commission (1970s Commission) studied Article II in depth and made extensive recommendations concerning the qualifications of members of the General Assembly, their compensation, and how to fill vacancies in the General Assembly when necessary.<sup>7</sup>

#### *Section 3 (Residence Requirements for State Legislators)*

In 1967, voters approved, by a margin of 59.17 percent to 40.83 percent, a state legislative district apportionment amendment that included amending Section 3 to replace a reference to the legislators’ places of residence as “counties,” with a reference to their districts.<sup>8</sup> The Legislative-Executive Committee of the 1970s Commission considered whether to change the provision, focusing on whether to recommend a requirement for a candidate to be a resident of the district for a certain period of time prior to election, and a requirement that a candidate maintain residency in that district throughout his or her term. Seeking to allow a candidate the opportunity to change residency prior to election, the committee recommended the following language:<sup>9</sup>

Senators and Representatives shall have resided in their respective districts on the day that they become candidates for the general assembly, as provided by law, and shall remain residents during their respective terms unless they are absent on the public business of the United States or of this State.<sup>10</sup>

However, the recommendation failed to achieve the support of a two-thirds majority of the full 1970s Commission, resulting in no recommendation for change being adopted.<sup>11</sup> The general concern was that the proposed amendment would alter the constitution beyond its scope, removing the secretary of state’s authority to require a legislator to be an elector of a district. A further concern was that having no residency requirement for the duration of the legislator’s term likely would lead the matter of representation to become a campaign issue.<sup>12</sup>

#### *Section 4 (Dual Office and Conflict of Interest Prohibited)*

Recognizing the definitional problems in the previous version of Section 4, which prevented persons “holding office under the authority of the United States” or holding “any lucrative office under the authority” of the state of Ohio, from serving in the General Assembly, the Legislative-Executive Committee of the 1970s Commission recommended replacing the ambiguous and outdated phrases with a reference to holding “public office.”<sup>13</sup> The committee considered the definition of public officer expressed in case law, but ultimately recognized that the General Assembly has the authority to define public office by statute.<sup>14</sup> The full 1970s Commission accepted the committee’s recommendation, eliminating a previous exemption for township officers and justices of the peace, and adding an exemption for officers of the United States armed forces.<sup>15</sup>

The 1970s Commission also recommended the repeal of Article II, Section 19, and the placement in Section 4 of Section 19’s prohibition on a legislator being appointed to a public office that either was created or had its compensation increased during the legislator’s term of office or for one year thereafter.<sup>16</sup> The 1970s Commission noted that the Citizens Conference on State Legislatures favored including a period of time in the language.<sup>17</sup> In recommending these changes, the 1970s Commission asserted the revisions essentially were non-substantive, noting the “wisdom of prohibiting public conflicts” of interest.<sup>18</sup>

The recommendations regarding Section 4 were part of a package of revisions that included changes related to Article II, Sections 4, 6, 7, 8, 9, 11, 14, 16, 17, 18, 19, and 25.<sup>19</sup> Presented to voters on May 8, 1973, the issue passed by a vote of 680,870 to 572,980.<sup>20</sup>

#### *Section 5 (Who Shall Not Hold Office)*

Section 5 currently reads the same as it did when first adopted in 1851. The provision prevents persons convicted of embezzlement from holding public office, and requires persons holding public money for disbursement from serving on the legislature until they have accounted for the money and paid it into the treasury. The 1970s Commission recommended the repeal of Section 5, considering it unnecessary due to the establishment of other qualifications for service in the General Assembly, and from a belief that such matters should be left to statutory law.<sup>21</sup> Moreover, the 1970s Commission observed that Article V, Section 4, declaring felony convicts to be ineligible for public office; and Article XV, Section 4, requiring elected officials to possess the qualifications of an elector; sufficiently articulated the ability of the General Assembly to prescribe qualifications for holding office.<sup>22</sup> Thus, the 1970s Commission determined Section 5 was obsolete.<sup>23</sup> However, the voters rejected the measure at the polls on May 8, 1973 by a margin of 61.55 percent to 38.45 percent.<sup>24</sup>

#### *Section 11 (Filling Vacancy in House or Senate Seat)*

Section 11, relating to how the two chambers of the General Assembly fill vacant seats, has been amended three times since 1851.<sup>25</sup> The 1851 version of Section 11 reads: “All vacancies which may happen in either House shall, for the unexpired term, be filled by election, as shall be

directed by law.”<sup>26</sup> After being successfully presented to voters as a legislatively-referred amendment on November 7, 1961, the detailed procedures set forth in Section 11 applied only to vacancies in the Senate.<sup>27</sup> Vacancies in the House were still to be “filled by election as shall be directed by law.”<sup>28</sup> The 1968 version of Section 11, which made the procedure to fill vacancies the same in both houses, was legislatively proposed and adopted by the electorate on May 7, 1968 by an overwhelming majority vote of 1,020,500 for and 487,938 against.<sup>29</sup>

The 1970s Commission called its recommendation to amend Section 11 to eliminate inconsistencies between the procedures for election and for appointment “corrective,” rather than substantive.<sup>30</sup> Thus, the 1970s Commission advocated revising the language adopted by the 1961 and 1968 amendments in favor of more precise terms, ultimately using the word “elected” in place of “appointed.”<sup>31</sup> As with the changes to Sections 3 and 4, the recommended change to Section 11 was adopted by voters as part of the package of ballot issues proposed on May 8, 1973.

### **Litigation Involving the Provisions**

Only two Supreme Court of Ohio cases related to Sections 3, 4, 5, or 11 have been issued since the review of these sections by the 1970s Commission.

In *State ex rel. Husted v. Brunner*, 123 Ohio St. 3d 288, 2009-Ohio-5327, 915 N.E.2d 1215, the Supreme Court of Ohio addressed a case that arose when the secretary of state canceled a state legislator’s voter registration on the grounds that the extensive time he was spending in Columbus in the service of the General Assembly meant he was no longer a resident of his home county for voting purposes. In concluding that the legislator’s home county remained his residence for voting purposes, the Court analyzed the requirements of Section 3, noting that the provision “ensures that a state legislator’s absence from the district on official duties does not jeopardize his or her right to claim a full year’s residence in the district.” *Id.* at ¶ 29. Thus, the Court held the legislator was eligible to remain on the poll books as a registered elector in Montgomery County. *Id.* at ¶ 35.

In *State ex rel. Meshel v. Keip*, 66 Ohio St.2d 379, 423 N.E.2d 60, the Court considered a claim that the state controlling board had unlawfully transferred rail transportation appropriations. Among other arguments, relator had asserted that the controlling board’s actions were unconstitutional because six of its seven members also were legislators, in violation of Article II, Section 4. Specifically, relator claimed that Section 4’s prohibition on legislators from holding public office during their term prevented legislators from serving on the controlling board. The Court disagreed, observing that, for controlling board members to be holding a public office, the controlling board must be said to exercise some portion of the state’s sovereign power. The Court found that the controlling board did not exercise independent power in the disposition of public property or have the power to incur financial obligations on behalf of the county or state, and so legislators did not violate Section 4 by simultaneously serving on the controlling board. *Id.*, 66 Ohio St.2d at 387-88, 423 N.E.2d at 66.

## **Presentations and Resources Considered**

### *Hollon Presentation*

On July 14, 2016, Steven C. Hollon, executive director, described to the Legislative Branch and Executive Branch Committee that Sections 3, 4, 5, and 11 deal with residency requirements and restrictions on those who serve in the General Assembly, and the method for filling a vacant seat of the General Assembly. Mr. Hollon suggested that, because these provisions cover related subject matter, they could be reviewed together and addressed in a single report and recommendation.

## **Discussion and Consideration**

In discussing Article II, Sections 3, 4, 5, and 11, the Legislative Branch and Executive Branch Committee determined the revision of the sections in the 1970s adequately addressed any previous concerns. The committee further considered that the sections continue to appropriately and effectively guide the legislature's organization and operation, and so should be retained.

## **Action by the Legislative Branch and Executive Branch Committee**

After formal consideration by the Legislative Branch and Executive Branch Committee, the committee voted on December 15, 2016 to issue a report and recommendation recommending that Article II, Sections 3, 4, 5, and 11 be retained in their present form.

## **Presentation to the Commission**

On March 9, 2017, Shari L. O'Neill, interim executive director and counsel to the Commission, on behalf of the Legislative Branch and Executive Branch Committee, presented a report and recommendation for Article II, Sections 3, 4, 5, and 11. She said the report indicates the committee's recommendation that the sections be retained in their current form. She said the report further describes that these sections address the qualifications of members of the General Assembly, as well as providing for filling vacancies in legislative seats. Originally adopted as part of the 1851 constitution, she said the report states that the sections specifically describe residency requirements and restrictions on those who serve in the General Assembly, and the method for filling a vacancy in the General Assembly.

Ms. O'Neill continued that the report outlines the changes recommended by the Constitutional Revision Commission in the 1970s, as well as amendments to the sections. She said the report also describes related litigation, as well as documenting the committee's discussion and consideration of the sections. She said the report expresses the committee's conclusion that the sections continue to appropriately and effectively guide the legislature's organization and operation, and so should be retained in their current form.

With regard to Section 11, which prescribes the procedure for filling vacancies, Commission member Charles Kurfess asked whether anyone has raised the issue of filling a vacancy if the

individual member whose departure caused the vacancy was elected in some capacity other than as a member of the Republican or Democratic Party. He noted that the current trend is for more candidates to run as independents, but the current provision does not seem to be designed for that situation.

Senator Bill Coley said he is not aware of any member who did not caucus with someone, so that, even in the United States Congress, where members are elected as independents, they choose to caucus with one party caucus or the other. He said a situation in which someone was truly independent and did not caucus with anyone and then left, that would pose a quandary. But, he said, under the current rules, if an independent caucuses with a party, it would be up to that party to replace that person.

Commission member Jeff Jacobson disagreed, indicating that the replacement would depend on what the person was elected as. He noted an example in which a Democrat was elected but joined the Republican Party after being elected; indicating that if that person had left the Democratic Party would have chosen his replacement.

Mr. Kurfess said, as he reads it, what the member does after he gets to the legislature does not affect which party replaces the legislator if there is a vacancy.

Co-chair Jonathan Dever suggested that question could be put to the Legislative Branch and Executive Branch Committee to determine how it might be addressed.

### **Action by the Commission**

At the Commission meeting held April 13, 2017, Legislative Branch and Executive Branch Committee Chair Fred Mills moved to adopt the report and recommendation for Article II, Sections 3, 4, 5, and 11, a motion that was seconded by Commission member Bob Taft. Upon a roll call vote, the motion passed unanimously, by a vote of 25 in favor, with none opposed, and five absent.

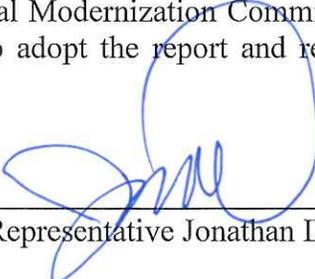
### **Conclusion**

The Ohio Constitutional Modernization Commission recommends that Article II, Sections 3, 4, 5, and 11 be retained in their present form.

### **Date Adopted**

After formal consideration by the Ohio Constitutional Modernization Commission on March 9, 2017 and April 13, 2017, the Commission voted to adopt the report and recommendation on April 13, 2017.

  
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Senator Charleta B. Tavares, Co-chair

  
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Representative Jonathan Dever, Co-chair

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## Endnotes

<sup>1</sup> *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio, 1850-51*, 2 vols. (Columbus: S. Medary, 1851), 102.

<sup>2</sup> *Id.* at 163-164.

<sup>3</sup> *Id.* at 258; Isaac F. Patterson, *The Constitutions of Ohio: Amendments and Proposed Amendments*. (Cleveland: Arthur H. Clark Co., 1912), 110.

<sup>4</sup> *Report of the Debates, supra*, at 163.

<sup>5</sup> *Id.* at 230.

<sup>6</sup> *Id.* at 232.

<sup>7</sup> Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part I, Administration, Organization, and Procedures of the General Assembly (Dec. 31, 1971). Available at: <http://www.lsc.ohio.gov/ocrc/recommendations%20pt1%20general%20assembly.pdf> (last visited Oct. 12, 2016). *See also*, Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report (June 30, 1977). Available at: <http://www.lsc.ohio.gov/ocrc/final%20report%20index%20to%20proceedings%20and%20research.pdf> (last visited Oct. 12, 2016).

<sup>8</sup> Ohio Secretary of State, Amendment and Legislation: Proposed Constitutional Amendments, Initiated Legislation, and Laws Challenged by Referendum, Submitted to the Elector, 13 (updated May 23, 2016). Available at: <http://www.sos.state.oh.us/sos/upload/elections/historical/issuehist.pdf> (last visited Sept. 23, 2016).

The amendment removed the word “counties” so that Section 3 reads “shall have resided in their respective districts.”

<sup>9</sup> Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Proceedings Research, Volume 1, 39 (Jan. 8, 1970). Available at: <http://www.lsc.ohio.gov/ocrc/v1%20pgs%201-548%20meetings%20beginning%201-8-1970.pdf> (last visited Sept. 23, 2016).

<sup>10</sup> *Id.*, Vol. 2 at 1096.

<sup>11</sup> Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Proceedings Research, *supra*, at 42.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part I, Administration, Organization, and Procedures of the General Assembly, *supra*, at 20; *see also*, Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report, *supra*, at 100.

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<sup>16</sup> Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part I, Administration, Organization, and Procedures of the General Assembly, *supra*, at 17-20; *see also*, Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report, *supra*, at 97-100.

<sup>17</sup> Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part I, Administration, Organization, and Procedures of the General Assembly, *supra*, at 22; *see also*, Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report, *supra*, at 102.

<sup>18</sup> *Id.*

<sup>19</sup> The ballot language asked whether Article II, Sections 4, 6, 7, 9, 11, 14, and 16 should be amended, whether Sections 8 and 15 should be enacted, and whether Sections 8, 15, 17, 18, 19, and 25 should be repealed, with the goal of providing qualifications for members of the General Assembly, allowing each house to choose its own officers and rules of proceeding, requiring annual legislative sessions and allowing special sessions, and providing for procedures for passing and enacting legislation.

*See* [https://ballotpedia.org/Ohio\\_Procedures\\_of\\_the\\_General\\_Assembly,\\_Amendment\\_6\\_\(May\\_1973\)](https://ballotpedia.org/Ohio_Procedures_of_the_General_Assembly,_Amendment_6_(May_1973)) (last visited Oct. 6, 2016), citing the *Toledo Blade*, May 7, 1973, <https://news.google.com/newspapers?id=8QhPAAAAIIBAJ&sjid=RAIEAAAAIIBAJ&pg=7444,4723240&hl=en> (last visited Oct. 6, 2016).

<sup>20</sup> Ohio Secretary of State, Amendment and Legislation: Proposed Constitutional Amendments, Initiated Legislation, and Laws Challenged by Referendum, Submitted to the Elector, 14 (updated May 23, 2016). Available at: <http://www.sos.state.oh.us/sos/upload/elections/historical/issuehist.pdf> (last visited Sept. 23, 2016).

<sup>21</sup> Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part I, Administration, Organization, and Procedures of the General Assembly, *supra*, at 23; *see also*, Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report, *supra*, at 103.

<sup>22</sup> *Id.*

<sup>23</sup> Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part I, Administration, Organization, and Procedures of the General Assembly, *supra*, at 24; *see also*, Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report, *supra*, at 104.

<sup>24</sup> Ohio Secretary of State, Amendment and Legislation: Proposed Constitutional Amendments, Initiated Legislation, and Laws Challenged by Referendum, Submitted to the Elector, 14 (updated May 23, 2016). Available at: <http://www.sos.state.oh.us/sos/upload/elections/historical/issuehist.pdf> (last visited Sept. 23, 2016).

<sup>25</sup> Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part I, Administration, Organization, and Procedures of the General Assembly, *supra*, at 26; *see also*, Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report, *supra*, at 106.

<sup>26</sup> *Id.*

<sup>27</sup> Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part I, Administration, Organization, and Procedures of the General Assembly, *supra*, at 37; *see also*, Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report, *supra*, at 117.

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See <https://www.law.csuohio.edu/sites/default/files/lawlibrary/ohioconlaw/vacancies2.jpg> (last visited Oct. 12, 2016)(providing the full text of the 1961 proposed amendment to the Constitution).

<sup>28</sup> Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part I, Administration, Organization, and Procedures of the General Assembly, *supra*, at 37; *see also*, Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report, *supra*, at 117.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION

#### OHIO CONSTITUTION ARTICLE II, SECTIONS 6, 7, 8, 9, 13, AND 14

#### CONDUCTING BUSINESS OF THE GENERAL ASSEMBLY

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The Ohio Constitutional Modernization Commission adopts this report and recommendation regarding Article II, Sections 6, 7, 8, 9, 13, and 14 of the Ohio Constitution concerning the organization of the General Assembly and the basic standards for conducting the business of the body. It is adopted pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*The Commission recommends that Article II, Sections 6, 7, 8, 9, 13, and 14 of the Ohio Constitution be retained in their current form.*

#### **Background**

Article II generally concerns the Legislative Branch, providing the organizational structure and membership requirements of the General Assembly and the method for it conducting its business.

Article II, Section 6 outlines the powers of each house of the General Assembly, providing:

Each House shall be judge of the election, returns, and qualifications of its own members. A majority of all the members elected to each House shall be a quorum to do business; but, a less number may adjourn from day to day, and compel the attendance of absent members, in such manner, and under such penalties, as shall be prescribed by law.

Each House may punish its members for disorderly conduct and, with the concurrence of two-thirds of the members elected thereto, expel a member, but not the second time for the same cause. Each House has all powers necessary to provide for its safety and the undisturbed transaction of its business, and to obtain, through committees or otherwise, information affecting legislative action under

consideration or in contemplation, or with reference to any alleged breach of its privileges or misconduct of its members, and to that end to enforce the attendance and testimony of witnesses, and the production of books and papers.

Section 7 provides for the organization of each house of the General Assembly, providing:

The mode of organizing each House of the general assembly shall be prescribed by law.

Each House, except as otherwise provided in this Constitution, shall choose its own officers. The presiding officer in the Senate shall be designated as president of the Senate and in the House of Representatives as speaker of the House of Representatives.

Each House shall determine its own rules of proceeding.

Section 8 governs the calendar of the General Assembly, providing:

Each general assembly shall convene in first regular session on the first Monday of January in the odd-numbered year, or on the succeeding day if the first Monday of January is a legal holiday, and in second regular session on the same date of the following year. Either the governor, or the presiding officers of the general assembly chosen by the members thereof, acting jointly, may convene the general assembly in special session by a proclamation which may limit the purpose of the session. If the presiding officer of the Senate is not chosen by the members thereof, the President pro tempore of the Senate may act with the speaker of the House of Representatives in the calling of a special session.

Section 9 requires the two chambers to keep and publish a journal of proceedings, and to record the votes:

Each House shall keep a correct journal of its proceedings, which shall be published. At the desire of any two members, the yeas and nays shall be entered upon the journal; and, on the passage of every bill, in either house, the vote shall be taken by yeas and nays, and entered upon the journal.

Section 13 relates to the public nature of the legislative process, requiring open proceedings:

The proceedings of both houses shall be public, except in cases which, in the opinion of two-thirds of those present, require secrecy.

Section 14 controls the ability of either house to adjourn, providing:

Neither House shall, without the consent of the other, adjourn for more than five days, Sundays excluded; nor to any other place than that, in which the two Houses are in session.

## Amendments, Proposed Amendments, and Other Review

An early agenda item for the Ohio Constitutional Revision Commission (1970s Commission) was to address the administration, organization, and procedures of the General Assembly. Consequently, the 1970s Commission issued a comprehensive report recommending the amendment of Article II, Sections 4, 6, 7, 9, 11, 14, 16, and 31; the repeal of Article II, Sections 5, 17, 18, 19, and 25; and the repeal and enactment of new sections for Article II, Sections 8 and 15.<sup>1</sup>

In relation to Section 6, the 1970s Commission recommended that the original section from the 1851 constitution (which had its genesis in the 1802 constitution), be amended to include portions of former Section 8 dealing with the ability of each chamber of the General Assembly to discipline and control its members. Thus, the 1970s Commission advocated adding the second paragraph of Section 6, which allows each house to punish members for disorderly conduct, to expel members, and to enforce rules and procedures promoting the orderly transaction of its business.<sup>2</sup>

Addressing Section 7, which derived from a provision in the 1802 constitution that was partially retained in the 1851 constitution, the 1970s Commission recommended the addition of a portion of former Section 8 that had described the procedure for selecting legislative officers, including the president of the senate and the speaker of the house of representatives. The 1970s Commission also supported a statement confirming that each house may determine its own procedural rules. The 1970s Commission's recommended changes were intended to correct an omission from the 1851 constitution that resulted in there being no reference to how the senate was to select its officers.<sup>3</sup>

With regard to Section 8, the 1970s Commission recommended repeal and replacement, explaining that its recommendations to split the section between Sections 6 and 7 resulted in there being no remaining portion of the section to retain.<sup>4</sup> To take its place, the 1970s Commission proposed a new section detailing what constitutes a "session" of the General Assembly, specifically describing a "regular session" and a "special session." Explaining its rationale, the 1970s Commission observed that, despite the provision in former Article II, Section 25 fixing the first Monday of January as the commencement of "all regular sessions," to occur biennially, the long practice of the General Assembly was to designate a "second regular session" on the same date of the following year. This resulted in the concept of the biennial General Assembly meeting in a first regular session, to be followed a year later by the second regular session. The 1970s Commission sought to clarify this practice by recommending that the constitution expressly recognize the practice of holding annual sessions, noting that it regarded the proposal as "an important element in strengthening the power of the legislative branch and insuring its ability to deal with problems as they arise."<sup>5</sup> The 1970s Commission also recommended the addition of a reference to the ability of the General Assembly to hold "special sessions," as convened by the governor or the presiding officers of the General Assembly.<sup>6</sup>

The 1970s Commission sought to maintain the journal-keeping requirement in Section 9, acknowledging that similar legislative recordkeeping requirements are standard in most, if not all, state constitutions, as well as in the United States Constitution. However, the 1970s Commission recommended that a portion of the section, which mandated that no law could be

passed without the concurrence of a majority of the members of each chamber, be moved to a proposed new Section 15.<sup>7</sup>

Section 13, requiring the General Assembly to hold open meetings, was not addressed by the 1970s Commission, and, in fact, has not been amended since its adoption in 1851. The current provision is based on a provision in the 1802 constitution literally expressing an “open door” policy, stating, in part, that the “doors of each house, and of committees of the whole, shall be kept open, except in such cases as, in the opinion of the house, require secrecy.”<sup>8</sup>

Reviewing Section 14, which restricted the separate houses of the General Assembly from adjourning for more than two days without the consent of the other house, the 1970s Commission recommended expanding the original two-day requirement to five days. The purpose of the change was to accommodate the legislature’s established practice of beginning a session week on a Tuesday, a practice that, in order to comply with the constitutional requirement, required the General Assembly to hold perfunctory, or “skeleton,” sessions on Mondays. As observed by the 1970s Commission, “a requirement that is being observed through the device of a technicality deserves reconsideration.”

The recommendations of the 1970s Commission with regard to Sections 6 through 9, and 14, were presented to voters on the May 8, 1973 ballot as part of a ballot issue package related to General Assembly operational reforms.<sup>9</sup> The measure passed by a margin of 54.30 percent to 45.70 percent.<sup>10</sup>

### **Litigation Involving the Provision**

Two Supreme Court of Ohio cases addressing these sections have been decided since the 1970s Commission completed its work.

*State ex rel. Hodges v. Taft*, 64 Ohio St.3d 1, 591 N.E.2d 1186 (1992), was a mandamus action based on a statutory initiative proponent’s claim that the secretary of state had forwarded the initiative petition to the General Assembly at a time that was not contemplated by Article II, Section 1b of the Ohio Constitution. Specifically, the case revolved around whether Article II, Section 8’s stipulation that the General Assembly convene in first regular session in an odd-numbered year required the secretary of state to wait to forward the initiative petition until the next General Assembly convened, which was over a year after the proponents filed their initiative petition. Interpreting the statutory initiative petition requirements of Article II, Section 1b in conjunction with the definition of “first” and “second” regular session of the General Assembly in Article II, Section 8, the Supreme Court held that once the proponents presented the initiative petition to the secretary of state on December 11, 1991, the secretary of state was required by law to transmit the petition to the General Assembly at its next regular session, which was in January 1992, rather than when the next General Assembly convened in January 1993. As interpreted by the Court, Section 8 “restores a clear distinction between the *term* of a General Assembly, which coincides with the biennial election cycle, and the *sessions* of the General Assembly, which are annual and two in number during each biennial term.” *Id.*, 64 Ohio St.3d at 21, 591 N.E.2d at 1193. Thus, the first regular session was said to convene when each house is called to order by its respective presiding officer on the relevant day in January in

the odd-numbered year, and the second regular session then convenes automatically on the same day of the following year. *Id.*

In *State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 1999-Ohio-130, 716 N.E.2d 704, the Supreme Court considered joint legislative rules adopted pursuant to Article II, Section 7, which gives each house of the General Assembly the ability to independently choose its officers and its rules of procedure. In *Grendell*, the senate and house of representatives passed competing versions of a bill, which was then referred to conference committee to work out the differences. In doing so, the conference committee deleted a key provision, allegedly because it would have benefited the district of a state representative who had voted against the bill. The state representative then sought a writ of mandamus to compel the conference committee to include the provision. In rejecting the writ, the Court found the complaint to be nonjusticiable because Section 7 allows each chamber of the General Assembly to determine its own rules of proceeding. *Id.*, 86 Ohio St.3d at 633, 716 N.E.2d at 709. While the case holding hinged on the separation of powers principle, noting that “mandamus will not issue to a legislative body or its officers to require the performance of duties that are purely legislative in character and over which such legislative bodies have exclusive control,” *Grendell* nevertheless confirms Section 7 as expressing the self-governing power of the General Assembly. *Id.*

## **Presentations and Resources Considered**

### *Hollon Presentation*

In his presentation to the Legislative Branch and Executive Branch Committee on July 14, 2016, Steven C. Hollon, executive director, said the sections in this category deal with the organization and power of the General Assembly, providing basic standards for conducting the business of the body. He observed that, of the six sections in this category, four were adopted in 1851 and then amended in 1973, one was adopted in 1851 and has never been amended, and one was adopted in 1973. Mr. Hollon said the subject matter of these provision supports creating one report and recommendation to report the committee’s work on the topics.

## **Discussion and Consideration**

In considering Article II, Sections 6 through 9, 13, and 14, the Legislative Branch and Executive Branch Committee recognized the General Assembly’s ability to determine how often it meets, noting that there is nothing in the constitution controlling the legislative calendar. The committee saw no need to alter that arrangement, based on its conclusion that the legislature is its own best authority for determining how often and how long it should meet.

## **Action by the Legislative Branch and Executive Branch Committee**

After formal consideration by the Legislative Branch and Executive Branch Committee, the committee voted on December 15, 2016 to issue a report and recommendation recommending that Article II, Sections 6, 7, 8, 9, 13, and 14 be retained in their present form.

## **Presentation to the Commission**

On March 9, 2017, Shari L. O’Neill, interim executive director and counsel to the Commission, on behalf of the Legislative Branch and Executive Branch Committee, presented a report and recommendation for Article II, Sections 6, 7, 8, 9, 13, and 14. Ms. O’Neill said the report describes that Section 6 outlines the powers of each house of the General Assembly, requiring each house to be the judge of the election, returns, and qualifications of its own members, setting the number of members for a quorum, allowing each house to prescribe punishment for disorderly conduct, and to obtain information necessary for legislative action, including the power to call witnesses and obtain the production of books and papers. She said the report describes that Section 7 provides for the organization of each house of the General Assembly, allowing the mode of organizing to be prescribed by law, and requiring each house to choose its own officers, with there being designated a president of the Senate and a Speaker of the House of Representatives. Ms. O’Neill indicated the report outlines that Section 8 governs the calendar of the General Assembly, and allows the governor, or the presiding officers of the general assembly chosen by the members thereof, acting jointly, to convene the general assembly in special session by a proclamation which may limit the purpose of the session.

Ms. O’Neill said the report states that Section 9 requires the two chambers to keep and publish a journal of proceedings, and to record the votes. The report also indicates that Section 13 relates to the public nature of the legislative process, requiring open proceedings except where, in the opinion of 2/3s of those present, secrecy is required. Finally, Ms. O’Neill stated, the report outlines that Section 14 controls the ability of either house to adjourn, providing that neither may adjourn for more than five days without the consent of the other. Ms. O’Neill indicated that the report and recommendation describes the work of the 1970s Constitutional Revision Commission on these sections, indicating where amendments were recommended and adopted. She said the report also outlines litigation involving the provisions before describing the discussion and consideration by the committee. She said the report indicates the committee’s conclusion that Article II, Sections 6, 7, 8, 9, 13, and 14 should be retained in their current form.

## **Action by the Commission**

At the Commission meeting held April 13, 2017, Legislative Branch and Executive Branch Chair Fred Mills moved to adopt the report and recommendation for Article II, Sections 6, 7, 8, 9, 13, and 14, a motion that was seconded by Senator Bill Coley. The motion passed unanimously, by a vote of 25 in favor, with none opposed, and five absent.

## **Conclusion**

The Ohio Constitutional Modernization Commission recommends that Article II, Sections 6, 7, 8, 9, 13, and 14 be retained in their present form.

## Date Adopted

After formal consideration by the Ohio Constitutional Modernization Commission on March 9, 2017 and April 13, 2017, the Commission voted to adopt the report and recommendation on April 13, 2017.

  
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Senator Charleta B. Tavares, Co-chair

  
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Representative Jonathan Dever, Co-chair

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## Endnotes

<sup>1</sup> Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Ohio Constitution, Part I, Administration, Organization, and Procedures of the General Assembly (Dec. 31, 1971). Available at <http://www.lsc.ohio.gov/ocrc/recommendations%20pt1%20general%20assembly.pdf> (last visited Oct. 5, 2016). *See also* Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report (June 30, 1977). Available at: <http://www.lsc.ohio.gov/ocrc/final%20report%20index%20to%20proceedings%20and%20research.pdf> (last visited Oct. 12, 2016).

<sup>2</sup> *Id.* at 25.

<sup>3</sup> *Id.* at 26-29.

<sup>4</sup> *Id.* at 30.

<sup>5</sup> *Id.* at 31-32.

<sup>6</sup> *Id.* at 32-33.

<sup>7</sup> *Id.* at 33-34.

<sup>8</sup> *See, e.g.*, Steven H. Steinglass and Gino J. Scarselli, *The Ohio State Constitution* 149 (2nd prtg. 2011).

<sup>9</sup> The ballot language asked whether Article II, Sections 4, 6, 7, 9, 11, 14, and 16 should be amended, whether Sections 8 and 15 should be enacted, and whether Sections 8, 15, 17, 18, 19, and 25 should be repealed, with the goal of providing qualifications for members of the General Assembly, allowing each house to choose its own officers and rules of proceeding, requiring annual legislative sessions and allowing special sessions, and providing for procedures for passing and enacting legislation.

*See* [https://ballotpedia.org/Ohio\\_Procedures\\_of\\_the\\_General\\_Assembly\\_Amendment\\_6\\_\(May\\_1973\)](https://ballotpedia.org/Ohio_Procedures_of_the_General_Assembly_Amendment_6_(May_1973)) (last visited Oct. 6, 2016), citing the *Toledo Blade*, May 7, 1973, available at <https://news.google.com/newspapers?id=8QhPAAAAIIBAJ&sjid=RAIEAAAIAIBAJ&pg=7444,4723240&hl=en> (last visited Oct. 6, 2016).

<sup>10</sup> <http://www.sos.state.oh.us/sos/upload/elections/historical/issuehist.pdf> (last visited Oct. 6, 2016).



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION

#### OHIO CONSTITUTION ARTICLE II SECTIONS 10 AND 12

#### RIGHTS AND PRIVILEGES OF MEMBERS OF THE GENERAL ASSEMBLY

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The Ohio Constitutional Modernization Commission adopts this report and recommendation regarding Sections 10 and 12 of Article II of the Ohio Constitution concerning General Assembly members' rights of protest, and their privileges against arrest and of speech. It is adopted pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*The Commission recommends that no change be made to Article II, Sections 10 and 12 of the Ohio Constitution and that the provisions be retained in their current form.*

#### **Background**

Article II generally concerns the Legislative Branch, providing the organizational structure and membership requirements of the General Assembly and the method for it conducting its business.

#### *Section 10 (Rights of Members to Protest)*

Section 10, unaltered since 1851, provides:

Any member of either House shall have the right to protest against any act, or resolution thereof; and such protest, and the reasons therefor, shall, without alteration, commitment, or delay, be entered upon the journal.

Section 10 was slightly revised from the version adopted in the 1802 constitution, which reads:

Any two members of either house shall have liberty to dissent from, and protest against, any act or resolution which they may think injurious to the public or any individual, and have the reasons of their dissent entered on the journals.

The right of legislative members to protest, and to have their objections recorded in the journal, has its origins in the House of Lords of the British Parliament, where the right of written dissent was recognized as a privilege of the upper house.<sup>1</sup> Recording the dissent in the house journal was the minority's recognized method of registering political objection, but the protests would also appear in the press, and for this reason the decision to protest, and the wording of the objection, were carefully considered.<sup>2</sup>

While the right of protest is ancient, its use was uncommon until the 18<sup>th</sup> century, when it was promoted by the rise of partisan factionalism in Parliament and a growing public interest in politics that encouraged dissenters to air their protests in the court of public opinion.<sup>3</sup> By the close of the century, American state constitutions began to include the right of legislative members to dissent and have their protest journalized, with several of the original 13 colonies adopting the measure in their state constitutions, including New Hampshire, North Carolina, and South Carolina.<sup>4</sup> Tennessee followed suit in its 1796 constitution, with Ohio's provision being included in the 1802 constitution.<sup>5 6</sup>

Although about a dozen states maintain a similar provision in their constitutions, the United States Constitution contains no equivalent, merely providing at Article I, Section 5, Clause 3, that "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may, in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal." Commenting on the absence of a similar provision in the U.S. Constitution, the Ohio Constitutional Revision Commission (1970s Commission) observed that dissents in Congress are preserved by the publication of debates in the Congressional Record.<sup>7</sup>

### *Section 12 (Privilege of Members from Arrest, and of Speech)*

Section 12 has not been altered since its adoption in 1851. It provides:

Senators and Representatives, during the session of the General Assembly, and in going to, and returning from the same, shall be privileged from arrest, in all cases, except treason, felony, or breach of the peace; and for any speech, or debate, in either House, they shall not be questioned elsewhere.

Section 12 is nearly identical to Article I, Section 13 of the 1802 constitution, which reads:

Senators and Representatives shall, in all cases, except treason, felony, or breach of the peace, be privileged from arrest during the session of the General Assembly, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

The idea that legislative representatives must be able to freely engage in debate, consult with staff and constituents, and travel to and from legislative session without hindrance, was challenged in 17<sup>th</sup> century England when the Crown and Parliament clashed over their competing roles.<sup>8</sup> A particularly dramatic 1641 incident in which King Charles II stormed into Parliament demanding the arrest of members he deemed treasonous cemented the belief that an independent legislative body was essential to a democratic form of government, and the “freedom of speech and debates” for parliamentary members subsequently was included in the English Bill of Rights of 1689.<sup>9</sup>

By the time the U.S. Constitution was drafted, the privilege was accepted as a necessary democratic protection, and it was incorporated in Article I, Section 6, Clause 1, apparently without debate.<sup>10</sup> Various forms of the privilege also made their way into state constitutions, with nearly all states adopting constitutional provisions that protect legislative speech or debate.<sup>11</sup>

### **Amendments, Proposed Amendments, and Other Review**

Section 10 was reviewed by the Committee to Study the Legislature of the 1970s Commission. On October 15, 1971, that committee issued a report in which it indicated the right to protest on the record originated in an era in which legislators had no other ability to communicate their objection to legislation. The committee concluded that because dissenting legislators now have the ability to publicize their views in the news media, the provision is “an anachronism and appropriate for removal.”<sup>12</sup> Despite this recommendation, the question was not taken up by the full 1970s Commission, and, thus, the section remains as it was adopted in 1851.

The 1970s Commission did not address Section 12, thus, it also remains in its 1851 form.

### **Litigation Involving the Provisions**

The Supreme Court of Ohio has not had occasion to review Article II, Section 10 since the 1970s, however, the Court has reviewed Article II, Section 12.

In *Costanzo v. Gaul*, 62 Ohio St.2d 106, 403 N.E.2d 979 (1980), the plaintiff sued a city councilman who, in explaining why the plaintiff’s rezoning request had not been accepted, allegedly made defamatory statements about plaintiff to the press. In *Costanzo*, the Court considered whether the privilege of speech or debate was limited to the General Assembly, or whether communications by members of a city council also qualified for protection. The Court held the councilman, like a state legislator, was entitled to absolute privilege so long as his published statement concerned a matter reasonably within his legislative duties.

Two Ohio Court of Appeals cases also bear mentioning. In *Kniskern v. Amstutz*, 144 Ohio App.3d 495, 760 N.E.2d 876 (8<sup>th</sup> Dist. 2001), the Cuyahoga County Court of Appeals addressed whether a civil rights violation case could be maintained against 72 state legislators who voted in favor of tort reform legislation in 1996.<sup>13</sup> In dismissing, the appellate court emphasized that legislators acting in their legislative capacities enjoy immunity from lawsuit, even where, later, the enacted law is held unconstitutional. *Id.*, 144 Ohio App.3d at 497, 760 N.E.2d at 877-78.

In *City of Dublin v. State*, 138 Ohio App.3d 753, 742 N.E.2d 232 (10<sup>th</sup> Dist. 2000), the Franklin County Court of Appeals considered whether private meetings between legislators and corporate representatives were privileged from discovery in a case alleging portions of the state biennial budget bill unconstitutionally restricted municipalities from regulating public utilities. Noting that state court precedent primarily focused on immunity from suit – an issue not present in the facts of the case – the court sought guidance from federal case law holding that the speech or debate protection also provides evidentiary privilege against the use of statements made in the course of the legislative process. *Id.*, 144 Ohio App.3d at 758, 742 N.E.2d at 236. Following the rationale that the purpose of the speech or debate clause is to protect the legislator from the “harassment of hostile questioning,” rather than to encourage secrecy, the court concluded that “requiring legislators to divulge the identity of corporate representatives with whom they have had private, off-the-public-record meetings” does not infringe on an integral part of the legislative process and so does not violate legislative privilege. *Id.*, 144 Ohio App.3d at 760, 742 N.E.2d at 237.

## **Presentations and Resources Considered**

### *Hollon Presentation*

In July 2016, Steven C. Hollon, executive director, described to the Legislative Branch and Executive Branch Committee that Sections 10 and 12 were related in that both deal with the freedoms and privileges of legislators to express their views and to perform their legislative duties without interference. Mr. Hollon suggested that, because these provisions cover related subject matter, they could be reviewed together and addressed in a single report and recommendation.

### *Huefner Presentation*

In November 2016, Steven F. Huefner, assistant professor of law at the Ohio State University Moritz College of Law, presented on legislative privilege as set forth in Article II, Section 12.

Prof. Huefner, whose career included a position assisting the United States Senate’s efforts to protect and enforce its privileges, said the existence of the legislative privilege is about protecting the separation of powers, a concept that goes back to when the British Parliament was subservient to the Crown. He said the clause is intended to protect members of a legislative body from retaliation for actions taken in the performance of their official legislative duties. He noted the provision derives from the concept that, while all public representatives are subject to political retaliation, legislators should not be subject to retaliation by the executive or judicial branch, which could use their power to make the legislative branch subservient. Prof. Huefner said provisions protecting legislators from retaliation for speech or debate remain, even though the clashes in England have not been part of the American experience.

Noting there are justifications for continuing the privilege, Prof. Huefner nonetheless commented that the countervailing pressure is for legislative activities to be open and public. He said the

privilege should apply to staff as well as to legislators, but it is not always interpreted that way in the states.

Addressing the section's additional privilege against arrest, Prof. Huefner explained the privilege is against a citizen's civil arrest, which was occasionally used to detain members of a legislative body to prevent them from performing their legislative duty. He said the privilege excuses members of the legislature from being subject to civil arrest in all cases except treason, felony, and breach of the peace.

Regarding the prohibition against legislators being questioned elsewhere for any speech or debate, Prof. Huefner described the conduct and types of questioning covered. He said, by its terms, the provision protects members of the legislature, but for that protection to be fully effective, legislative staff members ought to be within the scope of that privilege if the legislative member desires the privilege to cover the staffer. He said it is the member's privilege to encompass the staff that is serving the member in connection with the work. Prof. Huefner said the privilege should cover broadly all the essential legislative activities, a privilege that may go beyond the official duties of the legislators. He noted there are duties performed that may not be expressly legislative.

Prof. Huefner said the remaining question is whether the privilege protects legislators only against liability or whether it also protects them against having to testify. He remarked that, if the phrase indicating they shall not be questioned "elsewhere" is only taken at face value, it is easy to argue legislators cannot be subpoenaed about what they have done, even if they are not defendants. But, he said, although this is how federal courts construe the rule, this is not always how state courts have construed it. He said the privilege against questioning includes being required to produce documents.

Prof. Huefner added the privilege raises questions about freedom of information laws, commenting that an argument could be made that an individual legislator could extend his or her privilege to the entire legislative body. He said, at the same time, the privilege only provides that members should be free from questioning elsewhere, meaning outside the legislature, so that legislators are always accountable to the public for what they do in legislative session, including ethics investigations, deciding what parts of the process to conduct in public session, and by videotaping floor and committee sessions. He said the legislature can choose to create paper documents as a way of making its activities more readily available to the public. Despite this, he said, it is his view that legislators need the ability to insulate themselves against the possibility that disgruntled constituents or other branches of government might be able to obtain information for harassment purposes.

### *O'Neill Presentation*

On February 9, 2017, Shari L. O'Neill, interim executive director and counsel to the Commission, presented to the committee on legislative privilege as applied to legislative staff. Based on a fifty-state survey, Ms. O'Neill said nearly all states provide some type of protection to legislators when performing their legislative duties, with most providing both a speech or debate privilege that protects legislators from having to testify or answer in any other place for

statements made in the course of their legislative activity, and a legislative immunity that protects legislators against civil or criminal arrest or process during session, during a period before and/or after session, and while traveling to and from session. She noted only Florida and North Carolina lack a constitutional provision relating to legislative privilege or immunity, although a North Carolina statute protects legislative speech and the Florida Supreme Court has recognized a legislative privilege as being available under the separation of powers doctrine. Ms. O'Neill indicated no state constitutions mention or protect legislative staff in their constitutional provisions relating to legislative privileges and immunities, although statutory protections are available in at least some states.

Reviewing state statutory provisions, Ms. O'Neill noted that several states expressly protect communications between legislators and their staff, particularly in the context of discovery requests in a litigation setting. She explained that, although Ohio's statute, R.C. 101.30, requires legislative staff to maintain a confidential relationship with General Assembly members and General Assembly staff, it does not expressly provide a privilege to legislative staff. She said R.C. 101.30 also does not indicate that legislative documents are not discoverable, and does not address whether legislative staff could be required to testify in court about their work on legislation. She added that the statute does not discuss oral communications between legislators and staff or expressly address communications that may occur between interested parties and legislative staff on behalf of legislators.

#### *Pierce and Coontz Presentation*

On February 9, 2017, the committee heard a presentation by two assistant attorneys general from the Constitutional Offices of the Office of the Ohio Attorney General, Sarah Pierce and Bridget Coontz. Ms. Pierce indicated that she and Ms. Coontz provide representation to General Assembly members in legal matters that arise in the course of legislators' official duties. She said there are few Ohio cases discussing legislative privilege, and Ohio courts often analyze the speech or debate clause as being co-extensive of the federal clause.

Ms. Pierce said the first case to discuss the topic at any length is *City of Dublin v. State, supra*, a case involving a challenge to a budget bill. In that case, the plaintiff noticed a sitting senator for deposition, and submitted interrogatories to General Assembly members and their staffs. She said the trial court quashed all of the discovery requests on the ground of privilege. Ms. Pierce indicated that when the case was appealed to the Tenth District Court of Appeals, the appellate court decision included an extensive analysis of legislative privilege, extending the privilege to all meetings and discussion. She said, however, the court did allow interrogatories to go to the lobbyists who had meetings with legislators.

Ms. Pierce described a second case relating to legislative privilege, *Vercellotti v. Husted*, 174 Ohio App.3d 609, 2008-Ohio-149, 883 N.E.2d 1112, in which the plaintiffs noticed depositions of sitting General Assembly members, as well as one legislative aide and one member of the Legislative Service Commission. The trial court granted a protective order preventing legislative members from having to appear for deposition. A Legislative Service Commission employee testified at a hearing about the committee meeting itself, but the state successfully asserted that conversations with legislators were privileged.

Ms. Pierce described that her office has raised legislative privilege in a number of cases in which motions to quash subpoenas were granted, or subpoenas were withdrawn, but said these issues were resolved without a court decision or analysis. She said when her office responds to discovery requests, it relies on R.C. 101.30 to assert a confidential relationship between the General Assembly and legislative staff.

Ms. Coontz said some legislatures voluntarily comply with discovery requests, adding that courts generally follow the wishes of the legislative member. She said, in the typical case, members are non-parties, and courts are reluctant to pull in members and staff for testimony.

## **Discussion and Consideration**

In discussing Article II, Sections 10 and 12, the Legislative Branch and Executive Branch Committee considered research indicating that most states protect the right to protest as well as providing a legislative privilege against having to answer in court or other places for words undertaken in the furtherance of the legislator's official duties.

Addressing the right to register a protest in the journal, as described in Section 12, the committee noted that the procedure allows General Assembly members who disagree with a procedural ruling against them, or a procedure that was not followed, to hand a written protest to the clerk. The protest is then included in the journal of that day's business, allowing a permanent record of that protest.

Regarding the committee report from the 1970s Commission recommending repeal of Section 10, committee members expressed that the section still has relevance despite the proliferation of multiple media and internet news outlets because the journal is the official record of the business of the General Assembly, and the member filing the protest can directly control the message being communicated. Committee members also noted that the protest allows legislators to counteract the fact that legislative minutes are vague, that legislative intent is not expressed in the legislation, and that bill sponsors are not required to explain their reasons for sponsoring the bill. Committee members also noted that a legislator may vote with the majority but may agree with the minority that the procedure for enacting the legislation was improper. In that case, because the legislator cannot speak through his or her vote, committee members indicated it is important to maintain the right to protest.

Regarding the issue of legislative privilege as provided in Section 12, some committee members expressed that because legislative members officially speak through their vote and their comments during session, other types of communications are properly viewed as being privileged. Members additionally indicated that legislative privilege helps to maintain the separation of powers, noting that many communications that occur in the executive and judicial branches of government are recognized as privileged. At the same time, committee members recognized that legislators are acting on behalf of citizens and should, as much as possible, maintain transparency as they conduct their duties. Addressing the confidentiality of communications between legislators and legislative staff, committee members observed that the privilege allows legislators to effectively perform their role.

## **Action by the Legislative Branch and Executive Branch Committee**

After formal consideration by the Legislative Branch and Executive Branch Committee, the committee voted on March 9, 2017 to issue a report and recommendation recommending that Article II, Sections 10 and 12 be retained in their present form.

## **Presentation to the Commission**

On March 9, 2017, Shari L. O'Neill, interim executive director and counsel to the Commission, on behalf of the Legislative Branch and Executive Branch Committee, presented a report and recommendation for Article II, Sections 10 and 12. Ms. O'Neill said the report and recommendation describes that Section 10 provides a right of legislative members to protest, and to have their objections recorded in the journal. Discussing Section 12, she said the report and recommendation describes the historic basis for the idea that legislative representatives must be able to freely engage in debate, consult with staff and constituents, and travel to and from legislative session without hindrance. She said the report further describes the work of 1970s Commission, indicating that its Committee to Study the Legislature issued a report in which it concluded that because dissenting legislators now have the ability to publicize their views in the news media, the protest provision is "an anachronism and appropriate for removal." She said the report indicates that, despite this recommendation, the question was not taken up by the full 1970s Commission, and, so remains as it was adopted in 1851. The report indicates the 1970s Commission did not address Section 12, thus, it also remains in its 1851 form.

Ms. O'Neill continued that the report addresses litigation involving the provisions, as well as describing presentations related to the speech or debate clause in Section 12. She said the report and recommendation indicates the committee's discussion and consideration, documenting the committee's conclusion that, because the journal is the official record of the business of the General Assembly, and the member filing the protest can directly control the message being communicated, it is important to retain that right. She said the report also indicates the committee's conclusion that that Section 12 should be retained because legislative privilege helps to maintain the separation of powers, noting that many communications that occur in the executive and judicial branches of government are recognized as privileged. She said the report acknowledges the views of some of the committee that legislators are acting on behalf of citizens and should, as much as possible; maintain transparency as they conduct their duties. In addressing the confidentiality of communications between legislators and legislative staff, she said the report notes committee members' observation that the privilege allows legislators to effectively perform their role.

She said the report and recommendation indicates the Legislative Branch and Executive Branch Committee's conclusion that Article II, Sections 10 and 12 continue to serve the General Assembly and should be retained in their current form.

## Action by the Commission

At the Commission meeting held April 13, 2017, Legislative Branch and Executive Branch Committee Chair Fred Mills moved to adopt the report and recommendation for Article II, Sections 3, 4, 5, and 11, a motion that was seconded by Commission member Jo Ann Davidson. After general discussion, a roll call vote was taken, and the motion passed unanimously, by a vote of 25 in favor, with none opposed, and five absent.

## Conclusion

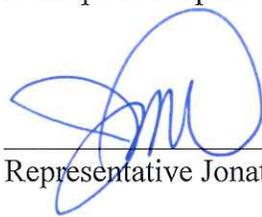
The Ohio Constitutional Modernization Commission recommends that Article II, Sections 10 and 12 be retained in their present form.

## Date Adopted

After formal consideration by the Ohio Constitutional Modernization Commission on March 9, 2017 and April 13, 2017, the Commission voted to adopt the report and recommendation on April 13, 2017.



Senator Charleta B. Favares, Co-chair



Representative Jonathan Dever, Co-chair

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## Endnotes

<sup>1</sup> William C. Lowe, *The House of Lords, Party, and Public Opinion: Opposition Use of the Protest, 1760-1782*, 11 *Albion* 2 (1979) 143, 143-44. Available at: <https://www.jstor.org/stable/4048271> (last visited Jan. 10, 2017).

<sup>2</sup> *Id.* at 144.

<sup>3</sup> *Id.* at 143; A Short History of Parliament: England, Great Britain, the United Kingdom, Ireland and Scotland 156 (Clyve Jones, ed. 2009).

<sup>4</sup> North Carolina Const., art. II, § 18 provides: “Any member of either house may dissent from and protest against any act or resolve which he may think injurious to the public or to any individual, and have the reasons of his dissent entered on the journal.”

South Carolina Const. art. III, § 22 provides, in part: “Any member of either house shall have liberty to dissent from and protest against any Act or resolution which he may think injurious to the public or to an individual, and have the reasons of his dissent entered on the journal.”

New Hampshire Const. Part II, Art. 24 provides, in part: “And any member of the senate, or house of representatives, shall have a right, on motion made at the time for that purpose to have his protest, or dissent, with the reasons, against any vote, resolve, or bill passed, entered on the journal.”

<sup>5</sup> A copy of the Tennessee Constitution of 1796 is available at: <http://teva.contentdm.oclc.org/cdm/fullbrowser/collection/tfd/id/380/rv/compoundobject/cpd/421/rec/7> accessed 1/9/17 (last visited Jan. 9, 2017).

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<sup>6</sup> In fact, Tennessee’s constitution is recognized as providing, or at least influencing, most of the text of Ohio’s first constitution. Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution* 22 (2nd prtg. 2011), citing Howard McDonald, A Study in Constitution Making – Ohio: 1802-1874, Ph.D. Dissertation, Univ. of Michigan, 27 (1916).

<sup>7</sup> Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Ohio Constitution, Proceedings Research, Volume 3, 1109, <http://www.lsc.ohio.gov/ocrc/v3%20pgs%201098-1369%20legislative-executive%201370-1646%20finance-taxation.pdf> (last visited Jan. 9, 2017).

<sup>8</sup> Michael L. Shenkman, *Talking About Speech or Debate: Revisiting Legislative Immunity: Introduction*, 32 Yale L. & Pol’y Rev. 351, 357-58 (2014).

<sup>9</sup> *Id.* at 358-59; Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 Wm. & Mary L. Rev. 221, 229-30 (2003).

<sup>10</sup> U.S. Const. art. I, § 6, cl. 1 states that members of both Houses “shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their Respective Houses, and in going to and from the same, and for any Speech or Debate in either House, they shall not be questioned in any other place.”

For a comprehensive history of the speech or debate clause in the U.S. Constitution and the British Constitution, see Josh Chafetz, *Democracy’s Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions* (2007).

<sup>11</sup> Huefner, *supra*, at 235-37.

<sup>12</sup> *Ohio Constitutional Revision Commission, supra* note 7, at 1110.

<sup>13</sup> The full cite of this case is *Kniskern v. Amstutz*, 144 Ohio App.3d 495, 760 N.E.2d 876 (8<sup>th</sup> Dist. 2001), dismissed, 93 Ohio St.3d 1458, 756 N.E.2d 1235 (2001), cert. denied, 535 U.S. 990 (2002).



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION

#### OHIO CONSTITUTION ARTICLE IV, SECTION 19

#### COURTS OF CONCILIATION

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The Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article IV, Section 19 of the Ohio Constitution concerning courts of conciliation. The Commission issues this report pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*The Commission finds that Article IV, Section 19 is obsolete and therefore recommends its repeal.*

#### **Background**

Article IV, Section 19 reads as follows:

The General Assembly may establish courts of conciliation, and prescribe their powers and duties; but such courts shall not render final judgment in any case, except upon submission, by the parties, of the matter in dispute, and their agreement to abide such judgment.

Article IV governs the judicial branch, specifically vesting judicial power in the state supreme court, courts of appeals, courts of common pleas, and other courts as may be established by law.<sup>1</sup>

Section 19, which is original to the 1851 constitution, was proposed at the 1850-51 Constitutional Convention to allow the resolution of disputes without resorting to the traditional legal process.<sup>2</sup>

George B. Holt, a delegate from Montgomery County whose long career in the law included serving terms as a state representative, state senator, and common pleas court judge, was the leading proponent of the proposal to permit the General Assembly to create courts of conciliation. Holt's comments during the discussion of courts of conciliation suggest that the

adoption of Section 19 was motivated by concern over the adversarial and formal nature of litigation under the established court system:

The plan of a court of conciliation has many advocates, who desire to see it established. It has been tried in other countries, with excellent effect—greatly diminishing litigation, and subduing a litigious spirit—a spirit which is the bane of a community. It sets neighbor against neighbor, brother against brother and even father against son, and son against father. Such litigation have I often witnessed, and in some cases seen it prosecuted with an embittered spirit, little short of devilish. Every means which promises only a mitigation of the evil should be employed. The expense and time wasted in such controversies, employing judges, jurors, witnesses, lawyers and suitors, is but a little of the mischief. The monstrous evil consists in the engendering and perpetuating of strife and contention among neighbors, begetting and nursing discord and hatred in families, and in disturbing the harmony and peace of society. A judicious peace loving and peace making officer of this kind may be more useful, far more useful than the first judge of your State, whom you propose to dignify with title of Chief Justice of Ohio.<sup>3</sup>

Despite the authority provided by Section 19, the General Assembly has never established courts of conciliation; rather it has created arbitration proceedings and other methods for litigants wishing to avoid using the courts.<sup>4</sup>

### **Amendments, Proposed Amendments, and Other Review**

Article IV, Section 19 has not been amended since its adoption as part of the 1851 Ohio Constitution.

In the 1970s, the Ohio Constitutional Revision Commission recommended the repeal of Section 19, based upon its conclusion that the General Assembly had never exercised its constitutional authorization to establish courts of conciliation. In making this recommendation, the commission noted that its repeal would not affect current or future alternative dispute resolution provisions under Ohio law.<sup>5</sup> Despite this recommendation, the General Assembly did not submit the proposed repeal of Section 19 to the voters.

In 2011, the 129<sup>th</sup> General Assembly adopted Amended House Joint Resolution Number 1, intended, in part, to repeal Section 19.<sup>6</sup> The question was presented to voters as “Issue 1” on the November 8, 2011 ballot, which also included a proposal to repeal Article IV, Section 22 (authorizing the creation of supreme court commissions), as well as a proposal to amend Article IV, Section 6 to increase the maximum age for assuming elected or appointed judicial office from 70 to 75. This last proposal, involving age eligibility requirements for judicial office, was the principal focus of the opposition to Issue 1 and perhaps was the reason for its sound defeat at the polls.<sup>7</sup>

## **Litigation Involving the Provision**

There has been no litigation involving this provision, and no court of conciliation has ever been established by the General Assembly.

## **Presentations and Resources Considered**

On September 11, 2014, Jo Ellen Cline, Government Relations Counsel for the Ohio Supreme Court, presented to the Judicial Branch and Administration of Justice Committee on Article IV, Section 19. Ms. Cline noted that it is unlikely under the current structure of the judicial branch that courts of conciliation would be necessary.

Also on September 11, 2014, William K. Weisenberg, Senior Policy Advisor to the Ohio State Bar Association, presented his perspective on Section 19. He observed that the judicial and legislative branches have collaborated to enact laws and encourage alternative dispute resolution measures such as arbitration, mediation, and private judging. Mr. Weisenberg stated that he does not believe Section 19 is necessary to allow for alternative dispute resolution but, instead, the section is a remnant of history and properly should be repealed.

## **Action by the Judicial Branch and Administration of Justice Committee**

After formal consideration by the Judicial Branch and Administration of Justice Committee on November 13, 2014, and January 15, 2015, the committee voted unanimously to adopt this report and recommendation on January 15, 2015.

## **Presentation to the Commission**

On February 12, 2015, Senator Larry Obhof, acting in his capacity as member of the Judicial Branch and Administration of Justice Committee, appeared before the Commission to present the committee's report and recommendation, by which it recommended repeal of Article IV, Section 19. Senator Obhof explained that Article IV, Section 19 has never been used to create courts of conciliation, and that alternative forms of dispute resolution have been promulgated without applying Article IV, Section 19.

## **Action by the Commission**

On behalf of the Judicial Branch and Administration of Justice Committee, Sen. Larry Obhof moved to adopt the committee's recommendation to repeal Article IV, Section 19. Mark Wagoner seconded the motion, upon which a roll call vote was taken. The motion passed by an affirmative vote of 23 to one.

## **Conclusion**

The Ohio Constitutional Modernization Commission finds that Article IV, Section 19 has not been used since its adoption in 1851, and determines it is not necessary to authorize any existing

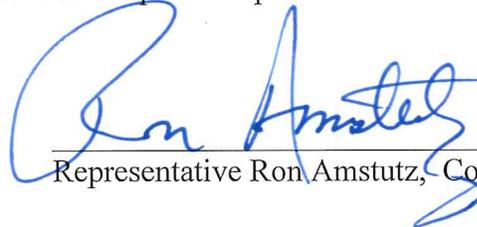
or future alternative dispute resolution mechanisms. Therefore, the Commission concludes that the provision is obsolete and recommends that Article IV, Section 19 be repealed.

### Date Adopted

After formal consideration by the Ohio Constitutional Modernization Commission on February 12, 2015, and April 9, 2015, the Commission voted to adopt this report and recommendation on April 9, 2015.



Senator Charleta B. Tavares, Co-Chair



Representative Ron Amstutz, Co-Chair

### Endnotes

<sup>1</sup> Ohio Constitution, Article IV, Section 1.

<sup>2</sup> Steinglass, Steven H. and Gino J. Scarselli. *The Ohio State Constitution*. New York: Oxford UP (2nd printing), 2011. 207. Print.

<sup>3</sup> *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio 1850-51*. Columbus: S. Medary, 1851. 391. Print.

<sup>4</sup> Steinglass & Scarselli, *supra*, at 208, citing R.C. Chapter 2711, and R.C. 2701.10.

<sup>5</sup> Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part 10, The Judiciary, p. 65. Print. 15 March 1976. Available at: <http://www.lsc.ohio.gov/ocrc/recommendations%20pt10%20judiciary.pdf> (accessed September 15, 2015).

*See also* Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Vol. 11, Final Report, Index to Proceedings and Research, Appendix J, p. 420. Print. 30 June 1977. Available at: <http://www.lsc.ohio.gov/ocrc/final%20report%20index%20to%20proceedings%20and%20research.pdf> (accessed Sept. 15, 2015).

<sup>6</sup> As it appeared on the ballot, Issue 1 read as follows:

Proposed Constitutional Amendment

TO INCREASE THE MAXIMUM AGE AT WHICH A PERSON MAY BE ELECTED OR APPOINTED JUDGE, TO ELIMINATE THE AUTHORITY OF THE GENERAL ASSEMBLY TO ESTABLISH COURTS OF CONCILIATION, AND TO ELIMINATE THE AUTHORITY OF THE GOVERNOR TO APPOINT A SUPREME COURT COMMISSION.

Proposed by Joint Resolution of the General Assembly:

To amend Section 6 of Article IV and to repeal Sections 19 and 22 of Article IV of the Constitution of the State of Ohio. A majority yes vote is required for the amendment to Section 6 and the repeal of Sections 19 and 22 to pass.

This proposed amendment would:

- 
1. Increase the maximum age for assuming elected or appointed judicial office from seventy to seventy-five.
  2. Eliminate the General Assembly's authority to establish courts of conciliation.
  3. Eliminate the Governor's authority to appoint members to a Supreme Court Commission.

If approved, the amendment shall take effect immediately.

A "YES" vote means approval of the amendment to Section 6 and the repeal of Sections 19 and 22.

A "NO" vote means disapproval of the amendment to Section 6 and the repeal of Sections 19 and 22.

<sup>7</sup> The voters rejected Issue 1 by a vote of 2,080,207 to 1,273,536, a margin of 62.03 percent to 37.97 percent. Source: Secretary of State's website; State Issue 1: November 8, 2011 (Official Results); <https://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2011results/20111108Issue1.aspx> (accessed Oct. 27, 2014).



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION

#### OHIO CONSTITUTION ARTICLE IV, SECTION 22

#### SUPREME COURT COMMISSION

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The Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article IV, Section 22 of the Ohio Constitution concerning supreme court commissions. The Commission issues this report pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*The Commission finds that Article IV, Section 22 is obsolete and therefore recommends its repeal.*

#### **Background**

Article IV, Section 22 reads as follows:

A commission, which shall consist of five members, shall be appointed by the governor, with the advice and consent of the senate, the members of which shall hold office for the term of three years from and after the first day of February, 1876, to dispose of such part of the business then on the dockets of the supreme court, as shall, by arrangement between said commission and said court, be transferred to such commission; and said commission shall have like jurisdiction and power in respect to such business as are or may be vested in said court; and the members of said commission shall receive a like compensation for the time being, with the judges of said court. A majority of the members of said commission shall be necessary to form a quorum or pronounce a decision, and its decision shall be certified, entered, and enforced as the judgments of the supreme court, and at the expiration of the term of said commission, all business undisposed of shall by it be certified to the supreme court and disposed of as if said commission had never existed. The clerk and reporter of said court shall be the clerk and reporter of said commission, and the commission shall have such other attendants not exceeding in number those provided by law for said court,

which attendants said commission may appoint and remove at its pleasure. Any vacancy occurring in said commission, shall be filled by appointment of the governor, with the advice and consent of the senate, if the senate be in session, and if the senate be not in session, by the governor, but in such last case, such appointment shall expire at the end of the next session of the general assembly. The general assembly may, on application of the supreme court duly entered on the journal of the court and certified, provide by law, whenever two-thirds of such [each] house shall concur therein, from time to time, for the appointment, in like manner, of a like commission with like powers, jurisdiction and duties; provided, that the term of any such commission shall not exceed two years, nor shall it be created oftener than once in ten years.<sup>1</sup>

Article IV governs the judicial branch, specifically vesting judicial power in the state supreme court, courts of appeals, courts of common pleas, and other courts as may be established by law.<sup>2</sup>

Section 22 is not original to the 1851 Constitution, but it was adopted by Ohio voters in 1875.

The creation of a supreme court commission to alleviate the court's backlog was a topic of considerable discussion at the 1873-74 Constitutional Convention. Some delegates felt that the creation of a commission to assist the court in dealing with its burgeoning docket would dilute the authority of the court; others were concerned that it would be difficult to recruit lawyers willing to leave successful practices in order to render this public service. Proponents of the use of commissions pointed out the difficulties faced by the court in attempting to keep up with the workload: despite 14-hour workdays and diligent attention to its responsibilities, the court was unable to reduce its significant backlog.<sup>3</sup>

After extensive debate, the convention approved provisions to create an initial commission for a three-year term and to authorize the General Assembly to create subsequent commissions.<sup>4</sup> The voters, however, rejected the proposed Ohio Constitution of 1874.

In 1875, after the rejection of the 1874 constitution, the General Assembly proposed Section 22, a variant of the earlier plan to create supreme court commissions. Voters approved the amendment on October 12, 1875<sup>5</sup> by a 77.5 to 22.5 percent margin of those voting on the proposal.<sup>6</sup> This was the first amendment approved by the voters under the authority given the General Assembly in the 1851 constitution to propose amendments directly to the voters.<sup>7</sup>

The first supreme court commission was created by direct operation of this largely self-executing amendment. Section 22 required the governor to appoint the five members of the initial commission with advice and consent of the Senate for a three-year term beginning in February 1876. Additionally, the amendment gave the General Assembly authority to create subsequent commissions for two-year terms by a two-thirds vote (after application by the Ohio Supreme Court), and the General Assembly created a second commission in 1883. The second commission ceased operation in 1885, and since then there have not been any commissions to provide docket relief to the Ohio Supreme Court.<sup>8</sup>

## **Amendments, Proposed Amendments, and Other Review**

Article IV, Section 22 has not been amended since its approval by voters in 1875.

In the 1970s, the Ohio Constitutional Revision Commission twice recommended that Section 22 be repealed. It first recommended the change as part of its review of the General Assembly's administration, organization, and procedures. In May 1973, however, the voters rejected a ballot issue proposing repeal of Section 22. The 1970s Commission attributed this rejection to a lack of appropriate voter education.<sup>9</sup> Then, in 1976, it again recommended the repeal of this provision,<sup>10</sup> but the General Assembly did not resubmit this renewed recommendation to repeal Section 22 to the voters.

In recommending repeal of the authority to create commissions, the 1970s Commission noted that the case backlog in the 1870s arose out of an organizational system that expected supreme court judges to hear cases in multiple districts around the state. At the time, the delegates thought that the use of commissions could help resolve the problem. Subsequent to adoption of Section 22 in 1875, the voters approved an amendment in 1883 reorganizing the court system and relieving the judges of their remaining circuit-riding responsibilities. Finally, in 1912, the voters again amended Article IV to create courts of appeals, thus significantly reducing the caseload burden on the Ohio Supreme Court and removing the need for supreme court commissions.

In 2011, the 129th General Assembly adopted Amended House Joint Resolution Number 1, intended, in part, to repeal Section 22.<sup>11</sup> The question was presented to voters as "Issue 1" on the November 8, 2011, ballot, which also included a proposal to repeal Article IV, Section 19 (authorizing the General Assembly to create courts of conciliation), as well as a proposal to amend Article IV, Section 6 to increase the maximum age for assuming elected or appointed judicial office from 70 to 75. This last proposal involving age eligibility requirements for judicial office was the principal focus of the opposition to Issue 1 and perhaps was the reason for its defeat at the polls.<sup>12</sup>

### **Litigation Involving the Provision**

During the relatively brief existence of supreme court commissions, there was no significant litigation concerning the operation of commissions and their relationship to other constitutional courts.

### **Presentations and Resources Considered**

On September 11, 2014, Jo Ellen Cline, Government Relations Counsel for the Ohio Supreme Court, presented to the Judicial Branch and Administration of Justice Committee on the topic of Article IV, Section 22. Ms. Cline noted that, in practice, the section essentially allows for the simultaneous operation of two supreme courts. She observed that the requirement that the Ohio Supreme Court hold court in each county annually was not an onerous requirement in 1803, when Ohio only had nine counties. However, by 1850, Ohio had 87 counties and a fast-growing population, thus resulting in a heavier burden for the court and a backlog of cases. The

elimination of most circuit-riding responsibilities for members of the Ohio Supreme Court in the 1851 constitution did not solve the problem of delay, and by the 1870's the court was four years behind in its docket. Based upon 2013 statistics showing that the current court has a 99 percent clearance rate for cases, Ms. Cline asserted that "the need for such a drastic docket management tool no longer exists."

### **Action by the Judicial Branch and Administration of Justice Committee**

After formal consideration by the Judicial Branch and Administration of Justice Committee on November 13, 2014, and January 15, 2015, the committee voted unanimously to adopt this report and recommendation on January 15, 2015.

### **Presentation to the Commission**

On February 12, 2015, Senator Larry Obhof, acting in his capacity as member of the Judicial Branch and Administration of Justice Committee, appeared before the Commission to present the committee's report and recommendation, by which it recommended repeal of Article IV, Section 22. Senator Obhof explained that Article IV, Section 22 was rendered unnecessary by organizational changes in the court system, with the result that the provision was only briefly used in the late 1800s to create a supreme court commission, and has not been used since.

### **Action by the Commission**

On behalf of the Judicial Branch and Administration of Justice Committee, Sen. Larry Obhof moved to adopt the committee's recommendation to repeal Article IV, Section 22. Judge Patrick Fischer seconded the motion, upon which a roll call vote was taken. The motion passed by a unanimous affirmative vote of 24 members of the Commission.

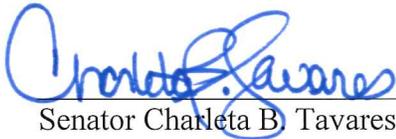
### **Conclusion**

The Ohio Constitutional Modernization Commission concludes that Article IV, Section 22 has not been utilized since 1885 and no longer is necessary to assist the Supreme Court in reducing any backlog. Further, the Commission observes that subsequent changes to the Ohio Constitution have resolved the challenges created by the judicial branch's former organizational structure, and so a future need to create a supreme court commission is unlikely.

Therefore, the Commission concludes that the provision is obsolete and recommends that Article IV, Section 22 be repealed.

## Date Adopted

After formal consideration by the Ohio Constitutional Modernization Commission on February 12, 2015, and April 9, 2015, the Commission voted to adopt this report and recommendation on April 9, 2015.



Senator Charleta B. Tavares, Co-Chair



Representative Ron Amstutz, Co-Chair

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## Endnotes

<sup>1</sup> This provision is sometimes erroneously referred to as Section 21[22]. There has never been a Section 21 of Article IV of the 1851 Constitution, but for reasons that are not clear some commentators treat Section 22 as once having been Section 21 and thus use a bracketed citation. *See, e.g.,* Patterson, Isaac F., *The Constitution of Ohio: Amendments and Proposed Amendments*. Cleveland: Arthur H. Clark Co., 1912. 238. Print. (Referring to section “21[22]”.)

<sup>2</sup> Ohio Constitution, Article IV, Section 1.

<sup>3</sup> Adel, J.G., *Official Report of the Proceedings and Debates of the Third Constitutional Convention of Ohio*. Cleveland: W.S. Robison & Co., 1873-74. 751-74. Print.

<sup>4</sup> *See* Patterson, *supra*, at 198-99. (Proposed 1874 Constitution, Article IV, Sections 4-6.)

<sup>5</sup> *See* Laws of Ohio, vol. 72, p. 269-70 (1874).

<sup>6</sup> There were 339,076 favorable votes, comprising 57.3 percent of the 595,248 votes that were cast in that election, thus satisfying the super-majority requirement. Patterson, *supra*, at 238.

<sup>7</sup> Article XVI, Section 1, as it existed from 1851 to 1912, provided that an amendment proposed by the General Assembly had to receive a majority of votes cast in the election, as opposed to a majority of votes on the proposed amendment. All seven amendments proposed by the General Assembly under the 1851 Constitution between 1857 and 1874 failed because they did not receive a majority of the votes cast at the election; six of the proposed amendments that failed received more affirmative than negative votes but still failed under the super-majority requirement. *See* Steinglass, Steven H. & Gino J. Scarselli, *The Ohio State Constitution*. New York: Oxford UP (2<sup>nd</sup> printing), 2011. 373-74. Print.

<sup>8</sup> *See id.* at 209.

<sup>9</sup> Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part 1, Administration, Organization, and Procedures of the General Assembly, pp. 65-67. Print. 31 Dec. 1971. Available at: <http://www.lsc.ohio.gov/ocrc/recommendations%20pt1%20general%20assembly.pdf> (accessed Sept. 15, 2015).

<sup>10</sup> Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report, Part 10, The Judiciary, pp. 67-68. Print. 15 March 1976. Available at: <http://www.lsc.ohio.gov/ocrc/recommendations%20pt10%20judiciary.pdf> (accessed Sept. 15, 2015).

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*See also* Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Vol. 11, Final Report, Index to Proceedings and Research, Appendix J, pp. 422-23. Print. 30 June 1977. Available at: <http://www.lsc.ohio.gov/ocrc/final%20report%20index%20to%20proceedings%20and%20research.pdf> (accessed Sept. 15, 2015).

<sup>11</sup> As it appeared on the ballot, Issue 1 read as follows:

Proposed Constitutional Amendment

TO INCREASE THE MAXIMUM AGE AT WHICH A PERSON MAY BE ELECTED OR APPOINTED JUDGE, TO ELIMINATE THE AUTHORITY OF THE GENERAL ASSEMBLY TO ESTABLISH COURTS OF CONCILIATION, AND TO ELIMINATE THE AUTHORITY OF THE GOVERNOR TO APPOINT A SUPREME COURT COMMISSION.

Proposed by Joint Resolution of the General Assembly:

To amend Section 6 of Article IV and to repeal Sections 19 and 22 of Article IV of the Constitution of the State of Ohio. A majority yes vote is required for the amendment to Section 6 and the repeal of Sections 19 and 22 to pass.

This proposed amendment would:

1. Increase the maximum age for assuming elected or appointed judicial office from seventy to seventy-five.
2. Eliminate the General Assembly's authority to establish courts of conciliation.
3. Eliminate the Governor's authority to appoint members to a Supreme Court Commission.

If approved, the amendment shall take effect immediately.

A "YES" vote means approval of the amendment to Section 6 and the repeal of Sections 19 and 22.

A "NO" vote means disapproval of the amendment to Section 6 and the repeal of Sections 19 and 22.

<sup>12</sup> Issue 1 was defeated by a vote of 2,080,207 to 1,273,536, a margin of 62.03 percent to 37.97 percent. Source: Secretary of State's website; State Issue 1: November 8, 2011 (Official Results); <https://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2011results/20111108Issue1.aspx> (accessed Oct. 27, 2014).



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION

#### OHIO CONSTITUTION ARTICLE V, SECTION 2

#### ELECTION BY BALLOT

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The Ohio Constitutional Modernization Commission adopts this report and recommendation regarding Article V, Section 2 of the Ohio Constitution concerning the requirement that elections be by ballot. It is adopted pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*The Commission recommends that Article V, Section 2 be retained in its current form.*

#### **Background**

Article V of the Ohio Constitution concerns the Elective Franchise.

Article V, Section 2 reads as follows:

All elections shall be by ballot.

Adopted as part of the 1851 constitution, Section 2 was taken verbatim from Article IV, Section, 2 of the 1802 Constitution, and has never been amended.

The 19<sup>th</sup> century saw significant changes to the electoral process, particularly concerning the widespread adoption of what became known as the secret, or "Australian," ballot. Proponents of the Australian ballot urged the use of an official ballot that included the names of all the candidates for office, was printed at public expense, was distributed only at polling places, and was marked in secret.<sup>1</sup> In 1888, Massachusetts became the first state to adopt the Australian ballot, and virtually all of the states embraced this reform by the turn of the century.<sup>2</sup>

Secrecy of the ballot was the most important feature of the Australian ballot, and prior to its adoption Americans used to vote with ballots provided them by political parties, with their voices (*viva voce*), with their hands, or with their feet.<sup>3</sup> Of the many variants of the Australian

ballot, in 1891 Ohio chose the party column format, which stayed in place throughout the first half of the 20<sup>th</sup> century.<sup>4 5</sup>

Ohio ballot reform in the latter portion of the 19<sup>th</sup> century addressed corrupt practices that included stuffing ballot boxes, engaging in kick-back schemes, and buying votes, all activities enabled by the fact that voters were not provided a list of candidates, could remove ballots from the polling location, and were not required to place ballots directly into the ballot box.<sup>6</sup> Upon his election in 1890, Ohio Governor James E. Campbell sought to secure a “free, secret, untrammled and unpurchased ballot which shall be honestly counted and returned.”<sup>7</sup> That effort culminated in the General Assembly’s 1891 enactment of the Australian Ballot Law.

Although the Ohio Constitution does not explicitly require a secret ballot, a dispute in the early 20<sup>th</sup> century about whether voting machines violated Section 2 ultimately resulted in case law holding that the ballot is secret.

In *State ex rel. Karlinger v. Bd. of Deputy State Supervisors of Elections*, 80 Ohio St. 471, 89 N.E. 33 (1909), the Supreme Court of Ohio held the General Assembly lacked the power to adopt a statute permitting the use of voting machines, and that the proposed machines violated Section 2’s requirement that elections be by ballot. Acknowledging conflicting court decisions from around the country, the court expressed skepticism about the reliability of voting machines and the ability of voters to quickly master the machine and cast their vote. *See Id.*, 80 Ohio St. at 488-89, 89 N.E. at 36.

The delegates to the 1912 Ohio Constitutional Convention, taking a more progressive view, proposed an amendment to permit the use of voting machines, but voters rejected the proposal, leaving the question of voting machines unsettled.<sup>8</sup> In *State ex rel. Automatic Registering Machine Co. v. Green*, 121 Ohio St. 301, 310, 168 N.E. 131, 134 (1929), the Supreme Court of Ohio overruled *Karlinger* and upheld the use of voting machines, holding, as syllabus law, that the term “ballot” “designates a method of conducting elections which will insure secrecy, as distinguished from open or viva-voce voting.”

In reaching this decision, the Court relied on decisions from other states upholding the use of voting machines, as well as an article by Professor John H. Wigmore, who stated that “his search has convinced him that in common usage the term *ballot* has always been used, without an adjective, to express the idea of a vote cast in such a way that its purport is unknown at the time of casting – in short, of ‘secret’ voting.” *See Green, supra*, 121 Ohio St. at 308, 168 N.E. at 134 (citing Wigmore, *Ballot Reform: Its Constitutionality*, 23 *American Law Review* 719, 725 (1889)). Finally, the Court recognized that the meaning of constitutional provisions must be permitted to evolve as new technologies develop.<sup>9</sup>

## **Amendments, Proposed Amendments, and Other Review**

In the 1970s, the Ohio Constitutional Revision Commission (1970s Commission) did not recommend a change to Section 2, concluding that the fundamental principle of the secret ballot – that “voters must be permitted to express their views on election matters without fear of retaliation” – is a proper matter for the constitution.

### **Litigation Involving the Provision**

The Supreme Court of Ohio’s only recent opportunity to consider Section 2 involved a criminal case in which the defendant was charged with five counts of ballot tampering. In *State v. Jackson*, 102 Ohio St.3d 380, 2004-Ohio-3206, 811 N.E.2d 68, a county board of elections employee was accused of marking the ballots of nursing home residents in favor of a candidate that was not their preference. When the county prosecutor sought to introduce the allegedly tainted ballots, which had been seized pursuant to a valid warrant, the defendant argued Section 2 required the ballots’ secrecy. In rejecting this argument, the Court first noted that Section 2 “aspires to ballot secrecy, but it is not self-executing.” *Id.* at ¶ 24. The Court then decided the question based on statutory law, concluding that the statutory requirement of ballot secrecy applies only to election proceedings and not to the admission of evidence in a criminal trial, adding, “applying statutory ballot secrecy to preclude using a ballot as evidence of a crime conflicts with a board of elections’ duties to investigate and gather evidence of election irregularities.” *Id.* at ¶ 33.

### **Presentations and Resources Considered by the Bill of Rights and Voting Committee**

#### *Engstrom Presentation*

On February 9, 2017, Erik J. Engstrom, professor of political science from the University of California, Davis, presented to the Bill of Rights and Voting Committee on the politics of ballot choice, which is the topic of a recent law review co-authored by Prof. Engstrom.<sup>10</sup>

Prof. Engstrom began by noting Ohio has interesting history related to ballot laws. Providing a brief history of how elections were conducted in the 19<sup>th</sup> century, he said balloting was not the responsibility of state governments. Rather, he said, the political parties themselves would print the ballots and distribute them to voters. The parties would print the candidates for their own party on that ballot, and a voter would get a ballot from a party and cast that ballot. He said balloting was quite different, so, in effect, voters were almost forced to vote a straight party ticket by default. He added that voting was not secret – others could observe and monitor voters as they cast their ballots. He said the lack of a secret ballot created the potential for vote buying.

Prof. Engstrom continued that, at the end of the 19<sup>th</sup> century, the states began to reform the way they conducted elections by adopting the Australian, or “secret” ballot, with Massachusetts being the first state to adopt the change. He said this new ballot has the format largely used now in the United States. In addition, he said ballots are now printed and distributed by the state, rather than the political parties. He noted an additional feature, which is that the ballot is consolidated

so that, instead of just a Republican or Democratic Party ballot, all the candidates are listed, allowing a voter to split his or her vote more easily. He said a final important feature is that now voting is conducted in secret, using a curtain or a voting booth. He said it took about 30 years for all states to adopt some form of the new secret ballot, with Ohio being an early adopter in 1891. He noted that some states have a constitutional provision that says the ballot must be secret, but Ohio has not constitutionalized this requirement.

### **Discussion and Consideration by the Bill of Rights and Voting Committee**

In considering Article V, Section 2, some committee members expressed that embedding the concept of a secret ballot in the state's foundational document would emphasize the importance of protecting the integrity of the voting process by emphasizing the need for ballots to be secret. Initially, committee members sought to add the word "secret" to Section 2 on the basis that the recommendation would merely constitutionalize a concept that is already accepted under case law.

However, after further consideration, a majority of the committee concluded that, because the requirement is well-established and has been recognized by the Supreme Court of Ohio since the 1920s, it may not be necessary to add the word "secret" to Section 2.

In reaching this conclusion, committee members commented that adding the word "secret" could be interpreted as indicating a greater level of secrecy than is already understood to be the case, potentially permitting an argument that absentee ballots are not appropriate. Other members similarly cautioned that a change could have unintended consequences, such as potentially affecting issues surrounding voter coercion and voter fraud. In the absence of evidence that problems have arisen due to the lack of a provision expressly requiring ballots to be secret, committee members were reluctant to recommend a constitutional change. Ultimately, the committee's consensus was to leave the section in its present form.

### **Action by the Bill of Rights and Voting Committee**

After formal consideration by the Bill of Rights and Voting Committee, the committee voted on May 11, 2017 to retain Article V, Section 2 in its present form.

### **Presentation to the Commission**

On May 11, 2017, Richard Saphire, chair of the Bill of Rights and Voting Committee, presented a report and recommendation for Article V, Section 2, describing the committee's review and indicating the committee's consensus that Article V, Section 2 should be retained in its current form.

### **Action by the Commission**

At the Commission meeting held May 11, 2017, Representative Hearcel Craig moved to adopt the report and recommendation, a motion that was seconded by Commission member Jo Ann

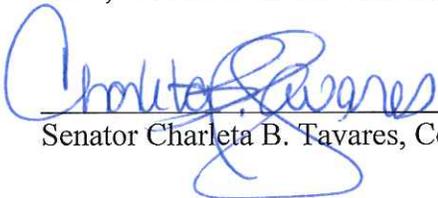
Davidson. Upon a roll call vote, the motion passed by a vote of 21 in favor, one abstention, and eight absent.

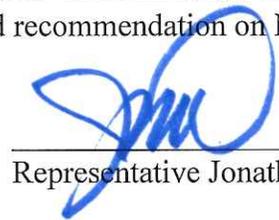
## Conclusion

The Ohio Constitutional Modernization Commission recommends that Article V, Section 2 be retained in its present form.

## Date Adopted

After formal consideration by the Ohio Constitutional Modernization Commission on May 11, 2017, the Commission voted to adopt the report and recommendation on May 11, 2017.

  
\_\_\_\_\_  
Senator Charleta B. Tavares, Co-chair

  
\_\_\_\_\_  
Representative Jonathan Dever, Co-chair

## Endnotes

<sup>1</sup> See generally L. E. Fredman, *The Australian Ballot: The Story of an American Reform* (1968); see also Erik J. Engstrom & Jason M. Roberts, *The Politics of Ballot Choice*, 77 Ohio St. L.J. 839, 842-43 (2016).

<sup>2</sup> See Alan Ware, *Anti-Partism and Party Control of Political Reform in the United States: The Case of the Australian Ballot*, 30 Brit. J. Pol. Sci. 1, 9 (2000).

<sup>3</sup> See Jill Lepore, *Rock, Paper, Scissors: How We Used to Vote*, *The New Yorker* (Oct. 13, 2008). Available at: <http://www.newyorker.com/magazine/2008/10/13/rock-paper-scissors> (last visited Feb. 26, 2017). See also, Eldon Cobb Evans, *A History of the Australian Ballot System in the United States*, 1917.

<sup>4</sup> In their introduction to their law review article on ballot formats, Professors Engstrom and Roberts identified a number of state variations in ballot formats.

Some states line candidates in party columns while others list candidates by office. Some states provide for party emblems at the top of the ballot. Others provide a box at the top of the ballot allowing voters to simply cast a straight ticket with one check mark. Moreover, states have varied in how long they have stuck with one type of ballot.

Engstrom & Roberts, *supra*, note 1 at 841.

<sup>5</sup> Ohio first adopted what is known as the party column format of the ballot, but it switched to the office bloc format in 1949 with the adoption of Article V, Section 2a, of the Ohio Constitution. See, *id.* at 854-56.

<sup>6</sup> *Australian Ballot*, Ohio History Central, [http://www.ohiohistorycentral.org/w/Australian\\_Ballot](http://www.ohiohistorycentral.org/w/Australian_Ballot) [<https://perma.cc/F267-AFJQ>].

<sup>7</sup> *Id.*

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<sup>8</sup> The proposed amendment on voting machines provided as follows: “All elections shall be either by ballot or by mechanical device, or both, preserving the secrecy of the vote. Laws may be enacted to regulate the preparation of the ballot and to determine the application of such mechanical device.” Proceedings and Debates of the Constitutional Convention of the State of Ohio, Vol. 2, 1321, 1795, & 1959 (1913).

<sup>9</sup> The Court stated:

It was manifestly impossible for the framers of the Ohio Constitution to foresee all of the mechanical developments of our modern age. Just as our forefathers in drafting the national Constitution could not foresee the time when the term ‘post roads’ would be applied to airplane traffic – a traffic through air lanes which have not the slightest physical resemblance to the highway, as it has been known from the time of the Egyptians down – so the framers of the Ohio Constitution could not well foresee the time when a voter, by manipulating a lever, could mark either a straight ticket or a split ticket with exactly the same definiteness of individual expression as when he marks the ballot in his hand. However, surely the impress upon the record of a machine is not much farther removed from marking the ballot than the impress upon the key of the typewriter is removal from the actual making of characters of the alphabet by hand. If typewriting is the equivalent of long-hand, how can voting by machine be said essentially to differ, except in its efficiency, from voting by the old system of the ballot?

We think that the constitutional provision was meant merely to relate to the essential secrecy of the indication of the voter’s choice; that this secrecy has been demonstrated to be retained and enhanced by the use of voting machines; that, by the vast weight of authority, the Karlinger Case was an incorrect decision, and therefore we overrule that holding.

*Automatic Registering Machine Co.*, 121 Ohio St. at 310-11, 168 N.E. at 134.

<sup>10</sup> See Engstrom & Roberts, *supra* note 1.



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION

#### OHIO CONSTITUTION ARTICLE V, SECTION 2a

#### NAMES OF CANDIDATES ON BALLOT

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The Ohio Constitutional Modernization Commission adopts this report and recommendation regarding Article V, Section 2a of the Ohio Constitution concerning the names of candidates on the ballot. It is adopted pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*The Commission recommends that Article V, Section 2a be retained in its current form.*

#### **Background**

Article V of the Ohio Constitution concerns the Elective Franchise.

Article V, Section 2a reads as follows:

The names of all candidates for an office at any election shall be arranged in a group under the title of that office. The general assembly shall provide by law the means by which ballots shall give each candidate's name reasonably equal position by rotation or other comparable methods to the extent practical and appropriate to the voting procedure used. At any election in which a candidate's party designation appears on the ballot, the name or designation of each candidate's party, if any, shall be printed under or after each candidate's name in less prominent type face than that in which the candidate's name is printed. An elector may vote for candidates (other than candidates for electors of President and Vice-President of the United States, and other than candidates for governor and lieutenant governor) only and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate.

Proposed by initiative in 1949, Section 2a was intended to bar straight-party voting by emphasizing the candidates for office rather than their political parties.<sup>1</sup> Previously, voters could cast a straight-party vote by marking a single “X” on the ballot, a method known as the “party column format.”<sup>2</sup> With the adoption of Section 2a, boards of elections began using an office-bloc or office-type ballot by which voters would cast their vote for each individual candidate for office.<sup>3</sup>

Originally, the section required each candidate’s name to appear, where reasonably possible, “substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs.”<sup>4</sup> In 1974, the Supreme Court of Ohio addressed whether this requirement prohibited the use of voting machines and other means of voting that rotated names on a precinct-by-precinct basis. *See State ex rel. Roof v. Hardin Cty. Bd. of Commrs*, 39 Ohio St.2d 130, 314 N.E.2d 172 (1974). The Court held that “although the Constitution does not prohibit the use of voting machines, it does require that among the various methods of machine rotation that are economically and administratively feasible, the only method that may be utilized is the one which most closely approaches perfect rotation. Precinct-by-precinct rotation does not comply with this requirement and is, therefore, unconstitutional.” *Id.*, 39 Ohio St.2d at 134, 314 N.E.2d at 176.

To address the issue, voters approved an amendment in 1975 that allowed the General Assembly “to provide by law the means by which ballots shall give each candidate’s name reasonably equal position by rotation or other comparable methods to the extent practical and appropriate to the voting procedure used.”<sup>5</sup>

In 1976, Section 2a again was amended to indicate the governor and lieutenant governor, like the United States president and vice president, are exempt from the requirement that candidates appear on the ballot and must be voted on as separate candidates.<sup>6</sup>

While most states require ballot rotation by statute, Ohio is the only state to prescribe ballot rotation by constitutional provision.<sup>7</sup>

### **Amendments, Proposed Amendments, and Other Review**

In its March 1975 report, the Ohio Constitutional Revision Commission (1970s Commission) recommended removal of Section 2a’s self-executing language that had been interpreted as requiring perfect rotation of names on the ballot, instead preferring to allow the General Assembly to enact law providing for rotation.<sup>8</sup> Acknowledging that no candidate should be able to gain an advantage by ballot position, the 1970s Commission found the “perfect rotation” requirement to be too restrictive in that it could be used to invalidate election results due to simple printing errors, prevent the use of emerging new technologies for voting, and cause other difficulties and expenses for county boards of elections.<sup>9</sup> The 1970s Commission further recommended that Section 2a be expanded to cover all elections, not merely general elections, removing a clause that could be interpreted as emphasizing party over candidate names in a primary or non-partisan election, and removing reference to type-size and appearance because future ballots may not be printed.<sup>10</sup> The 1970s Commission asserted its recommendations were

intended to “create a more flexible and workable approach to achieving fairness in the balloting process.”<sup>11</sup>

### **Litigation Involving the Provision**

The Supreme Court of Ohio has acknowledged that voting irregularities, such as the failure to properly rotate candidate names and problems with voting machines, may be grounds for setting aside the results of an election. *See In re Election of Nov. 6, 1990, for the Office of Attorney General of Ohio*, 58 Ohio St. 3d 103, 569 N.E.2d 447 (1991). However, before election results are invalidated, it must be established by “clear and convincing” evidence that such irregularities occurred and that they affected enough votes to change or make uncertain the result of the election. *Id.*, 58 Ohio St.3d at 105, 569 N.E.2d at 450.

### **Presentations and Resources Considered**

#### *Damschroder Presentation*

On February 9, 2017, Matthew Damschroder, assistant secretary of state and chief of staff for Ohio Secretary of State Jon Husted, and former director of the Franklin County Board of Elections, presented to the committee on the order of candidate names on the ballot.

Mr. Damschroder said in the 1950s and 60s, boards of elections in Ohio had hand-counted paper ballots. He said there were several forms of ballot: a presidential ballot, a party-type ballot, a nonparty ballot, and a question-and-issue ballot. He said the voter would sign in at the polling place and tear off a sheet from a pad for each of the different ballots. Mr. Damschroder said that process continued as counties implemented punch card systems, and other new technology, on into the 1980s and 90s when boards of elections began using optical scan sheets and touch screens. He continued that, within each of the ballot categories, contests appear in the order of statewide, then district, then county, then any offices within the county, noting that some counties have districts for their county commissions.

Regarding rotation of names, Mr. Damschroder said, within each office contest, candidate names are rotated. He said Ohio is the only state that has rotation built into the constitution. He described that other states require rotation by state law, and in some states all ballots are the same in alphabetical order. He noted that, in Illinois, names are drawn out of a hat to establish ballot order.

Mr. Damschroder said, in Ohio, the procedure is for the first precinct in the county to have a straight alphabetical order, and the next precinct shifts the list of candidate names down one, and so on through each of the precincts. He said the goal, within a county, is for every candidate in a contest to have the opportunity to have his or her name first. He said there is research indicating a statistical advantage to being first, so the idea behind rotation is to prevent any one candidate from having an advantage. He noted that, now that Ohio has no fault absentee voting and a larger percentage of ballots being cast early, Secretary of State Husted requires all counties to follow the same layout for absentee ballots that would appear on the ballot the voter would see at

the polls on Election Day. As a result, a precinct's voters receive the exact same ballot regardless of whether they are voting early, absentee, or in person.

Regarding ballot questions and issues, Mr. Damschroder said there is also a type of rotation that happens on an annual basis, with statewide questions always being the first to appear. However, he said the categories of other issues rotate year to year. For example, he said it is possible that this year if countywide issues are at the top, next year school levies or township issues would be first.

### *Engstrom Presentation*

On February 9, 2017, Erik J. Engstrom, professor of political science from the University of California, Davis, presented to the committee on the politics of ballot choice, which is the topic of a recent law review co-authored by Prof. Engstrom.<sup>12</sup>

Prof. Engstrom began by noting Ohio has an interesting history related to ballot laws. Providing a brief history of how elections were conducted in the 19<sup>th</sup> century, he said balloting was not the responsibility of state governments. Rather, he said, the political parties themselves would print the ballots and distribute them to voters. The parties would print the candidates for their own party on that ballot, and a voter would get a ballot from a party and cast that ballot. He said balloting was quite different, so, in effect, voters were almost forced to vote a straight party ticket by default. He added that voting was not secret – others could observe and monitor voters as they cast their ballots. He said the lack of a secret ballot created the potential for vote buying.

Prof. Engstrom continued that, at the end of the 19<sup>th</sup> century, the states began to reform the way they conducted elections by adopting the Australian, or “secret” ballot, with Massachusetts being the first state to adopt the change. He said this new ballot has the format largely used now in the United States. In addition, he said ballots are now printed and distributed by the state, rather than the political parties. He noted an additional feature, which is that the ballot is consolidated so that, instead of just a Republican or Democratic party ballot, all the candidates are listed, allowing a voter to split his or her vote more easily. He said a final important feature is that now voting is conducted in secret, using a curtain or a voting booth. He said it took about 30 years for all states to adopt some form of the new secret ballot, with Ohio being an early adopter in 1891.

Prof. Engstrom said, despite these changes, the states still varied in the types or formats of ballots they chose to use. He said the ballot format most commonly in use now is the office-bloc format, which lists the candidates office by office. He said this is the format Ohio uses, as a result of a voter referendum in 1949 to switch from the party column to the office-bloc format. Prof. Engstrom said most states prescribe ballot order by statute, with Ohio being unique in setting out the requirement in the constitution.

## **Discussion and Consideration**

After a brief discussion, the Bill of Rights and Voting Committee agreed that the various amendments to Section 2a, particularly the 1975 amendment that allows the General Assembly the flexibility to enact law to honor the provision's goal of ballot fairness while accommodating new voting methods and technologies, allow the section to continue to serve the state well. Thus, the consensus of the committee was that no changes to the section are warranted at this time.

## **Action by the Bill of Rights and Voting Committee**

After formal consideration by the Bill of Rights and Voting Committee, the committee voted on March 9, 2017 to issue a report and recommendation recommending that Article V, Section 2a be retained in its present form.

## **Presentation to the Commission**

On March 9, 2017, Christopher Gawronski, legal intern, on behalf of the Bill of Rights and Voting Committee, presented a report and recommendation for no change to Article V, Section 2a, relating to the order of names of candidates on the ballot. Mr. Gawronski said the report describes the current provision, deriving from a 1949 constitutional initiative, was intended to bar straight-party voting, emphasizing the candidates for office rather than their political parties by using an office-bloc format. He said the report indicates the provision was subsequently amended twice to clarify how rotation of names on ballots is to occur. He said the report outlines the presentations offered on the issue, and concludes with the committee's sense that the current wording provides the necessary flexibility to the General Assembly to provide for the specifics of name rotation based on the needs of new voting methods and technologies, so that no change is necessary.

## **Action by the Commission**

At the Commission meeting held April 13, 2017, Bill of Rights and Voting Committee Chair Richard Saphire moved to adopt the report and recommendation for Article V, Section 2a, a motion that was seconded by Commission member Kathleen Trafford. Upon a roll call vote, the motion passed unanimously, by a vote of 25 in favor, with none opposed, and five absent.

## **Conclusion**

The Ohio Constitutional Modernization Commission recommends that Article V, Section 2a be retained in its present form.

## Date Adopted

After formal consideration by the Ohio Constitutional Modernization Commission on March 9, 2017 and April 13, 2017, the Commission voted to adopt the report and recommendation on April 13, 2017.



Senator Charleta B. Tavares, Co-chair



Representative Jonathan Dever, Co-chair

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## Endnotes

<sup>1</sup> Steven H. Steinglass and Gino J. Scarselli, *The Ohio State Constitution* 215 (2nd prtg. 2011); Erik J. Engstrom and Jason M. Roberts, *The Politics of Ballot Choice*, 77 Ohio St. L.J. 839, 854 (2016).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> As originally adopted in 1949, Section 2a read as follows:

The names of all candidates for an office at any general election shall be arranged in a group under the title of that office, and shall be so alternated that each name shall appear (in so far as may be reasonably possible) substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs. Except at a Party Primary or in a non-partisan election, the name or designation of each candidate's party, if any, shall be printed under or after each candidate's name in lighter and smaller type face than that in which the candidate's name is printed. An elector may vote for candidates (other than candidates for electors of President and Vice-President of the United States) only and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate.

<sup>5</sup> Amendment 6 appeared on the November 4, 1975 ballot as the "Ohio Rotation of Candidate Names on Ballots Amendment." Available at: [https://ballotpedia.org/Ohio\\_Rotation\\_of\\_Candidate\\_Names\\_on\\_Ballots,\\_Amendment\\_6\\_\(1975\)](https://ballotpedia.org/Ohio_Rotation_of_Candidate_Names_on_Ballots,_Amendment_6_(1975)) (last visited Feb. 26, 2017); <https://www.sos.state.oh.us/sos/elections/Research/electResultsMain/1970-1979OfficialElectionResults/GenElect110475.aspx> (last visited Feb. 26, 2017).

The rotation requirements of Section 2a are effectuated by R.C. 3513.15, which provides:

The names of the candidates in each group of two or more candidates seeking the same nomination or election at a primary election, except delegates and alternates to the national convention of a political party, shall be rotated and printed as provided in section 3505.03 of the Revised Code, except that no indication of membership in or affiliation with a political party shall be printed after or under the candidate's name. When the names of the first choices for president of candidates for delegate and alternate are not grouped with the names of such candidates, the names of the first choices for president shall be rotated in the same manner as the names of candidates. The specific form and size of the ballot shall be prescribed by the secretary of state in compliance with this chapter.

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It shall not be necessary to have the names of candidates for member of a county central committee printed on the ballots provided for absentee voters, and the board may cause the names of such candidates to be written on said ballots in the spaces provided therefor.

The secretary of state shall prescribe the procedure for rotating the names of candidates on the ballot and the form of the ballot for the election of delegates and alternates to the national convention of a political party in accordance with section 3513.151 of the Revised Code.

R.C. 3505.03 sets out the requirements for use of the “office-type ballot,” indicating, in part:

On the office type ballot shall be printed the names of all candidates for election to offices, except judicial offices, who were nominated at the most recent primary election as candidates of a political party or who were nominated in accordance with section 3513.02 of the Revised Code, and the names of all candidates for election to offices who were nominated by nominating petitions, except candidates for judicial offices, for member of the state board of education, for member of a board of education, for municipal offices, and for township offices.

<sup>6</sup> Amendment 1 on the June 1976 Ballot, proposing, inter alia, to require the lieutenant governor to be elected jointly with the governor. The measure passed by a margin of 61.16 percent to 38.84 percent. Ballotpedia, “Ohio Joint Election of Governor and Lieutenant Governor, Amendment 1 (June 1976), available at [https://ballotpedia.org/Ohio\\_Joint\\_Election\\_of\\_Governor\\_and\\_Lieutenant\\_Governor,\\_Amendment\\_1\\_\(June\\_1976\)](https://ballotpedia.org/Ohio_Joint_Election_of_Governor_and_Lieutenant_Governor,_Amendment_1_(June_1976)) (last visited Feb. 26, 2017); <https://www.sos.state.oh.us/sos/elections/Research/electResultsMain/1970-1979OfficialElectionResults/GenElect110276.aspx> (last visited Feb. 26, 2017).

<sup>7</sup> Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Ohio Constitution, Part 7, Elections and Suffrage, 16 (March 15, 1975), <http://www.lsc.ohio.gov/ocrc/recommendations%20pt7%20elections%20and%20suffrage.pdf>, (last visited Feb. 26, 2017).

<sup>8</sup> *Id.* at 17.

<sup>9</sup> *Id.* at 18.

<sup>10</sup> *Id.* at 19.

<sup>11</sup> *Id.*

<sup>12</sup> See Engstrom & Roberts, *supra*, note 1.



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION

#### OHIO CONSTITUTION ARTICLE V, SECTION 4

#### EXCLUSION FROM FRANCHISE FOR FELONY CONVICTION

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The Ohio Constitutional Modernization Commission adopts this report and recommendation regarding Article V, Section 4 of the Ohio Constitution concerning the disenfranchisement of persons convicted of a felony. It is issued pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*The Commission recommends that no change be made to Article V, Section 4 of the Ohio Constitution and that the provision be retained in its current form.*

#### **Background**

Article V, Section 4 reads as follows:

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

The clear purpose of the provision is to disqualify from voting, and from holding public office, persons who have been convicted of a felony. The provision modifies the broad enfranchisement of United States citizens over the age of 18 who otherwise meet the qualifications of an elector, as contained in Article V, Section 1.<sup>1</sup>

Adopted as part of the 1851 Ohio Constitution, the provision was amended in 1976. The word "felony" is not original to the 1851 Ohio Constitution. Before it was revised, Article V, Section 4 stated:

The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of bribery, perjury, or other infamous crime.

The section is not self-executing, but empowers the General Assembly to enact laws that exclude felons from voting or holding office, rather than directly disenfranchising. In the exercise of this authority, the General Assembly enacted Ohio Revised Code Section 2961.01, which provides that a person who pleads or is found guilty of a felony “is incompetent to be an elector or juror or to hold an office of honor, trust, or profit.” R.C. 2961.01(A)(1).<sup>2</sup> When a felon is granted parole, judicial release, or conditional pardon, or is released under a control sanction, the statute provides that he or she is competent to be an elector during that period. R.C. 2961.01(A)(2). Finally, under the statute, a felon is incompetent to “circulate or serve as a witness for the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition.” R.C. 2961.01(B).

### **Amendments, Proposed Amendments, and Other Review**

The Ohio Constitutional Revision Commission (“1970s Commission”) recognized that the phrase “infamous crime” was vague and out-of-date, and that the term “felony” would bring the constitutional provision into line with the criminal statutes. The Elections and Suffrage Committee (“E&S Committee”) of the 1970s Commission, in attempting to discern the definition of “infamous crime,” noted that in some states the term is synonymous with “felony.”<sup>3</sup> A “felony” generally is described as an offense for which more than a year’s incarceration may be imposed, or an offense otherwise identified as a felony in the particular criminal statute. R.C. 2901.02 (E), (F).

The E&S Committee also was influenced by the enactment in 1973 of the new Ohio Criminal Code (effective January 1, 1974), which created R.C. 2961.01, specifying that felons are disenfranchised only during their incarceration.<sup>4</sup> The E&S Committee initially recommended no change to the provision’s phrase “bribery, perjury, or other infamous crime,” focusing instead on a proposal to eliminate Section 6 (disenfranchisement of mentally incapacitated persons) and to add the phrase “and any person mentally incompetent for the purpose of voting” to the end of Section 4.<sup>5</sup>

However, on September 19, 1974, the E&S Committee issued a revision of its recommendation, by which it indicated it was no longer recommending that disenfranchisement of the mentally impaired be included in the provision.<sup>6</sup> The E&S Committee further recommended that reference to eligibility for public office be severed from the provision, instead suggesting that the General Assembly could enact laws to preclude felons from holding public office even after the conclusion of their incarceration. Most importantly, the E&S Committee recommended a change that would substitute the word “felony” for “bribery, perjury, or other infamous crime.”<sup>7</sup>

The 1970s Commission did not approve the E&S Committee’s revised recommendation in full, ultimately only recommending the substitution of the word “felony” for “bribery, perjury, or other infamous crime.” In so recommending, the 1970s Commission articulated its desire “to preserve the flexibility now available to the General Assembly to expand or restrict the franchise in relation to felons in accordance with social and related trends.”<sup>8</sup> Thus, the 1970s Commission recognized that the constitutional provision needed to track the statutory enactment under the criminal code, which the 1970s Commission recognized as providing that “when a convicted felon is granted probation, parole, or conditional pardon, he is competent to be an elector during

such time and until his full obligation has been performed and thereafter following his final discharge.”<sup>9</sup>

The 1970s Commission recommendation, that Article V, Section 4 read that “The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of a felony,” was presented in the 111<sup>th</sup> General Assembly by resolution pursuant to Am. S.J.R. No. 16, submitted by ballot and approved by voters, with an effective date of June 8, 1976.<sup>10</sup>

### **Litigation Involving the Provision**

Although felony disenfranchisement has been challenged under the Equal Protection Clause, it has been upheld by the United States Supreme Court. In *Richardson v. Ramirez*, 418 U.S. 24, 33 (1974), individuals with felony convictions argued that California’s felony disenfranchisement law was unconstitutional because it was not narrowly tailored to meet a compelling state interest. However, the U.S. Supreme Court upheld the law on the basis that the Fourteenth Amendment guarantees the right to vote “except for participation in rebellion, or other crime.” *Id.* at 54. The Court therefore found an “affirmative sanction” for felony disenfranchisement laws in the Fourteenth Amendment. *Id.*

The Ohio Supreme Court has cited Article V, Section 4 only a few times, primarily in cases pertaining to eligibility for public office, rather than to the disenfranchisement of felons.

In *Mason v. State ex rel. McCoy*, 58 Ohio St. 30, 50 N.E. 6 (1898), John W. Mason, after being elected Adams County probate judge, was removed from office for buying votes during his campaign. Mason argued that Article V, Section 4 mandated that the only way he could be removed from office was if he had been convicted of a criminal offense. The court disagreed, stating:

The most that can be said for section 4, article 5, of the Constitution of Ohio is that the general assembly is, by it, given the absolute power to exclude any person from the privilege of ever being eligible to an office – it does not contemplate a grant of a right to an office to all persons not so made eligible to hold one.

*Id.*, 58 Ohio St. at \_\_\_, 50 N.E. at 16.

In *Grooms v. State*, 83 Ohio St. 408, 94 N.E. 743 (1911), another Adams County voter fraud case, the court considered whether it was unconstitutional for a criminal sentence to include disenfranchisement for five years where the accused pled guilty to selling his vote for ten dollars.<sup>11</sup> Against Grooms’ argument that bribery is not an “infamous crime,” the court interpreted the prior version of Article V, Section 4, disenfranchising a person convicted of “bribery, perjury, or other infamous crime,” as indicating bribery is, in fact, an “infamous crime.” Although the decision does not specify the criminal charge, the court’s decision appears to be based on the notion that, regardless of whether selling a vote is categorized as “bribery,” it does meet the definition of “infamous crime,” and so the disenfranchisement was not unconstitutional.

The unsuccessful argument in *Mason, supra*, again was attempted in *In re Removal of Member of Council Joseph Coppola*, 155 Ohio St. 329, 98 N.E.2d 807 (1951), wherein the court reiterated that Article V, Section 4 does not infringe the power of the General Assembly to legislate as to reasonable qualifications for office, or to enact laws providing for the removal of a public officer for misconduct. *Id.*, 155 Ohio St. at 335-36, 98 N.E.2d at 811.

Interpreting the amended, current version of Article V, Section 4, the Ohio Supreme Court in *State v. Bissantz*, 40 Ohio St.3d 112, 532 N.E.2d 126 (1988), addressed whether a person convicted of bribery in office is forever barred from holding public office if his record is expunged. The court concluded the General Assembly was within its authority under Article V, Section 4 to impose qualifications on those who seek public office, and that the prohibition “reflects an obvious, legitimate public policy \* \* \* that felons convicted of crimes directly related to and arising out of their position of public trust should not ever again be entitled to enjoy such a position.” *Id.*, 40 Ohio St.3d at 116, 532 N.E.2d at 130.

### **Presentations and Resources Considered**

On October 9, 2014, Douglas A. Berman, professor of law at the Moritz College of Law, Ohio State University, presented to the committee on felony disenfranchisement. Professor Berman said Ohio is recognized as one of the few states that allow felons to vote once they have been released from incarceration. Stating that voting is a right, privilege, and responsibility, Prof. Berman expressed that the state must have a strong rationale before disenfranchising.

Asserting the disproportionate impact of felon disenfranchisement on minorities, Prof. Berman cited to statistics showing that, while only 0.6 percent of Ohio’s entire voting population is disenfranchised by having a current felony sentence, that rate is four times higher for African Americans, where 2.4 percent of all voting-age Ohioans of this racial category are disenfranchised by having a felony conviction. Prof. Berman noted that approximately 25,000 of the 50,000 prison population in Ohio is African American.

Prof. Berman asserted that re-enfranchised felons are less likely to commit additional crimes because voting allows them to invest in the laws of the state. Upon release from incarceration, the act of voting becomes a strong symbol of re-entry into society, according to Prof. Berman.

Stating his belief that even those currently serving time should be allowed to vote, Prof. Berman stated that Maine and Vermont allow for this without problems, and that the administrative burden of providing voting opportunities to prisoners is diminished by use of absentee ballots. To Prof. Berman, voting engenders a desire to be involved and informed. Prof. Berman added that the voting right is not about punishment, but about a felon’s engagement with the laws to which he is subject.

Proposing a potential change to Section 4, Prof. Berman suggested that it might be amended to include an express provision allowing incarcerated felons to petition the governor to be re-enfranchised.

## **Discussion and Consideration**

Upon discussion, the consensus of the Bill of Rights and Voting Committee was that Ohio's disenfranchisement of felons only during the period of their incarceration is a reasonable approach that appropriately balances the goals and interests of the criminal justice system with those of incarcerated felons.

Upon considering Prof. Berman's suggestion that the section be revised to include a provision allowing the governor authority to grant petitions to vote by incarcerated felons, the committee concluded that the review and/or modification of the governor's authority is not within the purview of the committee's charge. The committee further acknowledged the possibility that the broad scope of the governor's power to grant reprieves, commutations, and pardons under Article III, Section 11 may already encompass an ability to permit felon enfranchisement. Thus, the committee made no recommendation in this regard.

## **Action by the Bill of Rights and Voting Committee**

After formal consideration by the Bill of Rights and Voting Committee on November 12, 2015, the committee voted on November 12, 2015 to issue a report and recommendation recommending that Article V, Section 4 be retained in its current form.

## **Presentation to the Commission**

On December 10, 2015, on behalf of the Bill of Rights and Voting Committee, committee Chair Richard Saphire appeared before the Commission to present the committee's report and recommendation, by which it recommended retention of Article V, Section 4. Chair Saphire explained the history and purpose of the provision, indicating that the committee had determined that it would be appropriate to retain Article V, Section 4 in its current form.

## **Action by the Commission**

At the Commission meeting held January 14, 2016, Jeff Jacobson moved to adopt the report and recommendation for Article V, Section 4, a motion that was seconded by Representative Ron Amstutz. The Commission then discussed the report and recommendation.

Some Commission members expressed concern that Article V, Section 4 gives the General Assembly the power to determine whether felons will be re-enfranchised once they are released. Those members indicated that the voting right should not be subject to legislative will, but should be secured in the constitution. Thus, they expressed an interest in revising Article V, Section 4 to ensure the restoration of voting rights to felons upon their release.

Other members supported retaining Article V, Section 4 as it is, based on their view that Ohio is one of the more permissive states in relation to voting rights for felons. In their view, the General Assembly has appropriately exercised the authority given by Section 4 by enacting statutory law protecting felon voting rights. Members additionally expressed that changing the

constitutional provision would require adding specific language that is more suited to statutory law.

Finally, some members were in favor of retaining the provision so long as the issue could be reconsidered should circumstances warrant.

A roll call vote was taken, and the motion passed by an affirmative vote of 20 members of the Commission, with two opposed.

### **Conclusion**

The Ohio Constitutional Modernization Commission concludes that Article V, Section 4 should be retained in its current form.

### **Date Adopted**

After formal consideration by the Ohio Constitutional Modernization Commission on December 10, 2015, and January 14, 2016, the Commission voted to adopt this report and recommendation on January 14, 2016.

  
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Senator Charleta B. Tavares, Co-Chair

  
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Representative Ron Amstutz, Co-Chair

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### **Endnotes**

<sup>1</sup> Article V, Section 1 provides:

Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, has the qualifications of an elector, and is entitled to vote at all elections. Any elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless he again registers to vote.

<sup>2</sup> R.C. 2961.01, relating to civil rights of convicted felons, provides:

(A) (1) A person who pleads guilty to a felony under the laws of this or any other state or the United States and whose plea is accepted by the court or a person against whom a verdict or finding of guilt for committing a felony under any law of that type is returned, unless the plea, verdict, or finding is reversed or annulled, is incompetent to be an elector or juror or to hold an office of honor, trust, or profit.

(2) When any person who under division (A)(1) of this section is incompetent to be an elector or juror or to hold an office of honor, trust, or profit is granted parole, judicial release, or a conditional pardon or is released under a non-jail community control sanction or a post-release

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control sanction, the person is competent to be an elector during the period of community control, parole, post-release control, or release or until the conditions of the pardon have been performed or have transpired and is competent to be an elector thereafter following final discharge. The full pardon of a person who under division (A)(1) of this section is incompetent to be an elector or juror or to hold an office of honor, trust, or profit restores the rights and privileges so forfeited under division (A)(1) of this section, but a pardon shall not release the person from the costs of a conviction in this state, unless so specified.

(B) A person who pleads guilty to a felony under laws of this state or any other state or the United States and whose plea is accepted by the court or a person against whom a verdict or finding of guilt for committing a felony under any law of that type is returned is incompetent to circulate or serve as a witness for the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition.

(C) As used in this section:

(1) “Community control sanction” has the same meaning as in section 2929.01 of the Revised Code.

(2) “Non-jail community control sanction” means a community control sanction that is neither a term in a community-based correctional facility nor a term in a jail.

(3) “Post-release control” and “post-release control sanction” have the same meanings as in section 2967.01 of the Revised Code.

<sup>3</sup> Ohio Constitutional Revision Commission (1970-77), Proceedings Research, Volume 5, Elections and Suffrage Committee Research Study No. 25, 2365 (Aug. 20, 1973), <http://www.lsc.ohio.gov/ocrc/v5%20pgs%20195-2601%20elections-suffrage%202602-2743%20local%20govt.pdf> (last visited Aug. 13, 2015).

<sup>4</sup> Ohio Constitutional Revision Commission (1970-77), Vol. 5, Elective Franchise Recommendations, *supra*, at 2513 (Apr. 22, 1974).

For an in-depth discussion of the 1973 enactment of the Criminal Code, see Harry J. Lehman and Alan E. Norris, *Some Legislative History and Comments on Ohio’s New Criminal Code*, 23 Clev.St.L.Rev. 8 (1974).

<sup>5</sup> Ohio Constitutional Revision Commission (1970-77), Volume 5, Elective Franchise Recommendations, *supra*, at 2513-16.

<sup>6</sup> Ohio Constitutional Revision Commission (1970-77), Volume 5, Elections and Suffrage Committee Revision of Committee Recommendation, *supra* at 2586 (Sept. 19, 1974).

<sup>7</sup> *Id.*

<sup>8</sup> Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Ohio Constitution, Part 7, Elections and Suffrage, 21-22 (March 15, 1975), <http://www.lsc.ohio.gov/ocrc/final%20report%20index%20to%20proceedings%20and%20research.pdf> (last visited Aug. 13, 2015).

*See also* Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Ohio Constitution, Vol. 11, Final Report, Index to Proceedings and Research, Appendix G, 264-65 (June 30, 1977), <http://www.lsc.ohio.gov/ocrc/final%20report%20index%20to%20proceedings%20and%20research.pdf> (last visited Sept. 16, 2015).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

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<sup>11</sup> *Grooms* was yet another case of vote-buying in Adams County, which had experienced a severe problem with the corrupt practice around the turn of the last century. As described by one author:

During Christmas week, 1910, Judge Albion Z. Blair and a grand jury revealed a state of affairs in this Ohio River county which shocked Ohio and the nation. For thirty years, the testimony disclosed, voters of every class and political affiliation – clergymen, physicians, prominent businessmen, as well as humble farm hands and the village poor – had been selling their votes to candidates for office of either party, whichever was willing to pay the price. When the grand jury completed its work in mid-January, 1911, 1,690 persons – all vote sellers – were indicted and pleaded guilty before Judge Blair. Since his purpose in initiating the probe had been to stop the practice rather than to exact a heavy punishment, his penalties were light. A typical sentence was a fine of twenty-five dollars, with all but five dollars remitted, a prison sentence of six months, at once suspended, and loss of voting rights for five years, which was absolute. The number disenfranchised totaled nearly a third of the voting population.

Hoyt Landon Warner, *Progressivism in Ohio 1897-1917*, 267-68 (1964).





## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION

#### OHIO CONSTITUTION ARTICLE VI, SECTION 1

#### FUNDS FOR RELIGIOUS AND EDUCATIONAL PURPOSES

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The Ohio Constitutional Modernization Commission adopts this report and recommendation regarding Article VI, Section 1 of the Ohio Constitution concerning funds for religious and educational purposes. It is issued pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*The Commission recommends that no change be made to Article VI, Section 1 of the Ohio Constitution and that the provision be retained in its current form.*

#### **Background**

Article VI, Section 1 reads as follows:

The principal of all funds, arising from the sale, or other disposition of lands, or other property, granted or entrusted to this state for educational and religious purposes, shall be used or disposed of in such manner as the General Assembly shall prescribe by law.

Article VI of the Ohio Constitution concerns education, and Section 1 deals more specifically with lands provided to the state for educational and religious purposes.

As originally adopted in the 1851 constitution, Article VI, Section 1 provides:

The principal of all funds arising from the sale or other disposition of lands or other property granted or entrusted to this state for educational or religious purposes, shall forever be preserved inviolate and undiminished; and the income arising therefrom shall be faithfully applied to the specific objects of the original grants or appropriations.

## *School Lands*

School lands provided by the federal government to Ohio and other states played an important role in the development of public education in this country, and school lands supported education in virtually all the new states beginning with Ohio in 1803.<sup>1</sup>

The history of school lands dates to the days before statehood, when the Confederation Congress, through the Land Ordinance of 1785,<sup>2</sup> reserved in every township in the survey of the land tract in the eastern portion of the state (which was known as the Seven Ranges) a one-mile square section for the maintenance of public schools.<sup>3</sup> The Northwest Ordinance,<sup>4</sup> enacted in 1787 by the Confederation Congress and reaffirmed by the first United States Congress in 1789,<sup>5</sup> established a path to statehood for Ohio and the other states that were carved from the Northwest Territory. It also continued the commitment to public education by providing, in part, that “[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”<sup>6</sup> The founders’ emphasis on the value of education, and particularly on its relationship to religion and morality, is recognized as stemming from the view that the establishment of a new nation required “an educated, moral, sober citizenry in the new states that would have the stability and civil responsibility of a republican society.”<sup>7</sup>

In the 1802 Enabling Act, Congress moved Ohio along the path to statehood by enacting legislation to “enable the people of the eastern division of the territory northwest of the river Ohio to form a constitution and State government and for the admission of such State into the Union \* \* \*.”<sup>8</sup> It also contains an unusual provision offering the new state one “section, number 16, in every township” or other equivalent lands.<sup>9</sup> The 1802 Constitutional Convention made a counteroffer<sup>10</sup> that, in turn, was accepted by the federal government. This resulted in Ohio ultimately gaining control of 704,204 acres (or 2.77 percent of its land area) of federally-donated land to support public schools.<sup>11</sup>

The importance of education to the new state was reflected in the 1802 constitution, which followed the Northwest Ordinance in providing, in Article VIII, Section 3, that “religion, morality and knowledge, being essentially necessary to good government and the happiness of mankind, schools and the means of instruction shall forever be encouraged by legislative provision, not inconsistent with the rights of conscience.”

After statehood, the General Assembly leased much of this land, with some leases being as long as 99 years and renewable forever. In 1826, however, Congress permitted land sales with the consent of township residents.<sup>12</sup> And in 1827, the General Assembly adopted legislation providing that proceeds from the sale of school lands were to be deposited in the Common School Fund and earmarked for the benefit of schools within the townships.<sup>13</sup>

Because of concerns about the local stewardship of the school lands, the General Assembly in 1914 and 1917 transferred supervision of the school (and ministerial) lands to the Auditor of State. In 1985, the General Assembly transferred supervision to the Director of Administrative Services, and in 1988, the General Assembly transferred supervision of all remaining monies to

the Board of Education in each school district that had been allotted these lands, with title held in trust by the State of Ohio.<sup>14</sup>

### *Ministerial Lands*

In addition to allocating land to support education, the federal government allocated land in Ohio to support religion by providing that section 29 of certain land purchases be used to support religion.<sup>15</sup> The granting of real property for religious purposes has been identified as a “holdover from English and other European traditions where one denomination constituted a state church and received its support and other perquisites from the state.”<sup>16</sup> Ohio’s “ministerial lands,” which totaled 43,525 acres, represented only a small part of the total land originally granted to Ohio by Congress.<sup>17</sup>

The Confederation Congress (in the Ohio Company’s First Purchase in 1787) and the United States Congress (in the Symmes Purchase in 1794) reserved section 29 for the purpose of religion in what are today Washington, Meigs, Gallia, Lawrence, and Athens counties (from the Ohio Company’s First Purchase), and in Butler, Hamilton, and Warren Counties (from the Symmes Purchase). In addition, the Ohio Company on its own reserved section 29 from its Second Purchase in what are now Hocking and Vinton Counties.<sup>18</sup> “ ‘Ministerial land,’ as these lands have since been termed, are found nowhere in the United States, except within these three parts of the state of Ohio.”<sup>19</sup>

In 1833, Congress allowed the sale of lands that had been granted to the state for the support of churches and religious societies, with the proceeds to be placed in a trust fund and interest thereon paid to local schools and religious societies.<sup>20</sup>

The 1851 constitution addressed these issues by adopting a provision, Article VI, Section 1, which addressed both educational and ministerial lands and provided that the proceeds from the sale of lands granted for educational or religious purposes must be applied to the objects of the original grants.

### **Amendments, Proposed Amendments, and Other Review**

By 1968, the practice of state payments to religious organizations was recognized as problematic under the Establishment Clause of the First Amendment to the United States Constitution, and Congress acted to limit the use of sale proceeds to educational purposes only, subject to the discretion of the General Assembly.<sup>21</sup> Ohio voters subsequently approved an amendment to Article VI, Section 1 that expressly allowed the General Assembly discretion to disperse money set aside in the trust fund.<sup>22</sup> Thus, Article VI, Section 1 was altered to provide that funds arising from these lands would not be restricted to school or religious purposes, but “shall be used or disposed of in such manner as the General Assembly shall prescribe by law.” In the May 7, 1968, election, the voters approved an amendment proposed by the General Assembly to this section by a vote of 847,861 to 695,368, or 55 percent to 45 percent.<sup>23</sup>

In 1977, the Ohio Constitutional Revision Commission (“1970s Commission”) recommended no change to this section.<sup>24</sup>

## **Litigation Involving the Provision**

There has been no significant litigation involving Article VI, Section 1.

## **Presentations and Resources Considered**

On November 13, 2014, the committee heard a presentation by former Ohio Supreme Court Justice Robert R. Cupp, who was at that time chief legal counsel for the Ohio Auditor of State.<sup>25</sup> Mr. Cupp explained that while some may consider Article VI, Section 1 as an obsolete provision, the section remains necessary as the state still possesses some “school lands” as referenced in the provision.

Mr. Cupp provided a brief history of the provision, indicating that these lands first had been managed and supervised by township trustees, then by the auditor of state, and later by the director of the Department of Administrative Services. However, in 1988, legislation went into effect that transferred supervision, management, and all remaining monies of school lands to the board of education in each school district that had been allotted these lands. He said it is unclear how much real estate of this nature remains under state title, but the most recent transfer by the state took place in 2009 to the Upper Scioto School District in Hardin County. He said the Hardin County property has a current market value of \$2.5 million and is leased by the school district for farming. The school district derives \$247,000.00 in annual revenue from this lease.

## **Action by the Education, Public Institutions, and Local Government Committee**

After formal consideration by the Education, Public Institutions, and Local Government Committee on May 14, 2015, and October 8, 2015, the committee voted on October 8, 2015 to issue a report and recommendation recommending that Article VI, Section 1 be retained in its current form.

## **Presentation to the Commission**

On November 12, 2015, on behalf of the Education, Public Institutions, and Local Government Committee, committee Chair Chad A. Readler appeared before the Commission to present the committee’s report and recommendation, by which it recommended retention of Article VI, Section 1. Chair Readler explained the history and purpose of the provision, indicating that the committee had determined that it would be appropriate to retain Article VI, Section 1 in its current form.

## **Action by the Commission**

At the Commission meeting held December 10, 2015, Chad Readler moved to adopt the report and recommendation for Article VI, Section 1, a motion that was seconded by Governor Bob Taft. A roll call vote was taken, and the motion passed by a unanimous affirmative vote of 23 members of the Commission.

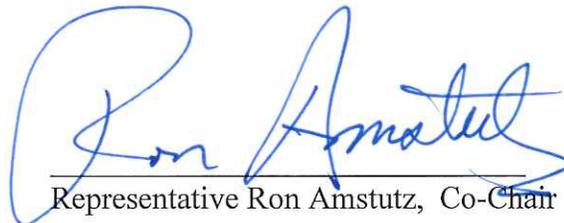
## Conclusion

The Ohio Constitutional Modernization Commission concludes that Article VI, Section 1 should be retained in its current form.

## Date Adopted

After formal consideration by the Ohio Constitutional Modernization Commission on November 12, 2015, and December 10, 2015, the Commission voted to adopt this report and recommendation on December 10, 2015.

  
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Senator Charleta B. Tavares, Co-Chair

  
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Representative Ron Amstutz, Co-Chair

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## Endnotes

<sup>1</sup> See generally Jon A. Souder & Sally K. Fairfax, *State Trust Lands: History, Management, and Sustainable Use* (1996); Sean E. O'Day, *School Trust Lands: The Land Manager's Dilemma Between Educational Funding and Environmental Conservation, A Hobson's Choice?*, 8 N.Y.U. Envtl. L.J. 163 (1999). For a compendium of the various legislative enactments relating to the creation and preservation of Ohio school lands in the early 1800s, see *A Compilation of Laws, Treaties, Resolutions, and Ordinances, of the General and State Governments, which Relate to Lands in the State of Ohio; including The Laws Adopted by the Governor and Judges; The Laws of the Territorial Legislature; and the Laws of this State, to the Years 1815-16*, Published in Pursuance of Resolutions of the General Assembly, passed January 22, 1825. (1825).

<sup>2</sup> General Land Ordinance of 1785, reprinted in 28 Journals of the Continental Congress 1774-1789, at 375.

<sup>3</sup> See generally Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution* 220 (2<sup>nd</sup> prtg. 2011).

<sup>4</sup> Northwest Ordinance of 1787, as reprinted in Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 et seq. It may be found online at: Journals of the Continental Congress, 1774-1789, 32:334 (Worthington C. Ford, et al., eds., 1904-37); Ordinance of 1787: The Northwest Territorial Government, Act of July 13, 1787, <http://uscode.house.gov/browse/frontmatter/organiclaws&edition=prelim> (last visited May 12, 2015), and additionally is available at: The Avalon Project, *Northwest Ordinance; July 13, 1787*, Lillian Goldman Law Library, Yale Law School (2008), [http://avalon.law.yale.edu/18th\\_century/nworder.asp](http://avalon.law.yale.edu/18th_century/nworder.asp) (last visited Aug. 31, 2015).

<sup>5</sup> Northwest Ordinance, Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51.

<sup>6</sup> Ordinance of 1787, *supra*, at Section 14 (Compact), Article III.

<sup>7</sup> Matthew J. Festa, *Property and Republicanism in the Northwest Ordinance*, 45 Ariz. St. L.J. 409, 460 (2013). See also Alexandra Usher, "Public Schools in the Original Federal Land Grant Program" 5 The Center on Education Policy (Apr. 2011), [http://www.eric.ed.gov/ERICWebPortal/search/detailmini.jsp?\\_nfpb=true&\\_ERICExtSearch\\_SearchValue\\_0=ED518388&ERICExtSearch\\_SearchType\\_0=no&accno=ED518388](http://www.eric.ed.gov/ERICWebPortal/search/detailmini.jsp?_nfpb=true&_ERICExtSearch_SearchValue_0=ED518388&ERICExtSearch_SearchType_0=no&accno=ED518388) (last visited Apr. 27, 2015), citing P.W. Culp, D.B.

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Conradi, and C.C. Tuell, *Trust land in the American west: A legal overview and policy assessment* 4-8 (Cambridge MA: Lincoln Institute of Land Policy 2005).

<sup>8</sup> Ohio Enabling Act, ch. 40, Sec. 7, 2 Stat. 173, 175 (1802),  
[http://www.ohiohistorycentral.org/w/Enabling\\_Act\\_of\\_1802?rec=1490](http://www.ohiohistorycentral.org/w/Enabling_Act_of_1802?rec=1490) (last visited Apr. 27, 2015)  
<http://research.archives.gov/description/299949> (last visited Apr. 27, 2015).

<sup>9</sup> *Id.*

<sup>10</sup> *Propositions From the Ohio Constitutional Convention to the Congress of the United States, Relating to the Admission of Ohio, Ordinance and Resolution Passed in Convention, Nov. 29, 1802*, as reprinted in Daniel J. Ryan, *From Charter to Constitution, Ohio Archaeological and Historical Publications*, Volume 5, Ohio St. Archaeological and Hist. Soc. 78 et seq. (1897),  
[http://publications.ohiohistory.org/ohj/browse/displaypages.php?display\[\]=0005&display\[\]=1&display\[\]=164](http://publications.ohiohistory.org/ohj/browse/displaypages.php?display[]=0005&display[]=1&display[]=164)  
(last visited May 5, 2015).

<sup>11</sup> George W. Knepper, *The Official Ohio Lands Book* (2002). See also Steinglass & Scarselli, *supra*.

<sup>12</sup> Knepper, *supra*.

<sup>13</sup> *Id.* at 58.

<sup>14</sup> *Id.* at 58-59.

<sup>15</sup> See generally William E. Peters, *Ohio Lands and Their Subdivision* 340-357 (2<sup>nd</sup> ed. 1918).

<sup>16</sup> Knepper, *supra*, at 59.

<sup>17</sup> *Id.* at 60.

<sup>18</sup> Peters, *supra*, at 362-364.

<sup>19</sup> *Id.* at 364.

<sup>20</sup> Steinglass & Scarselli, *supra*.

<sup>21</sup> *Id.* at 220-21, citing Public Law 90-304 (May 13, 1968).

<sup>22</sup> *Id.* at 221.

<sup>23</sup> Source: Ohio Secretary of State's website; May 7, 1968 Primary (Official Results),  
<http://www.sos.state.oh.us/sos/elections/Research/electResultsMain/1960-1969Results/68priconst.aspx> (last visited May 5, 2015).

<sup>24</sup> Ohio Constitutional Revision Commission (1970-77), *Recommendations for Amendments to the Ohio Constitution, Final Report, Index to Proceedings and Research*, 53 (June 30, 1977),  
<http://www.lsc.ohio.gov/ocrc/final%20report%20index%20to%20proceedings%20and%20research.pdf> (last visited Oct. 5, 2015).

<sup>25</sup> On November 4, 2014, Mr. Cupp was elected state representative for the Fourth District (Allen County) for a term beginning January 6, 2015. Upon being sworn as state representative, Representative Cupp was selected to serve as a legislative member of the Ohio Constitutional Modernization Commission.



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION

#### OHIO CONSTITUTION ARTICLE VI, SECTION 2

#### SCHOOL FUNDS

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The Ohio Constitutional Modernization Commission adopts this report and recommendation regarding Article VI, Section 2 of the Ohio Constitution concerning school funds. It is issued pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*The Commission recommends that no change be made to Article VI, Section 2 of the Ohio Constitution and that the provision be retained in its current form.*

#### **Background**

Article VI, Section 2 reads as follows:

The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this State.

Article VI of the Ohio Constitution concerns education.

Section 2, adopted as part of the Ohio Constitution of 1851 and never amended, includes the first use of the phrase "thorough and efficient" in the constitution of any state.<sup>1</sup> The provision was influenced by an 1837 report about education in England and Europe commissioned by the Ohio legislature and prepared by Calvin Ellis Stowe, a professor of biblical literature at Lane Theological Seminary in Cincinnati.<sup>2</sup> Stowe, the husband of Harriet Beecher Stowe, was a strong supporter of universal public education, and urged Ohio to follow the Prussian example of state-supported education.<sup>3</sup> Stowe's report was republished by the legislatures of Michigan, Massachusetts, Pennsylvania, North Carolina, and Virginia.<sup>4</sup> In fact, some 22 states are recognized as having constitutional provisions imposing educational standards similar or

identical to Ohio’s “thorough and efficient” clause.<sup>5</sup> Despite these similarities, the definition of “common schools,” as well as what constitutes a “thorough and efficient” system for providing education, varies widely from state to state due to differences in history, demographics, geography, and other factors.<sup>6</sup>

### **Amendments, Proposed Amendments, and Other Review**

In 1977, the Ohio Constitutional Revision Commission (“1970s Commission”) recommended no change to this section, concluding that adding specific language that dealt with school finance would undermine the view that a constitution should only state general principles and guidelines.

The 1970s Commission succinctly summarized its position on retaining current language by stating:

A system of school finance poses unique problems because so many factors are involved, many of which are legislative, economic and geographical considerations, and being subject to change, are not likely to be more adequately provided for in the [c]onstitution than by the language presently contained in that document.<sup>7</sup>

### **Litigation Involving the Provision**

The most recent, and notable, litigation involving school funding is the *DeRolph* line of cases,<sup>8</sup> in which a coalition of individuals and five Ohio school districts sued the state in 1991, alleging that the state educational funding system violated the “thorough and efficient” clause found in Article VI, Section 2.<sup>9</sup> Specifically, the *DeRolph* plaintiffs argued that the school funding scheme in place at the time relied too heavily on local property taxes, resulting in disparities in the quality of educational facilities and resources in different communities across the state. Concluding that the school funding system was “wholly inadequate” to meet the constitutional mandate, the Ohio Supreme Court directed in 1997 that the General Assembly “create an entirely new school financing system” that was not overly dependent on local property taxes. *DeRolph v. State*, 78 Ohio St.3d 193, 239, 213, 1997-Ohio-84, 677 N.E.2d 733, 765, 747 (*DeRolph I*).<sup>10</sup>

The *DeRolph* litigation brought to light evidence that a lack of funding in many districts had resulted in deteriorating school facilities, outdated textbooks, insufficient school supplies, overcrowded classrooms, and other conditions that were seen to impede learning. In *DeRolph I*, a majority of the court concluded that “state funding of school districts cannot be considered adequate if the districts lack sufficient funds to provide their students a safe and healthy learning environment.” *Id.*, 78 Ohio St.3d at 208, 677 N.E.2d at 744. The court ordered the General Assembly to “first determine the cost of a basic quality education in both primary and secondary schools in Ohio, and then ensure sufficient funds to provide each student with that education, realizing that local property taxes can no longer be the primary means of providing the finances for a thorough and efficient system of schools.” *Id.*, 78 Ohio St.3d at 261-262, 677 N.E.2d at 780.

In 2000, after the state undertook measures to institute reforms, the case again came before the court on the same question of whether the constitutional requirement that the state provide a “thorough and efficient system of common schools” had been met. Noting the complexity of the state’s educational system, a majority of the court observed that setting a per-pupil funding amount, or otherwise providing some specific funding scheme, would violate the separation of powers doctrine; thus, the court left the specific remedy to the General Assembly. *DeRolph v. State*, 89 Ohio St.3d 1, 6, 11-12, 2000-Ohio-437, 728 N.E.2d 993, 998, 1002-03 (*DeRolph II*). While recognizing that the General Assembly’s creation of the Ohio School Facilities Commission, as well as its enactment of other remedial legislation, had constituted a “good faith attempt to comply with the constitutional requirements” and had improved conditions around the state, the court nevertheless concluded that the state defendants needed more time to institute reforms before the court could declare the state had met its obligation to provide a “thorough and efficient system of common schools.”<sup>11</sup> *Id.*, 78 Ohio St.3d at 35-36, 728 N.E.2d at 1020.

In 2001, the court continued its review of the reforms adopted by the General Assembly, finding further measures were needed to conform with Article VI, Section 2. Specifically, the court ordered the state to modify its base cost formula, by which the state calculated the per-pupil cost of providing an adequate education; to accelerate the phase-in of a parity aid program that was designed to provide additional funding to poorer districts; and to consider alternative means of funding school buildings and facilities. *DeRolph v. State*, 93 Ohio St.3d 309, 324-25, 2001-Ohio-1343, 754 N.E.2d 1184, 1200-01 (*DeRolph III*).

In 2002, upon reconsideration of its decision in *DeRolph III*, a divided court agreed to vacate the judgment. However, despite this action, a majority of the court maintained that Ohio’s school funding system continued to be unconstitutional because the General Assembly, despite enacting reforms, had not performed “ ‘a complete systematic overhaul’ of the school-funding system.” *DeRolph v. State*, 97 Ohio St.3d 434, 435, 2002-Ohio-6750, 780 N.E.2d 529, 530 (*DeRolph IV*), quoting from *DeRolph I*. Commenting during a presentation before the committee about the impact of *DeRolph*, Justice Paul E. Pfeifer indicated that the consensus of the court in *DeRolph IV* was to release jurisdiction because litigation was not proving to be the answer to the problem, and because, by that time, reforms had resulted in school facility improvement.<sup>12</sup>

In May 2003, the Ohio Supreme Court granted a peremptory writ of prohibition, preventing the trial court from exercising further jurisdiction over *DeRolph*. *State ex rel. State v. Lewis*, 99 Ohio St.3d 97, 2003-Ohio-2476, 789 N.E.2d 195. In so deciding, the court clarified that its mandate in *DeRolph IV* was not for the trial court to conduct further proceedings, and determined that allowing the trial court to take further action would be an improper attempt to require judicial approval for proposed remedies. *Id.*, 99 Ohio St.3d at 103, 789 N.E.2d at 202. Thus, the court ended further litigation in *DeRolph*. *Id.*, 99 Ohio St.3d at 104, 789 N.E.2d at 202.<sup>13</sup>

Although the *DeRolph* litigation ended without there being a judicial determination that the state had complied with the constitutional mandate, *DeRolph* did bring to light school funding insufficiencies, and resulted in the adoption of changes that were intended to improve school facilities and other educational resources.<sup>14</sup>

## **Presentations and Resources Considered**

### *DeMaria Presentation*

Paolo DeMaria of Education First presented to the committee on August 8, 2013. His presentation focused on the importance of education to the public good, the role of government, the elements of an excellent education, the governance of education at the state and local level, the variety of local educational structures, and funding. He also identified emerging issues, including: standards, assessments, educating all students, early childhood education, accountability, teacher/leader quality, technology, data, school operational improvement, competency-based education, finances, and the relationship between education policy and tax policy. Finally, he concluded with a brief review of state and local support for K-12 education, observing that more spending does not result in better student outcomes.

### *Lewis Presentation*

Richard C. Lewis, Executive Director of the Ohio School Boards Association, also appeared before the committee on August 8, 2013, focusing on the constitutional structure of education in Ohio; the importance of local control; the importance of reliable and equitable funding; the spectrum of urban, suburban, and rural districts; the impact of privatization; the importance of balancing the traditional and the innovative; and accountability. He also provided the committee with some detailed materials on the elements of a model school funding formula.

### *Wilson Presentation*

Charles Wilson, professor emeritus of the Ohio State University Moritz College of Law, provided a broad overview of Article VI at his November 14, 2013, presentation to the committee. Subsequently, he submitted two alternative proposals. Both alternatives retain the “thorough and efficient” language and expressly characterize education as a “fundamental right.” One proposal requires the General Assembly to provide for and fund an “efficient, safe, secure, thorough, equitable, and high quality education.” Another alternative requires the General Assembly to fund and provide a “uniformly high quality educational system designed to prepare Ohio’s people to function effectively as citizens,” as well as an early childhood educational system.

### *Phillis Presentation*

William L. Phillis, Executive Director of the Ohio Coalition for Equity & Adequacy of School Funding, presented to the committee on December 12, 2013, and on March 13, 2014. Mr. Phillis provided the committee with information on public education, relevant methodologies for determining the cost of public education, and information on the impact of charter schools. He also provided drafts of specific amendments for the committee’s consideration.

Mr. Phillis recommended that the “thorough and efficient” clause be maintained. He also provided the committee with the text of three proposed amendments to Article VI. Under his proposal, a new Section 2a would provide state officials with direction in determining what

constitutes a “thorough and efficient” education. Mr. Phillis proposed a second provision that would require the institution of early childhood educational programs to all children beginning at three years of age. Mr. Phillis’ third proposed amendment concerns the state board of education and provides that “[s]tate board of education members shall be elected, one from each congressional district.”

#### *Pittner Presentation*

Nicholas A. Pittner, the lead attorney in the *DeRolph* litigation, appeared with William L. Phillis on December 12, 2013, and summarized the history of the *DeRolph* cases. Mr. Pittner opined that Ohio’s educational funding system remains inadequate because the current system is still over-reliant on local property taxes. According to Mr. Pittner, “Section 2, Article VI of the Ohio Constitution is clear and needs no revision. What is needed are specific standards by which compliance with the mandates of Section 2, Article VI can be measured and enforced.” Mr. Pittner expressed his support for a proposed amendment, submitted by Mr. Phillis, that would provide additional constitutional direction.

#### *Dyer Presentation*

On June 12, 2014, Stephen Dyer, the Education Policy Fellow at Innovation, Ohio, presented to the committee on the financing of education in Ohio, specifically, his concerns about the level of state support and the disparity in the ability of districts to support education. With respect to the “thorough and efficient” requirement, he urged that if the requirement is to be replaced it should be replaced with language that is even stronger. He pointed to provisions in the Florida and Montana Constitutions, and he provided the committee with proposed changes to Article VI, Section 2 that included a requirement that Ohio residents receive a “world-class education,” which the legislature would be responsible for funding.

#### *Reedy Presentation*

Maureen Reedy, co-founder of Ohio Friends of Public Education and a former grade school and special education teacher, presented to the committee on June 12, 2014. Her remarks emphasized the importance of public schools and expressed alarm at the possible removal of the “thorough and efficient” requirement from the constitution.

#### *Alt Presentation*

Robert Alt, President and CEO of the Buckeye Institute for Public Policy, appeared before the committee on September 11, 2014. In his comments, Mr. Alt gave an overview of the history of educational policy issues in Ohio, emphasizing that it is the role of the legislature, not the courts, to define the contours of education. Mr. Alt was critical of judicial intervention in education, and expressed concern that broad or generalized language in the constitution could invite improper judicial intervention. Criticizing some of the proposals being considered by the committee as being vague and too aspirational, Mr. Alt said he did not like the “thorough and efficient” phrase, but did not believe it should be repealed. Mr. Alt declined to suggest new

language because of his position that the General Assembly should have primary responsibility for education issues.

#### *Pfeifer Presentation*

Hon. Paul E. Pfeifer, Justice of the Ohio Supreme Court, presented to the committee on November 13, 2014. His talk focused upon the *DeRolph* decisions, specifically referencing his concurring opinions in two of the four *DeRolph* decisions. Justice Pfeifer, who is the only current justice to have participated in all four *DeRolph* decisions, provided background on the litigation. He expressed the view that not all decisions regarding education should be left to the legislature, but he observed that the court in *DeRolph* did not intend to tell the legislature what to do. Justice Pfeifer expressed the view that “thorough and efficient” served a worthy purpose, and he did not advocate removing it from the constitution. He did comment that he would not be opposed to more modern language to replace “thorough and efficient.”

#### *Morales Presentation*

Stephanie Morales, a member of the Board of the Cleveland Municipal School District, a graduate of the Cleveland public schools, and the parent of three children currently in the Cleveland public schools, made a presentation on January 15, 2015. Ms. Morales described the challenges faced by the school district, the efforts made by the district to support its mission, and the importance of state funds to the district. She acknowledged the substantial support provided to the district through the Ohio Facilities Construction Commission. With respect to the “thorough and efficient” requirement, she urged the committee to not take any action that might be interpreted as weakening the state’s duty to provide a quality education for all of Ohio’s children.

#### *Middleton Presentation*

Dr. Renee A. Middleton, Dean of the Patton College of Education at Ohio University, appeared before the committee on January 15, 2015. Dr. Middleton stressed the history of public education in Ohio and its importance in ensuring an educated citizenry and in safeguarding democracy. She urged that public education be fair and equitable, she expressed support for maintaining judicial oversight, and she advised the committee not to turn its back on “thorough and efficient.” She emphasized the importance of determining and funding a high-quality education without an overreliance on property taxes, as well as the importance of adequate funding to promote essential educational opportunities for all.

#### *Johnson Presentation*

On March 12, 2015, Darold Johnson, Director of Legislative and Political Action for the Ohio Federation of Teachers, appeared before the committee to express his organization’s position that the current language in Article VI, Section 2, be retained. He said that the Ohio Supreme Court in the *DeRolph* cases defined “thorough and efficient,” and that changing the provision would result in more litigation in order to provide clarity about whatever replacement language might signify. Mr. Johnson indicated that because civil rights already exist in federal law, and in

federal constitutional amendments, and because case law in this area is settled, the Ohio Constitution should only be changed in order to correct problems for which there are no other options. Mr. Johnson said that “through and efficient” is better than “equitable” or “equal” because *DeRolph* has defined the phrase and is a benchmark. He stressed that removing “thorough and efficient” would cause a bigger loss than would be gained from including the word “equitable.”

### **Action by the Education, Public Institutions, and Local Government Committee**

After formal consideration by the Education, Public Institutions, and Local Government Committee on May 14, 2015, and October 8, 2015, the committee voted on October 8, 2015 to issue a report and recommendation recommending that Article VI, Section 2 be retained in its current form.

### **Presentation to the Commission**

On November 12, 2015, on behalf of the Education, Public Institutions, and Local Government Committee, committee Chair Chad A. Readler appeared before the Commission to present the committee’s report and recommendation, by which it recommended retention of Article VI, Section 2. Chair Readler explained the history and purpose of the provision, indicating that the committee had determined that it would be appropriate to retain Article VI, Section 2 in its current form.

### **Action by the Commission**

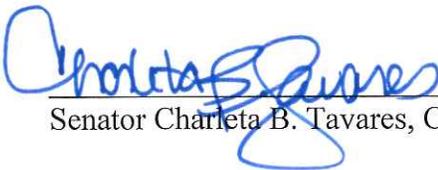
At the Commission meeting held December 10, 2015, Ed Gilbert moved to adopt the report and recommendation for Article VI, Section 2, a motion that was seconded by Sen. Bill Coley. A roll call vote was taken, and the motion passed by an affirmative vote of 22 to one.

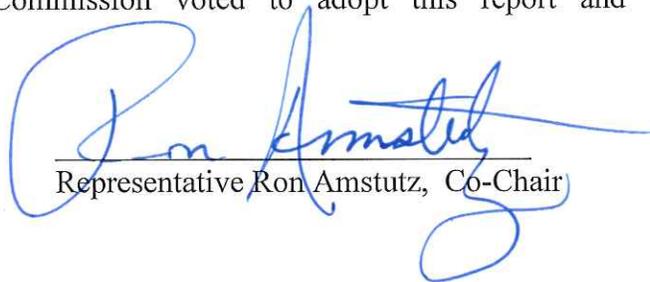
### **Conclusion**

The Ohio Constitutional Modernization Commission concludes that Article VI, Section 2 should be retained in its current form.

### **Date Adopted**

After formal consideration by the Ohio Constitutional Modernization Commission on November 12, 2015, and December 10, 2015, the Commission voted to adopt this report and recommendation on December 10, 2015.

  
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Senator Charleta B. Tavares, Co-Chair

  
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Representative Ron Amstutz, Co-Chair

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## Endnotes

<sup>1</sup> See, e.g., Jeremy J. Neff, *A Thorough and Efficient Definition of “Thorough and Efficient”*: *The Starting Point for Meaningful School Funding Reform*, 33:1 J. of Educ. Fin. 69 (2007).

<sup>2</sup> C.E. Stowe, *Report on Elementary Public Instruction in Europe, Made to the Thirty-Sixth General Assembly of the State of Ohio* (1837).

<sup>3</sup> A history of the concept and implementation of a “system of common schools” in Ohio may be found in Molly O’Brien & Amanda Woodrum, *The Constitutional Common School*, 51 Clev.St.L.Rev. 581 (2004).

<sup>4</sup> See, e.g., Frank Forest Bunker, *Reorganization of the Public School System*, Department of the Interior, Bureau of Education Bulletin No. 8, 24 (1916).

<sup>5</sup> William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 Educ. L. Rep. 19, note 10 at 23-24, as cited in O’Brien & Woodrum, *supra*, at 584, note 14.

<sup>6</sup> Paul L. Tractenberg, Paul L. “Education,” in *State Constitutions for the Twenty-First Century*, 241-42 (Alan G. Tarr & Robert F. Williams, eds., 2006).

<sup>7</sup> Ohio Constitutional Revision Commission (1970-77), *Recommendations for Amendments to the Ohio Constitution, Final Report, Index to Proceedings and Research*, 65-66 (June 30, 1977), <http://www.lsc.ohio.gov/ocrc/final%20report%20index%20to%20proceedings%20and%20research.pdf> (last visited Oct. 5, 2015).

<sup>8</sup> See *DeRolph v. State*, 78 Ohio St.3d 193, 1997-Ohio-84, 677 N.E.2d 733 (*DeRolph I*); *DeRolph v. State*, 89 Ohio St.3d 1, 2000-Ohio-437, 728 N.E.2d 993 (*DeRolph II*); *DeRolph v. State*, 93 Ohio St.3d 309, 2001-Ohio-1343, 754 N.E.2d 1184 (*DeRolph III*); and *DeRolph v. State*, 97 Ohio St.3d 434, 2002-Ohio-6750, 780 N.E.2d 529 (*DeRolph IV*).

<sup>9</sup> A comprehensive overview of the *DeRolph* litigation may be found in Larry J. Obhof, *DeRolph v. State and Ohio’s Long Road to an Adequate Education*, 2005 B.Y.U. Educ. & L.J. 83 (2005).

<sup>10</sup> Summarizing the comments of delegates to the Constitutional Convention of 1850-51 in the fourth, and final, *DeRolph* decision, Justice Paul Pfeifer emphasized that the purpose of the provision is to express the state’s commitment to education for all:

James Taylor, a delegate from Erie County, stated, “I think it must be clear to every reflecting mind that the true policy of the statesman is to provide the means of education, and consequent moral improvement, to every child in the State, the offspring of the black man equally with that of the white man, the children of the poor equally with the rich.” [citation omitted.] Samuel Quigley, a delegate from Columbiana County, stated, “The report directs the Legislature to make full and ample provision for securing a thorough and efficient system of common school education; free to all the children in the State. The language of this section is expressive of the liberality worthy a great State, and a great people. There is no stopping place here short of a common school education to all children in the State.” [citation omitted.] The delegates knew what they wanted, what the people wanted, and that it was necessary to use the Constitution to achieve what they wanted.

*DeRolph IV, supra*, 97 Ohio St.3d at 436, 2002-Ohio-6750, 780 N.E.2d at 531.

<sup>12</sup> Ohio Constitutional Modernization Commission, November 13, 2014, Meeting Minutes of the Education, Public Institutions, and Local Government Committee,

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[http://ocmc.ohio.gov/ocmc/committees/educ\\_pubinst\\_misc\\_localgovt;jsessionid=b957049e1ac01b4e1baacea4fc97](http://ocmc.ohio.gov/ocmc/committees/educ_pubinst_misc_localgovt;jsessionid=b957049e1ac01b4e1baacea4fc97)  
(last visited Apr. 30, 2015).

<sup>13</sup> In October 2003, the United States Supreme Court denied a petition for a writ of certiorari. *DeRolph v. Ohio*, 540 U.S. 966 (2003).

<sup>14</sup> See Obhof, *supra*, at 145-49.



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION

#### OHIO CONSTITUTION ARTICLE VI, SECTION 5

#### LOANS FOR HIGHER EDUCATION

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The Ohio Constitutional Modernization Commission adopts this report and recommendation regarding Article VI, Section 5 of the Ohio Constitution concerning loans for higher education. It is issued pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*The Commission recommends that no change be made to Article VI, Section 5 of the Ohio Constitution and that the provision be retained in its current form.*

#### **Background**

Article VI, Section 5 reads as follows:

To increase opportunities to the residents of this state for higher education, it is hereby determined to be in the public interest and a proper public purpose for the state to guarantee the repayment of loans made to residents of this state to assist them in meeting the expenses of attending an institution of higher education. Laws may be passed to carry into effect such purpose including the payment, when required, of any such guarantee from moneys available for such payment after first providing the moneys necessary to meet the requirements of any bonds or other obligations heretofore or hereafter authorized by any section of the Constitution. Such laws and guarantees shall not be subject to the limitations or requirements of Article VIII or of Section 11 of Article XII of the Constitution. Amended Substitute House Bill No.618 enacted by the General Assembly on July 11, 1961, and Amended Senate Bill No.284 enacted by the General Assembly on May 23, 1963, and all appropriations of moneys made for the purpose of such enactments, are hereby validated, ratified, confirmed, and approved in all respects, and they shall be in full force and effect from and after the effective date of this section, as laws of this state until amended or repealed by law.

Article VI of the Ohio Constitution concerns education, and Section 5 provides for a program to guarantee the repayment of student loans for state residents as a way of promoting the pursuit of higher education.

Adopted by voters upon being presented as Issue 1 on the May 1965 ballot, the provision expresses a public policy of increasing opportunities for state residents to pursue higher education by guaranteeing higher education loans and allowing laws to be passed to effectuate that purpose. The section also exempts state expenditures for student loan guarantees from the limitations on state spending contained in Article VIII (relating to state debt), and Article XII, Section 11 (preventing the state from issuing debt unless corresponding provision is made for levying and collecting taxes to pay the interest on the debt).

The provision was effectuated by statutes that first created the Ohio Student Loan Commission (OSLC), and, later, in 1993, by statutory revisions that created the Ohio Student Aid Commission (OSAC). The name change was prompted by the addition of state grant and scholarship programs to the administrative duties of OSLC, programs that previously had been under the auspices of the Ohio Board of Regents (now the Ohio Board of Higher Education).

As outlined in a 1993 Attorney General Opinion, the OSAC consisted of nine members appointed by the governor with the advice and consent of the Senate, with powers and duties that included the authority:

“ \* \* \* [T]o guarantee the loan of money for educational purposes; to acquire property or money for its purposes by the acceptance of gifts, grants, bequests, devises, or loans; to contract with approved eligible educational institutions for the administration of any loan or loan plan guaranteed by the OSAC; to contract with “approved lenders,” as defined in R.C. 3351.07(C), for the administration of a loan or loan plan guaranteed by the OSAC and “to establish the conditions for payment by the commission to the approved lender of the guarantee on any loan,” R.C. 3351.07(A)(4); to sue and be sued; to collect loans guaranteed by the OSAC on which the commission has met its guarantee obligations; and to “[p]erform such other acts as may be necessary or appropriate to carry out effectively the objects and purposes of the commission,” R.C. 3351.07(A)(10). Further, pursuant to R.C. 3351.13, the Ohio Student Aid Commission “is the state agency authorized to enter into contracts concerning the programs established” by those federal educational loan programs specified in that statute. The OSAC also has authority to “accept any contributions, grants, advances, or subsidies made to it from state or federal funds and shall use the funds to meet administrative expenses and provide a reserve fund to guarantee loans made pursuant to [R.C. 3351.05-.14].” R.C. 3351.13.<sup>1</sup>

In relation to its duties, the OSAC was empowered to collect loan insurance premiums, depositing them into a fund in the custody of the state treasurer to be used solely to guarantee loans and to make payments into the OSAC operating fund. Such moneys were reserved solely to pay expenses of the OSAC. Asked whether language in Article VI, Section 5 indicating the

state would guarantee the repayment of educational loans meant that the full faith and credit of the state had been pledged to cover that debt, the attorney general opined that the obligations incurred by OSAC are not backed by the full faith and credit of the state and, therefore, that the obligee would not have recourse to other funds of the state.

By 1995, the changing landscape of the student loan market rendered the utility of OSAC obsolete, partly due to the success of a federal direct-lending program, and partly because private companies were offering the same service.<sup>2</sup> Thus, OSAC commissioners voted to dissolve the agency at the conclusion of the biennial budget cycle in June 1997.<sup>3</sup> OSAC was eliminated by the 121<sup>st</sup> General Assembly with the passage of Am. Sub. H.B. 627, effective January 3, 1997, and any remaining functions and duties of OSAC were transferred to the Ohio Board of Regents. Finally, with the passage of H.B. 562 in the 122<sup>nd</sup> General Assembly, all references to the duties and authority of OSAC were eliminated from the Revised Code.<sup>4</sup>

### **Amendments, Proposed Amendments, and Other Review**

Section 5 has not been amended or reviewed since its adoption in 1965.

### **Litigation Involving the Provision**

Although the Ohio Supreme Court has not reviewed Section 5, a federal court case addressed whether federal law changes requiring states to return excess funds in their student loan guarantee accounts to the federal government violated the United States Constitution.

In *Ohio Student Loan Comm. v. Cavazos*, 709 F.Supp. 1411 (S.D. Ohio 1988), the court described the history of the hybrid federal-state arrangement regarding student loan guarantees:

The Ohio Higher Education Assistance Commission (“OHEAC”) was created by the Ohio General Assembly in 1961 and began operations in 1962. The OHEAC was originally funded solely with state appropriations and was designed to administer state programs to assist Ohio residents attending institutions of post-secondary education. In particular, the OHEAC guaranteed loans made by private lenders to certain eligible students.

Three years later, the United States Congress created the Guaranteed Student Loan Program pursuant to the Higher Education Act of 1965, as amended, 20 U.S.C. 1071 et seq. The purpose of this program was to encourage states and nonprofit organizations and institutions to establish student loan guaranty programs, to provide a federal guaranty program for those students not having reasonable access to state or private guaranty programs, to subsidize interest payments on student loans, and to reinsure state and private guaranty programs. 20 U.S.C. 1071(a). In response to this federal program, the Ohio General Assembly created the OSLC, pursuant to Chapter 3351 of the Ohio Revised Code, as a successor to the OHEAC. The creation of such a commission was authorized by Article VI, Section 5 of the Constitution of the State of Ohio.

The OSLC is a state agency created for the administration of Ohio's student loan guaranty program. The OSLC is authorized to enter into contracts and to sue and be sued in its own name. R.C. 3351.07. In addition, R.C. 3351.07(A)(2) expressly states "that no obligation of the commission shall be a debt of the state, and the commission shall have no power to make its debts payable out of moneys except those of the commission." The OSLC is also expressly authorized to accept federal funds and to enter into contracts pursuant to the Higher Education Act of 1965, as amended, 20 U.S.C. 1071 et seq. R.C. 3351.13.

As described in the facts of the case, OSLC's funding sources derived partially from federal government reimbursements for losses sustained due to student loan defaults, and federal payment of administrative cost allowances, but OSLC also received money from non-federal sources in the form of private lender fees, and interest and investment income from moneys held in a reserve fund. The program was subject to a federal-state reinsurance agreement providing that OSLC would administer the guaranteed student loan program in Ohio in exchange for which the secretary of the U.S. Department of Education would reinsure the state's guarantees.

In 1987, the relevant law was amended to limit the amount of state cash reserves, requiring any excess to be transferred to the secretary. A dispute arose when OSLC refused to transfer its excess reserves, which amounted to over \$26 million, on the grounds that the transfer would violate the terms of the contractual agreement between the secretary and OSLC. In response, the secretary withheld the reinsurance funds, and OSLC sued, and won, in federal district court.

However, the United States Court of Appeals for the Sixth Circuit reversed, concluding the secretary was transferring the funds from a federal program with a state administrator, rather than appropriating funds from a state program, and that none of the facts supported a conclusion that the federal government had breached a contract, misappropriated funds, or violated due process or other constitutional rights. *Ohio Student Loan Comm. v. Cavazos*, 900 F.2d 894 (6<sup>th</sup> Cir. 1990).

## **Presentations and Resources Considered**

### *Harmon Presentation*

On June 9, 2016, David H. Harmon, former executive director of OSLC, presented to the Education, Public Institutions, and Local Government Committee. Mr. Harmon was employed with OSLC from 1977 to 1988, and was executive director from 1984-88. According to Mr. Harmon, Ohio was one of the earliest states to recognize a need for the support and encouragement of the provision of credit for the financing of higher education. He noted the General Assembly acted in July of 1961 to create the Ohio Higher Education Commission, whose purpose was to guarantee repayment of student loans made by banks, savings and loan companies, and credit unions. The Higher Education Commission collected an insurance premium on each loan as it was made, covering administrative expenses and creating an insurance fund from which lender guaranty payments could be made.

Following the model established in Ohio and several other states, Mr. Harmon said the federal government moved in 1965 to create a federal program operating on the same principles. Mr. Harmon said the point of the constitutional section in 1965 was to allow OSLC to become the guaranteed agency under the federal loan program. He said the federal Guaranteed Student Loan Program was a part of the Higher Education Act of 1965. In response, in 1967, Ohio designated the Ohio Higher Education Commission as the state's guaranty agency, renaming it OSLC.

Mr. Harmon said the federal program provided for the "re-insurance" of all loans – meaning whenever the states paid off an insured loan, the federal government would reimburse the agency for each payment. He said OSLC continued collecting insurance premiums as loans were approved, providing the necessary revenue for agency operations.

During his time with the agency, Mr. Harmon said the annual loan volume grew from \$21.1 million in 1970 to \$120.3 million in 1978 – a 570 percent increase. He said the volume of loans guaranteed in 1979 was nearly double the 1978 loan volume. Mr. Harmon said OSLC began with only three employees in 1962, but grew to over 50 in 1970, and reached nearly 250 by the early 1990s.

Mr. Harmon said the 1980s saw the beginning of competition for loan volume, as several multi-state guaranty agencies began offering services to Ohio students, schools, and lenders. He said, although these competitors were non-profits, as required by federal law, increased loan volume brought increased revenue – thereby enhancing the ability of these agencies to offer enhanced support and automation.

Mr. Harmon said OSLC lacked the resources and spending authority to match these competitors on a feature-by-feature basis, but did respond to competitive developments. He said in 1992, the General Assembly authorized a move of the Ohio Instructional Grant Program from the Ohio Board of Regents to OSLC, resulting in the agency being renamed the Ohio Student Aid Commission (OSAC).

He noted that, despite the fact that the agency provided schools and students with enhanced service levels and streamlined processes, schools, lenders and student borrowers all found the competitive offerings from the out-of-state guarantors to be compelling, and the OSAC's market share, expressed as loan volume, plummeted.

Mr. Harmon said the creation of the Federal Direct Loan Program in the early 1990s resulted in a vote by the OSAC in 1995 to abolish the agency. He said, by that time, the OSAC's share of Ohio's loan volume had fallen to below 50 percent and revenues declined along with the loan volume. Thus, the OSAC ended its 36-year run at the end of the state's biennial budget cycle in 1997. As a result, the state's guaranty agency designation was awarded by the U.S. Department of Education to an out-of-state competitor, and the grant and scholarship programs were transferred to another state agency.

Asked whether there is any need to retain Article VI, Section 5, Mr. Harmon said, with the move to the federal direct loan program, no states have a guaranteed program any longer. Thus, he said, the section is no longer necessary. Mr. Harmon said unless new legislation is a precise

mirror of previous legislation, it is unlikely that Section 5 could be repurposed for the new legislation. He said he is not sure a change in the constitution was ever necessary to allow OSLC, but any need for new law could be done by statute rather than by constitutional amendment.

Mr. Harmon was asked whether eliminating Section 5 could prevent the state from promulgating programs that would forgive loan indebtedness for graduates who accept certain types of employment, such as teaching or medical jobs in underserved communities. Mr. Harmon said those types of programs are unrelated to the constitutional provision, were never part of OSLC, and could be created legislatively.

### *Estep Presentation*

Rae Ann Estep, currently deputy director of operations at the Office of Budget and Management (OBM), testified before the committee on June 9, 2016 to provide her perspective as a former executive director of OSAC from 1995-1997. Ms. Estep said the mission of the OSAC was to administer the federal-guaranteed student loan program, and to provide loan information to students and their families. She said the OSAC also administered a state grant and scholarship program. According to Ms. Estep, the OSAC consisted of nine persons serving three-year terms, with two members representing higher education institutions, one representing secondary schools, and the three remaining members representing approved lenders. Ms. Estep said, during her tenure, the OSAC staff consisted of an executive director and 225 employees.

Ms. Estep continued that, in the summer of 1995, the OSAC began proceedings to dissolve itself due to changes in financial aid policy on the federal and state levels in the 1990s. She said a primary factor was competition from private companies and the OSAC's subsequent declining market share of student loans. She noted that, in 1989, the OSAC guaranteed 99 percent of the state's higher education loans, but that number fell below 50 percent in 1995. She commented that the OSAC administered a federal program with federal money, and was in direct competition with private companies offering the same service. In addition, the OSAC faced the threat of federal funding cuts due to the federal government's rapidly-changing financial aid policy. According to Ms. Estep, when the new federal direct lending program was established, it took away the OSAC's market share, ultimately leading to the vote to dissolve the agency.

Ms. Estep concluded by saying because the OSAC was financed by the federal government, its closing did not have a direct cost-saving measure for Ohioans. She said the grant and scholarship program, which was the only part of the OSAC's operations financed by the state, was transferred to the Ohio Board of Regents. She said the OSAC's final closure occurred on June 30, 1997. Ms. Estep noted that her tenure at the agency was focused on closing the OSAC and assisting its employees in transitioning to new positions.

## **Discussion and Consideration**

In considering whether to recommend a change to Article VI, Section 5, the Education, Public Institutions, and Local Government Committee acknowledged that, as matters currently stand, Article VI, Section 5 would appear to be non-functional because it is not necessary to facilitate activities of the Ohio Department of Higher Education in relation to student loans, grants, and scholarships, to accommodate the federal student loan program, or to support private lender activity related to student loans.

Nevertheless, the committee was concerned that future changes to the federal government's student loan programs and policies could result in Ohio and other states taking on additional responsibilities related to student loan guarantees. Further, although the committee was uncertain whether the provision is necessary to support programs that forgive student loan debt in order to foster the provision of needed services in underserved areas of the state, the committee was reluctant to recommend its elimination in case it could be implemented in that manner. The consensus of the committee was that, in any event, the section expresses an important state public policy of encouraging higher education and helping students afford it.

For these reasons, the committee determined Article VI, Section 5 may continue to play a useful role in encouraging the state's support of funding for higher education.

## **Action by the Education, Public Institutions, and Local Government Committee**

After formal consideration by the Education, Public Institutions, and Local Government Committee, the committee voted on November 10, 2016 to issue a report and recommendation recommending that Article VI, Section 5 be retained in its current form.

## **Presentation to the Commission**

On December 15, 2016, on behalf of the Education, Public Institutions, and Local Government Committee, Commission Counsel Shari L. O'Neill appeared before the Commission to present the committee's report and recommendation, by which it recommended retention of Article VI, Section 5. Ms. O'Neill explained the history and purpose of the provision, indicating that the committee had determined that it would be appropriate to retain Article VI, Section 5 in its current form.

On March 9, 2017, Ms. O'Neill appeared before the Commission to provide a second presentation of the committee's report and recommendation. Ms. O'Neill indicated the report and recommendation expresses that the section articulates a policy encouraging financial support for state residents wishing to pursue higher education, declaring it to be in the public interest for the state to guarantee the repayment of student loans.

Ms. O'Neill continued that the report describes the history of the section, as well as indicating it has not been amended or reviewed since its adoption. She said the report indicates the section has not been subject to any Ohio Supreme Court decisions. Ms. O'Neill said the report describes that presentations by two former directors of the commissions that oversaw the state student loan

program would support the conclusion that the constitutional section is currently nonfunctional, however, the committee recommends the section be retained because it could be necessary in the future to accommodate changes to the federal student loan program, or to support programs that forgive student loan debt in order to foster the provision of needed services in underserved areas of the state. Thus, she said, the report documents the committee's recommendation to retain the section in its present form.

### **Action by the Commission**

At the Commission meeting held March 9, 2017, Commission member Ed Gilbert moved to adopt the report and recommendation for Article VI, Section 5, a motion that was seconded by Commission member Jo Ann Davidson.

A roll call vote was taken, and the motion passed unanimously, by a vote of 21 in favor, with none opposed, one abstention, and seven absent.

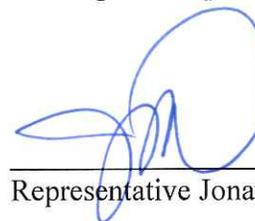
### **Conclusion**

The Ohio Constitutional Modernization Commission concludes that Article VI, Section 5 should be retained in its current form.

### **Date Adopted**

After formal consideration by the Ohio Constitutional Modernization Commission on December 15, 2016, and March 9, 2017, the Commission voted to adopt this report and recommendation on March 9, 2017.

  
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Senator Charleta B. Tavares, Co-chair

  
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Representative Jonathan Dever, Co-chair

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### **Endnotes**

<sup>1</sup> Ohio Atty. Gen. Opinion No. 93-058 (Dec. 20, 1993). Available at: <http://www.ohioattorneygeneral.gov/getattachment/110d0ab1-1ac3-46c3-9d07-838260f371f2/1993-058.aspx> (last visited June 3, 2016).

<sup>2</sup> Jeanne Ponessa, "Ohio Student-Aid Agency to Dissolve Itself," Education Week (Nov. 8, 1995) <http://www.edweek.org/ew/articles/1995/11/08/10oh.h15.html> (last visited June 3, 2016).

<sup>3</sup> *Id.*

<sup>4</sup> See, [http://archives.legislature.state.oh.us/bills.cfm?ID=122\\_HB\\_562](http://archives.legislature.state.oh.us/bills.cfm?ID=122_HB_562) (last visited June 3, 2016).



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION

#### OHIO CONSTITUTION ARTICLE VI, SECTION 6

#### TUITION CREDITS PROGRAM

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The Ohio Constitutional Modernization Commission adopts this report and recommendation regarding Article VI, Section 6 of the Ohio Constitution concerning the tuition credits program. It is issued pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*The Commission recommends that no change be made to Article VI, Section 6 of the Ohio Constitution and that the provision be retained in its current form.*

#### **Background**

Article VI, Section 6 reads as follows:

(A) To increase opportunities to the residents of this state for higher education, it is hereby determined to be in the public interest and a proper public purpose for the state to maintain a program for the sale of tuition credits such that the proceeds of such credits purchased for the benefit of a person then a resident of this state shall be guaranteed to cover a specified amount when applied to the cost of tuition at any state institution of higher education, and the same or a different amount when applied to the cost of tuition at any other institution of higher education, as may be provided by law.

(B) The tuition credits program and the Ohio tuition trust fund previously created by law, which terms include any successor to that program or fund, shall be continued subject to the same laws, except as may hereafter be amended. To secure the guarantees required by division (A) of this section, the general assembly shall appropriate money sufficient to offset any deficiency that occurs in the Ohio tuition trust fund, at any time necessary to make payment of the full amount of any tuition payment or refund that would have been required by a

tuition payment contract, except for the contract's limit of payment to money available in the trust fund. Notwithstanding Section 29 of Article II of this Constitution, or the limitation of a tuition payment contract executed before the effective date of this section, such appropriations may be made by a majority of the members elected to each house of the general assembly, and the full amount of any such enhanced tuition payment or refund may be disbursed to and accepted by the beneficiary or purchaser. To these ends there is hereby pledged the full faith and credit and taxing power of the state.

All assets that are maintained in the Ohio tuition trust fund shall be used solely for the purposes of that fund. However, if the program is terminated or the fund is liquidated, the remaining assets after the obligations of the fund have been satisfied in accordance with law shall be transferred to the general revenue fund of the state.

Laws shall be passed, which may precede and be made contingent upon the adoption of this amendment by the electors, to provide that future conduct of the tuition credits program shall be consistent with this amendment. Nothing in this amendment shall be construed to prohibit or restrict any amendments to the laws governing the tuition credits program or the Ohio tuition trust fund that are not inconsistent with this amendment.

Article VI of the Ohio Constitution concerns education, and Section 6 is designed to promote the pursuit of higher education by establishing in the constitution a government-sponsored program to encourage saving for post-secondary education.

Beginning in 1989, the General Assembly enacted Revised Code Chapter 3334, establishing a college savings program and creating the Ohio Tuition Trust Authority (OTTA), an office within the Ohio Board of Regents (now the Department of Higher Education). The OTTA was designed to operate as a qualified state tuition program within the meaning of section 529 of the federal Internal Revenue Code. *See*, R.C. 3334.02, 3334.03.

Additional statutes authorize the OTTA to develop a plan for the sale of tuition units through tuition payment contracts that specify the beneficiary of the tuition units, as well as creating a tuition trust fund that is to be expended to pay beneficiaries, or to pay higher education institutions on behalf of beneficiaries, for certain higher education-related expenses. R.C. 3334.09, 3334.11. Those expenses include tuition, room and board, and books, supplies, equipment, and other expenses that meet the definition of "qualified higher education expenses" under section 529 of the Internal Revenue Code. R.C. 3334.01(H) and (P).

Both Section 6 and the related Revised Code sections work in conjunction with the so-called "529 plans," named for the Internal Revenue Code section providing tax benefits for college savings plans. As described by an analyst for the Congressional Research Service:

529 plans, named for the section of the tax code which dictates their tax treatment, are tax advantaged investment trusts used to pay for higher-education expenses.

The specific tax advantage of a 529 plan is that distributions (i.e., withdrawals) from this savings plan are tax-free if they are used to pay for qualified higher education expenses. If some or all of the distribution is used to pay for nonqualified expenses, then a portion of the distribution is taxable, and may also be subject to a 10 percent penalty tax.

Generally, a contributor, often a parent, establishes an account in a 529 plan for a designated beneficiary, often their child. Upon establishment of a 529 account, an account owner, who maintains ownership and control of the account, must also be designated. In many cases the parent who establishes the account for their child also names [him or herself] as the account owner.

According to federal law, payments to 529 accounts must be made in cash using after-tax dollars. Hence, contributions to 529 plans are not tax-deductible to the contributor. The contributor and designated beneficiary cannot direct the investments of the account, and the assets in the account cannot be used as a security for a loan. A contributor can establish multiple accounts in different states for the same beneficiary. Contributors are not limited to how much they can contribute based on their income. Similarly, beneficiaries are not limited to how much they can receive based on their income. However, each 529 plan has established an overall lifetime limit on the amount that can be contributed to an account, with contribution limits ranging from \$250,000 to nearly \$400,000 per beneficiary. [Citations omitted.]<sup>1</sup>

Since their implementation in the early 1990s, 529 plans have grown to represent \$253.2 billion in investments nationwide, with the average account size now hovering at \$20,000.<sup>2</sup> Ohio plan data indicate that, as of December 2015, over a half million accounts are open, with over \$9 billion in assets:<sup>3</sup>

Plan	Assets Under Management	Open Accounts
CollegeAdvantage 529 Savings Plan (guaranteed) <sup>4</sup>	\$340,966,665	34,275
CollegeAdvantage 529 Savings Plan (direct) <sup>5</sup>	\$4,318,805,309	266,370
CollegeAdvantage 529 (advisor) <sup>6</sup>	\$4,631,704,946	339,962
Total	\$9,291,476,920	640,607

Section 6 was successfully proposed to voters as Issue 3 on the November 1994 ballot. Its purpose, as described on the ballot, was to “increase opportunities to the residents of the State of Ohio for higher education and to encourage Ohio families to save ahead to better afford higher education.” The proposed amendment was projected to:

1. Allow the state to maintain a program for the sale of tuition credits whereby the proceeds of such credits purchased for the benefit of state residents are guaranteed by the state to cover a specified amount when applied to the cost

of tuition at any state institution of higher education and the same or a different amount when applied to the cost of tuition at any other higher education institution as may be provided by law.

2. \* \* \* [R]equire that tuition credits paid from the tuition credits program and the Ohio tuition trust fund be supported by the full faith and credit of the state of Ohio and require the passage of laws for the conduct of the tuition credits program consistent with this amendment.
3. Require the General Assembly to appropriate money to offset any deficiency in the Ohio tuition trust fund to guarantee the payment of the full amount of any tuition payment or refund required by a tuition payment contract, and allow a majority of the members of each house of the General Assembly to appropriate funds for the payment of any tuition payment contract previously entered into.
4. Require that all Ohio tuition trust fund assets be used for the purpose of the fund, and if the fund is liquidated, require that any remaining assets be transferred to the general revenue fund of the state.<sup>7</sup>

### **Amendments, Proposed Amendments, and Other Review**

Section 6 has not been amended or reviewed since its adoption in 1994.

### **Litigation Involving the Provision**

There has been no litigation concerning Article VI, Section 6.

### **Presentations and Resources Considered**

#### *Gorrell Presentation*

On April 14, 2016, Timothy Gorrell, executive director of the Ohio Tuition Trust Authority (OTTA), presented to the Education, Public Institutions, and Local Government Committee on Ohio's tuition savings program. Mr. Gorrell said his agency is part of the Department of Higher Education and is charged with responsibility for administering the tuition credits program set forth in Article VI, Section 6.

According to Mr. Gorrell, the OTTA originally was created in 1989 under R.C. Chapter 3334, with the purpose of helping families save for higher education expenses. He described that, in November 1994, Ohio voters approved State Issue 3, a constitutional amendment that provided the state's full faith and credit backing for the Ohio Prepaid Tuition Program (now known as the Guaranteed Savings Plan), and to clarify the federal tax treatment of that plan.

Mr. Gorrell said in 1996, section 529 was added to the Federal Internal Revenue Code to provide a federal tax-advantaged way to save for college education expenses. Then, in 2000, the Ohio

General Assembly authorized Ohio to offer variable savings plans, as well as allowing a state tax benefit by which Ohio residents can deduct up to \$2,000 a year, per beneficiary, from their Ohio taxable income.

In December 2003 the Guaranteed Savings Plan was closed to contributions and new enrollments in response to rapidly rising tuition costs and investment pressures due to the market environment, said Mr. Gorrell.<sup>8</sup> Then, in 2009, existing legislation was changed to place OTTA under the Department of Higher Education, with the role of OTTA's 11-member board being limited to a fiduciary duty over the investments in OTTA's college savings plans.

Mr. Gorrell described OTTA as a "non-General Revenue Fund, self-funded agency," with all of its operating expenses being funded through account fees paid by CollegeAdvantage Program account owners.

Mr. Gorrell said OTTA currently sponsors three plans under the CollegeAdvantage 529 College Savings Program: the CollegeAdvantage Direct 529 Savings Plan, the CollegeAdvantage Advisor 529 Savings Plan offered through BlackRock, and the CollegeAdvantage Guaranteed 529 Savings Plan, which is closed to new investments. He said funds invested in these plans may be used at any accredited college or university in the country, as well as at trade schools and for other education programs that are eligible to participate in federal financial aid programs. According to Mr. Gorrell, across the three plans, OTTA directly manages or oversees over 641,000 accounts and \$9.4 billion in assets as of March 31, 2016.

Mr. Gorrell further explained that, in November 1994, by adopting Article VI, Section 6, Ohio voters approved providing the Guaranteed Savings Plan with the full faith and credit backing of the state, meaning that, if assets are not sufficient to cover Guaranteed Savings Plan liabilities, the Ohio General Assembly will appropriate money to offset the deficiency.

Mr. Gorrell also indicated that OTTA has the responsibility to generate investment returns on assets to match any growth in tuition obligations, noting that, currently, OTTA has sufficient assets on a cash basis to meet the payout obligations of the existing tuition units and credits held by account owners.

Mr. Gorrell said OTTA does not recommend any changes to Article VI, Section 6. He noted that a federal tax goal of the section was intended to address a period of unsettled case law that created uncertainty as to whether similar prepaid tuition programs were exempt from federal taxation. He said that uncertainty has been resolved by the codification of Internal Revenue Code section 529, rendering the constitutional provision unnecessary to clarify the federal tax treatment of such plans.

### **Discussion and Consideration**

In considering whether to recommend a change to Article VI, Section 6, the Education, Public Institutions, and Local Government Committee was persuaded by Mr. Gorrell's testimony indicating that, while one goal of the provision was to clarify federal tax treatment of the Guaranteed Savings Plan, a purpose that became obsolete with the federal enactment of Internal

Revenue Code section 529, the constitutional provision's other purpose, to establish the full faith and credit backing of the state for the Guaranteed Savings Plan, remains viable. The committee agreed with Mr. Gorrell that, although no new Guaranteed Savings Plan account holders have been added since 2003, the fact that some accounts are still active may require the constitutional provision to be retained in its current form.

Thus, the committee was reluctant to alter or repeal Article VI, Section 6, although a future constitutional review panel may conclude there is no justification for retaining the section because all accounts have been paid out.

### **Action by the Education, Public Institutions, and Local Government Committee**

After formal consideration by the Education, Public Institutions, and Local Government Committee, the committee voted on November 10, 2016 to issue a report and recommendation recommending that Article VI, Section 5 be retained in its current form.

### **Presentation to the Commission**

On December 15, 2016, on behalf of the Education, Public Institutions, and Local Government Committee, Commission Counsel Shari L. O'Neill appeared before the Commission to present the committee's report and recommendation, by which it recommended retention of Article VI, Section 6. Ms. O'Neill explained the history and purpose of the provision, indicating that the committee had determined that it would be appropriate to retain Article VI, Section 6 in its current form.

On March 9, 2017, on behalf of the Education, Public Institutions, and Local Government Committee, Ms. O'Neill provided a second presentation of a report and recommendation on Article VI, Section 6. Stating the report by the Education, Public Institutions, and Local Government Committee concludes the section should be retained in its current form, Ms. O'Neill described that Section 6 is designed to promote the pursuit of higher education by establishing in the constitution a government-sponsored program to encourage saving for post-secondary education. Ms. O'Neill said the report summarizes the history of the section, indicating it was adopted in order to address concerns about the tax exempt status of college savings plans. Ms. O'Neill said the report indicates these concerns were resolved by changes in the federal tax code that confirmed the exempt status of these "529 plans," so named for the Internal Revenue Code section that describes them. She said the report outlines a presentation to the committee by the director of the agency that oversees the program, as well as documenting the committee's sense that, although the need for the provision was resolved by the tax code change, the section should be retained because one purpose of the provision is to establish the full faith and credit backing of the state for one of the savings plans offered by the program. She said the report indicates the committee's conclusion that the fact that some accounts are still active may require the constitutional provision to be retained in its current form. Thus, she said, the report concludes Article VI, Section 6 should be retained.

## Action by the Commission

At the Commission meeting held March 9, 2017, Commission member Richard Saphire moved to adopt the report and recommendation for Article VI, Section 6, a motion that was seconded by Commission member Ed Gilbert. A roll call vote was taken, and the motion passed unanimously, by a vote of 21 in favor, with none opposed, one abstention, and seven absent.

## Conclusion

The Ohio Constitutional Modernization Commission concludes that Article VI, Section 6 should be retained in its current form.

## Date Adopted

After formal consideration by the Ohio Constitutional Modernization Commission on December 15, 2016, and March 9, 2017, the Commission voted to adopt this report and recommendation on March 9, 2017.



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Senator Charleta B. Tavares, Co-chair



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Representative Jonathan Dever, Co-chair

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## Endnotes

<sup>1</sup> Margot L. Crandall-Hollick, *Tax-Preferred College Savings Plans: An Introduction to 529 Plans*, (Washington, D.C.: Congressional Research Serv. 2015), <http://fas.org/sgp/crs/misc/R42807.pdf> (last visited June 14, 2016).

<sup>2</sup> “529 Plan Data,” College Savings Plans Network, available at: <http://www.collegesavings.org/529-plan-data/> (last visited June 15, 2016).

<sup>3</sup> 529 Plan Data, Reporting Date Dec. 31, 2015, College Savings Plans Network. Available at: <http://www.collegesavings.org/wp-content/uploads/2015/09/Dec-2015.pdf> (last visited June 15, 2016).

<sup>4</sup> A “guaranteed savings fund” is defined in the Ohio Administrative Code as: “those accounts in the Ohio college savings program, whether containing tuition credits and/or tuition units, which have the financial backing through the full faith and credit of the state of Ohio as more specifically set forth in Section 6 of Article VI, Ohio Constitution.” Ohio Admin.Code 3334-1-01(G).

<sup>5</sup> A direct plan is defined as one in which the investor directly contracts with the company managing the plan. *See*, [https://www.collegeadvantage.com/docs/default-source/stand-alone-documents/otta\\_decisiontree\\_02\\_cr\(1\).pdf?sfvrsn=4](https://www.collegeadvantage.com/docs/default-source/stand-alone-documents/otta_decisiontree_02_cr(1).pdf?sfvrsn=4) (last visited June 24, 2016).

<sup>6</sup> An “advisor” plan is one in which the investor has purchased the plan through a financial advisor or broker-dealer who, in turn, facilitates the investment with the company managing the plan. *See, id.*

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<sup>7</sup> Toledo *Blade*, Oct. 25, 1994, at p. 7, <https://news.google.com/newspapers?id=qUYxAAAAIBAJ&sjid=fQMEAAAAIBAJ&pg=6086.7819623&hl=en> (last visited June 14, 2016).

<sup>8</sup> According to the Legislative Service Commission, the suspension of the Guaranteed Savings Plan resulted from an actuarial deficit that was “initially caused largely by the combination of the downturn in the economy and the stock market, and the large increases in tuitions at Ohio’s public colleges and universities after the removal of the tuition caps in FY 2002 and FY 2003.” LSC Greenbook, Analysis of the Enacted Budget, Department of Higher Education (August 2015), p. 42. Available at: <http://www.lsc.ohio.gov/fiscal/greenbooks131/bor.pdf> (last visited June 24, 2016).



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION

#### OHIO CONSTITUTION ARTICLE VII, SECTION 1

#### SUPPORT FOR PERSONS WITH CERTAIN DISABILITIES

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The Ohio Constitutional Modernization Commission adopts this report and recommendation regarding Article VII, Section 1 concerning public institutions for persons with certain disabilities, specifically, the “insane, blind, and deaf and dumb.” It is adopted pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission’s Rules of Procedure and Conduct.

#### **Recommendation**

*The Commission recommends that Article VII, Section 1 be changed to modernize outdated language and clarify the state’s commitment to assisting persons with disabilities.*

*The Commission proposes that the current provision be revised to state the following:*

*Facilities for and services to persons who, by reason of disability, require care or treatment shall be fostered and supported by the state, as may be prescribed by the General Assembly.*

#### **Background**

Section 1 of Article VII reads as follows:

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

In addressing the topic of public institutions, the delegates to the 1850-51 Constitutional Convention devoted the greater portion of their discussion to the governance of the state correctional system, the purposes of incarceration, and the operation of prison facilities and prison labor programs.<sup>1</sup> Nevertheless, the consensus was that the state should play a role in assisting persons with disabilities, specifically, those who were “insane,” “blind,” and “deaf and dumb.”

The General Assembly has broad power to create institutions for the benefit of persons with mental or physical disabilities even without the authority in Section 1. Indeed, Ohio had been providing for the care and treatment of the “insane” since the early 1800s.<sup>2</sup> The new provision, however, created a constitutional mandate that the state address this issue by providing that the institutions in question “shall always be fostered and supported by the state.”

The initial version of Section 1 had respectfully referred to the intended beneficiaries of the institutions being created as “inhabitants of the State who are deprived of reason, or any of the senses \* \* \*.”<sup>3</sup> The use of the word “senses,” however, was felt to be too broad and was replaced with language referring to the insane, blind, and deaf and dumb.

### **Amendments, Proposed Amendments, and Other Review**

In the 1970s, the Ohio Constitutional Revision Commission (1970s Commission), recommended that Section 1 be retained without change.

The 1970s Commission engaged in extensive discussion, both at the committee and the Commission level, about how to describe the position of the state relative to the needs of persons with disabilities. Acknowledging the evolving state of “legal, and perhaps social, obligations to persons needing care,” the 1970s Commission struggled with how to recognize the state’s commitment as well as how to describe exactly which persons in need of care would be covered by the provision. The 1970s Commission recognized that the original language addressed only “the insane, blind, and deaf and dumb,” while some of the revisions they considered expanded the subject population to others in need of assistance, such as the aged, and the developmentally and mentally disabled. The 1970s Commission additionally wondered whether the word “institutions” should be clarified so as to create an obligation to help in settings outside of a physical facility, or whether the original concept of the state’s creating or funding schools, asylums, or other types of residential facilities should be maintained. The 1970s Commission also was concerned about using language that might suggest the state has an unlimited financial responsibility for the care of such persons. The committee of the 1970s Commission recommended the following language:

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

Although a majority of the 1970s Commission approved this proposal, it failed to achieve the necessary two-thirds support, and therefore did not become a recommendation. As reported by the 1970s Commission, the major objections “appeared to be grounded in the uncertainty of the state’s obligation as a result of the language,” with the result that the inclusion of the phrase “right to treatment” suggested to some members that the state would be taking on a greater burden than it could assume.

The failure of the recommendation to obtain the supermajority necessary for adoption prompted a minority report that was supported by 17 members of the 1970s Commission. As described by those signing the report, the first sentence of the recommended change states the same principle as the present constitution, allowing for more modern, less stigmatizing language. The minority report further suggested that removing the word “support” from the original provision would indicate that the state was not extending a right to specific services or facilities. The minority report asserted that the second part of its recommendation was a statement of the state’s obligations under federal constitutional, statutory, and case law to provide due process as well as a right to appropriate care, treatment, or habilitation.

### **Litigation Involving the Provision**

*In re Hamil*, 69 Ohio St.2d 97, 437 N.E.2d 317 (1982), invited the Supreme Court of Ohio to consider whether a state agency serving the mentally ill was required to cover the cost of care of a juvenile at a private psychiatric facility. In that case, the juvenile court found a 13-year-old charged with delinquency to be a mentally ill person in need of hospitalization at a state facility. When the superintendent at the state facility determined a more appropriate placement was at a private facility, the court ordered the juvenile’s private placement and further ordered that the state would be responsible for the full expense of his care, with reimbursement by his parents to the extent of their insurance coverage and ability to pay. On appeal, the Court held the juvenile court had acted beyond the scope of its jurisdiction in ordering the state to pay the cost of care of a juvenile in a private psychiatric hospital.

Acknowledging Article VII, Section 1’s requirement that state institutions of this kind “shall always be fostered and supported,” the Court interpreted this mandate as indicating the state’s “strong responsibility to care for citizens placed in its public institutions.” *Id.*, 69 Ohio St.2d at 99, 431 N.E.2d at 318. However, the Court found, “no justification exists \* \* \* for imposing a similar duty upon the state to care for persons confined to privately operated facilities over which the state has no control.” *Id.* The Court additionally observed that, historically, the phrase “benevolent institution” has been used to refer to state-owned and operated institutions, not private institutions. *Id.*, 69 Ohio St.2d at 100, 431 N.E.2d at 318.

The Court rejected the parents’ argument that a substantial portion of the expenses would be paid by insurance, so that the state’s burden would be light. Instead, the Court reasoned that a decision solely based on the cost to the state would have negative repercussions, since in other cases the state would be called upon to “absorb the entire cost of treatment at an expensive private institution.” *Id.*, 69 Ohio St.3d at 104, 437 N.E.2d at 321.

### **Presentations and Resources Considered**

#### *Kirkman Presentation*

On September 8, 2016, the Education, Public Institutions, and Local Government Committee heard a presentation by Michael Kirkman, who is executive director of Disability Rights Ohio, on the history of Article VII, Section 1, relating to “Institutions for the Insane, Blind, and Deaf and Dumb.”

Mr. Kirkman noted the word “institution” is ambiguous because an institution can be a physical place or a service, among other things. He added that the language of the section is not self-executing, requiring action by the General Assembly.

Describing the history of the state’s involvement in the care of the mentally disabled, Mr. Kirkman said the earliest attempts to provide care reflected a lack of understanding. He noted that, in the 1800s, reformers Benjamin Rush and Dorothea Dix led campaigns to provide more humane treatment to mentally ill persons. He said during that period, twenty states expanded the number of mental hospitals. He noted that, prior to the passage of Section 1 in 1851, Ohio had provided for the care and treatment of the insane, although most responsibility fell to charities, counties, and churches. After 1851, the state population grew, and there came a need for the state to sponsor asylums to provide more humane treatment to the mentally ill. He said there was no scientific evidence that Dix’s asylum model actually had a therapeutic value, but many believed asylums helped.

Mr. Kirkman commented that, as time went on, these institutions changed for the worse. Further problems were related to the philosophy behind the Eugenics Movement in the early 20<sup>th</sup> century, which regarded “feeble-mindedness” as being genetic, and which was viewed as justification for mandatory sterilization. Mr. Kirkman noted examples of persons or groups who were institutionalized or sterilized solely because of race or economic status rather than due to actual mental incapacity.

Mr. Kirkman remarked that, in the 1960s, attitudes changed, and the field of psychiatry adopted new views on treating and institutionalizing the mentally ill. He said during that period the mental hospital was replaced with community care and neighborhood clinics. In the 1980s, he said, law evolved to the point where the state is now required to provide training to people in commitment, and the mentally ill are afforded equal protection and due process rights under the Fourteenth Amendment to the United States Constitution.

He commented there has been a significant depopulation of state hospitals since the 1980s, with the unfortunate result that many mentally disabled persons became homeless or were imprisoned. He further noted that assistance to that population is now governed by the Americans with Disabilities Act (ADA), which focuses on services in the community rather than institutionalization.

He said Ohio currently has six psychiatric hospitals with a total of 1,067 beds. He said as many as 70 percent of this population has been committed as a result of a criminal proceeding.

Mr. Kirkman emphasized that the language used to describe those with psychiatric disabilities is a “major focus in the mental health world.” He said the word “insane” is offensive and discriminatory, with the current trend in the Ohio Revised Code being to identify people first and the disability second.

Mr. Kirkman suggested that, because Ohio does not operate any institution for the “blind” or the “deaf and dumb,” and because the trend is away from institutionalizing the mentally

incapacitated, Article VII, Section 1 could be eliminated. As further support, he noted that funding state institutions takes away from community-based services. He said eliminating the section would not affect treatment of persons in the criminal justice system because treatment for those persons is required by the U.S. Constitution and derives from the inherent authority of the state to prescribe criminal laws.

Addressing the phrase “deaf and dumb” in Section 1, Mr. Kirkman said that the deaf community does not like the word “dumb,” and that many do not consider themselves as having a disability but rather that they simply have a different language. He said the main point is the deaf and blind are integrated into society now and are not institutionalized.

Mr. Kirkman described that the inherent authority to use public funds to assist the disabled lies with the general authority to provide for the general welfare of people in the state. But, he acknowledged, taking this language out could be viewed by some as eliminating a backstop.

### *Colker Presentation*

On January 12, 2017, Ruth Colker, professor of law at the Ohio State University Moritz College of Law, presented to the committee in relation to the committee’s review of Article VII, Section 1. Prof. Colker indicated her first recommendation would be to repeal Section 1 as unnecessary. Failing that, she said, her second recommendation would be to recommend new language that would meet the underlying purpose of the original section, but would be more respectful and consistent with other provisions. She said, in this regard, she would recommend changing the language to state:

The state shall always foster and sustain services and supports for people with disabilities who need assistance to live independently; these services and supports will, to the maximum extent possible, be provided in the community, rather than in institutions.

Prof. Colker said, in formulating this language, she consulted with members of the disability rights community. She said the revision is more respectful, and offers a more functional definition of disability. She said another goal was to have the section be more consistent with modern notions under federal law and the United States Constitution.

Addressing the terms used in the current section to describe persons with disabilities, Prof. Colker said the disability rights community prefers “person first” language, thus persons with psychiatric impairment would not be described as “the insane.” She said the thinking behind this word choice is that disability status is only one aspect of personhood. She added that descriptors such as “insane” or “deaf or dumb” are not used. Instead, such persons would be described as being individuals with psychiatric, speech, sensory, visual, or intellectual impairments. Describing definitions that have been used at the federal level, she said no one definition would serve the purpose, and that the federal government has chosen different functional definitions depending on the context.

Prof. Colker emphasized considering the kind of assistance the state is saying it wants to provide. Noting federal case precedent, she said the United States Supreme Court and Congress have adopted the concept that people with disabilities should be integrated into communities as much as possible. She cited an example as being that the Individuals with Disabilities Education Act (IDEA) provides that states must have procedures assuring, to the maximum extent appropriate, that children with disabilities are educated with children who are not disabled, and that special or separate placement occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary assistance cannot be achieved satisfactorily. She said this has been the preference since 1975, and suggests a default principle that persons with disabilities be placed in an integrated environment.

Noting Section 1's use of the word "institutions," Prof. Colker said this word choice suggests a preference for an institutional setting, a concept that is no longer the prevailing view. She said she tried to craft language that would indicate an understanding that, aspirationally, the state would try to place people in a community setting, rather than have the default be placing them in institutions.

She said this approach is also reflected in the Americans with Disabilities Act, which was passed in 1990. Citing the case of *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), she said the ADA is violated when people who are able to live in the community are placed in institutions because, as the U.S. Supreme Court concluded, unjustified isolation is discrimination based on disability. She noted that principle is stated in the Court's finding that there is a presumption of deinstitutionalization, and that states are required to provide community-based treatment for persons with mental disabilities when it is determined "that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." *Olmstead* at 607.

Addressing whether her suggested language could be interpreted as creating a fundamental right, Prof. Colker said that would depend on what doctrine or rule of law applies. She said she relied on the language in the *Olmstead* decision indicating the resources of the state are a consideration. She said, as a result, her recommendation would be to describe the state's obligation as being "to the maximum extent possible." She said the definition of a fundamental right does not mean limitless support, but rather means a court would develop a pragmatic rule that is flexible. She said one goal in changing Section 1 would be to maintain the principle articulated in the current provision that the state should be doing something for people who cannot live without assistance.

Prof. Colker said the current language indicates the state only has an obligation to support people who are in an institutional setting. She said from a policy perspective that is wrong, and is also unconstitutional and illegal.

Asked whether, if Ohio did not have Section 1, the standard would be found in state law, Prof. Colker said eliminating Section 1 would not have a significant impact because *Olmstead* already requires the state to provide for the disabled. She said a constitution is aspirational, and that keeping and refining the obligation set out in Section 1 would continue that aspirational goal using language that is respectful and modern.

Discussing her recommendation that the provision be changed to include the phrase “assistance to live independently,” Prof. Colker said it is important to recognize that each individual might need a different level of assistance. As to whether the proposed language would create an obligation the state could not fulfill in a budget crisis, Prof. Colker said the current provision mandates state support that would be important to maintain in any revision. She said, if rewriting the provision is not an option, her preference would be to delete it.

### *Pizzuti Presentation*

Also on January 12, 2017, Marjory Pizzuti, who is president and chief executive officer of Goodwill Columbus, appeared before the committee to provide her organization’s perspective on the state’s support of people with disabilities. She said her organization serves more than 77,000 individuals, with 85 percent of those persons having a disadvantaging condition such as long-term unemployment, incarceration, low educational attainment, and physical or intellectual disabilities. She said Goodwill chapters throughout Ohio are partners and providers of services through many state agencies, including Opportunities for Ohioans with Disabilities, and the Ohio Departments of Aging, Jobs and Family Services, Developmental Disabilities, Rehabilitation and Corrections, and Mental Health and Addiction Services. She said her organization seeks to provide support to individuals with disabilities, and to assure that all citizens can be full and active participants in the community.

Addressing current Section 1, Ms. Pizzuti said the commitment to community-based integration may be fundamentally at odds with the intent of Section 1, which specifically references “institutions.” She said Section 1 raises three issues: the wording used, the appropriateness of continuing to include a provision that focuses on institutionalizing people with disabilities, and the fundamental question of whether any reference to a specific population should be included anywhere in the Ohio Constitution.

With regard to the terminology used to describe persons with disabilities, Ms. Pizzuti said the current section is not only offensive but inappropriate based on the current understanding of illness and disabilities. She said, while this language was relevant at the time of adoption, it has no place in current or future revisions of the Ohio Constitution. However, she recognized that an attempt to revise the terminology is difficult and ultimately would not resolve the problem because society’s perception of individuals with disabilities continues to evolve.

Ms. Pizzuti continued that the movement toward community integration has been reflected in the downsizing of the state’s institutional facilities, the increase in competitive integrated employment, and the transition into community-based settings. She said this is an intentional and widely-acknowledged paradigm shift for the full integration of individuals with physical and intellectual disabilities into communities.

Acknowledging the good intentions of the drafters of Section 1 to protect and serve individuals with disabilities, she said the previous practice of institutionalizing people with disabilities has given way to policies that favor community-based support.

Ms. Pizzuti said there is a more fundamental question of whether a need to foster and support individuals with disabilities has a place in the constitution, and, if so, where it should be placed. She said it is possible such a “general welfare” statement could be incorporated in the Bill of Rights or the Preamble. She said Article VII, Section 1 provides an important voice for individuals with disabilities, although the notion of institutionalization and the language used is obsolete. She encouraged the committee to work toward balancing the need to modernize the language with the need to reaffirm the spirit of the intent of the provision, which is to provide assistance that “fosters and supports” opportunities for individuals with disabilities.

### *Hetrick Presentation*

Finally, on January 12, 2017, the committee heard a presentation by Sue Hetrick, executive director of the Center for Disability Empowerment, to provide her agency’s perspective on potential changes to Section 1. Ms. Hetrick described that her agency operates a center for independent living, and that such facilities have been around since the 1970s. She said the concept that persons with disabilities, with assistance, could be integrated into the community corresponded with the civil rights movement. She said her organization emphasizes consumer control, and that 51 percent of the board of directors is comprised of persons who are disabled.

Ms. Hetrick said disability is regarded as a neutral difference, meaning that it results from the interaction of the individual with his or her environment, rather than from other causes. She said, despite the emphasis on integrating persons into the community, Ohio continues to have a culture of institutions, maintaining schools for the deaf and for the blind, as well as nursing facilities sometimes being mental health institutions. She said any congregate setting can be an institution. However, she said, under *Olmstead*, if the appropriate supports and services are in place segregation is not necessary.

Asked whether, if Section 1 is not revised, it should be removed or kept as is, Ms. Hetrick remarked that, if the constitution is to provide sections protecting gender and religion, there should be a section acknowledging and protecting persons with disabilities. Thus, she said, if revision is not an option she would prefer that the section be left as is.

### **Discussion and Consideration by the Education, Public Institutions, and Local Government Committee**

While all members of the Education, Public Institutions, and Local Government Committee agreed that the current references to “the insane” and the “deaf and dumb,” are outdated and disrespectful, there was concern that alternate language may overly broaden the scope of the state’s responsibility by expanding the population to be served.

In considering how to phrase the state’s involvement in fostering and supporting care, committee members indicated a concern that state resources could be stretched beyond capacity if the constitutional provision were written or interpreted as requiring limitless support. Committee members also expressed concern that use of the term “disability” may be vague, preferring language to allow the General Assembly to determine which conditions will be subject to the provision.

The committee discussed whether the reference to “institutions” indicates that the state has an obligation to provide physical facilities, or whether, more broadly, it suggests a state obligation to accommodate the needs of persons with disabilities, whatever those needs may require. Committee members observed that the current trend is away from institutionalizing persons in need of care. Instead, for example, mentally ill persons often benefit from community-based treatment. In addition, children with vision or hearing impairments, with appropriate assistance, can attend public schools. Some members expressed support for a change that would indicate the state would provide support “to the maximum extent appropriate,” which would allow the creation of facilities for persons requiring an institutional setting.

Some committee members expressed that Section 1 could be removed without eliminating the General Assembly’s authority to enact laws assisting the subject populations. However, members acknowledged that a recommendation to repeal Section 1 should not be interpreted as suggesting that the state should no longer foster programs that support the disabled. In the end, the committee decided against recommending repeal of the section.

### **Action by the Education, Public Institutions, and Local Government Committee**

After formal consideration by the Education, Public Institutions, and Local Government Committee on April 13, 2017 and May 11, 2017, the committee voted unanimously to recommend that Article VII, Section 1 be replaced by the following language:

Facilities for and services to persons who, by reason of disability, require care or treatment shall be fostered and supported by the state, as may be prescribed by the General Assembly.

### **Presentation to the Commission**

On May 11, 2017, and June 8, 2017, Ed Gilbert, chair of the Education, Public Institutions, and Local Government Committee, presented a report and recommendation for Article VII, Section 1, indicating the history and purpose of the section, describing the presentations to the committee, and discussing the committee’s proposed change to the section.

### **Action by the Commission**

At the Commission meeting held June 8, 2017, Commission member Pierrette Talley moved to adopt the report and recommendation for Article VII, Section 1, a motion that was seconded by Commission member Robert Taft. Upon a roll call vote, the motion passed by a vote 24 in favor, with none opposed, and six absent.

### **Conclusion**

The Ohio Constitutional Modernization Commission recommends that Article VII, Section 1 be amended by the modernization of outdated language and the addition of language to clarify the

state's commitment to assisting persons with disabilities. The Commission proposes that the current provision be revised to state the following:

Facilities for and services to persons who, by reason of disability, require care or treatment shall be fostered and supported by the state, as may be prescribed by the General Assembly.

### **Date Adopted**

After formal consideration by the Ohio Constitutional Modernization Commission on May 11, 2017 and June 8, 2017, the Commission voted to adopt the report and recommendation on June 8, 2017.



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Senator Charleta B. Tavares, Co-chair



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Representative Jonathan Dever, Co-chair

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### **Endnotes**

<sup>1</sup> An analysis of this debate, including a table of the participating delegates and an excerpt of the proceedings, is contained in a memorandum provided to the Committee. *See* O'Neill, Article VII (Public Institutions) at the 1851 Constitutional Convention (August 23, 2016). The discussion, in full, may be found in Ohio Convention Debates, pages 539-49, available at <http://quod.lib.umich.edu/m/moa/ae0639.0002.001?view=toc> (last visited Aug. 23, 2016).

<sup>2</sup> *See* Eagle and Kirkman, Ohio Mental Health Law, Section 1.11 (2<sup>nd</sup> Ed. Banks-Baldwin). *See generally* Kirkman, "Fostering" Institutions and People with Disabilities (Sept. 8, 2016) (presentation to the Ohio Constitutional Modernization Commission).

<sup>3</sup> As originally introduced, Section 1 provided as follows:

The Institutions for the benefit of these classes of the inhabitants of the State who are deprived of reason, or any of the senses, shall always be fostered and supported by the State, and be regulated by law so as to be open to all classes alike, subject only to reasonable restrictions.



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION

#### OHIO CONSTITUTION ARTICLE VII, SECTIONS 2 AND 3

#### DIRECTORS OF PUBLIC INSTITUTIONS

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The Ohio Constitutional Modernization Commission adopts this report and recommendation regarding Article VII, Sections 2 and 3 concerning directors of public institutions. It is adopted pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*The Commission recommends that Article VII, Sections 2 and 3 be repealed as obsolete.*

#### **Background**

Sections 2 and 3 of Article VII read as follows:

##### Section 2

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

##### Section 3

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

### *Origin of Sections 2 and 3*

In creating provisions about public institutions, the delegates to the 1850-51 Constitutional Convention were plowing new ground; no similar article or provisions were a part of the 1802 Constitution. While one apparent goal was to express support and provide for “benevolent institutions,” understood as facilities for persons with diminished mental capacity as well as for the blind and deaf, the greater portion of the discussion centered on the governance of the state correctional system, the purposes of incarceration, and the operation of prison facilities and prison labor programs.<sup>1</sup>

Addressing proposals for Section 2, delegates immediately focused on whether directors of the penitentiary should be selected by the General Assembly, appointed by the governor, or directly elected by voters.<sup>2</sup> Some delegates supported allowing the General Assembly to make this determination. Others expressed that the rationale given for involving the governor – that the General Assembly had become unpopular – was not supported by fact, and, in any event, was not sufficient justification to have voters approve “every small office in the state.”

Other delegates expressed that the importance of the role of directors of the penitentiary meant they should be elected, with one delegate, Daniel A. Robertson of Fairfield County, having previously supported that position in his previous role as a member of the New York Constitutional Convention in 1837, where he advocated the popular election of all public officers.<sup>3</sup> In fact, requiring all state offices to be elective had been a key plank in the platform of reforms advocated by Samuel Medary and others as justification for voting to hold the 1850-51 convention.<sup>4</sup>

Some delegates supported allowing the governor to appoint, with a requirement for obtaining the advice and consent of the Senate as a compromise measure.

Delegates then returned to the issue of how directors should be selected. G.J. Smith, a Warren County attorney, offered an amendment that would add at the close of Section 2 the words “and the question upon all nominations made by the Governor shall be taken by yeas[] and nays and entered upon the journal of the senate,” which delegates approved.

D.P. Leadbetter, a Holmes County farmer, then proposed Section 3 to address how vacancies would be filled, as follows:

The governor shall have power to fill all vacancies that may occur in the offices created by this article of the Constitution, until their successor in office shall be elected and qualified, or until the meeting of the ensuing legislature, and the successor confirmed and qualified.<sup>5</sup>

This addition was adopted, and the committee reported both sections back to the convention.

The discussions of Sections 2 and 3 resulted in provisions that assigned roles to the General Assembly and the governor in selecting penitentiary and benevolent institution directors, and provided a procedure for filling director vacancies in penitentiaries and benevolent institutions.

While a significant portion of the discussion dealt with the purposes of incarceration and compensation for prison labor, these topics did not culminate in a recommendation.

Although Sections 2 and 3 may seem overly concerned with how the officers of the institutions are selected, in 1850-51, a concern about legislative overreaching, as well as a related desire to elevate the role of the voter, heightened delegates' interest in the topic.<sup>6</sup> Indeed, a large part of the delegates' discussion about public institutions centered on which branch of government should control and regulate these institutions.

Aside from expressing general support for public institutions, the convention delegates' primary goal seems to have been to address the election-versus-appointment issue. The meandering discussion allowed delegates to express opinions on crime and punishment, racial segregation, and political power, but the discourse never ripened into a substantive policy statement or consensus for an approved recommendation. While one delegate attempted to expand the concept of "public institutions" to include a provision related to prison labor, his proposal was rejected. No other delegate appears to have attempted to propose a new amendment.

#### *Relationship to Statutory Law*

The provisions in Article VII, Sections 2 and 3 are not self-executing, and the General Assembly has adopted more detailed statutory provisions.

Article VII, Section 2 references "directors of the penitentiary" but does not create that role. The phrasing of Article VII, Section 2 suggests that the referenced positions already exist. Thus, its primary purpose, as well as that of Section 3, is not to create the roles but to describe how the roles are to be filled.

Under current statutory law, the most analogous position to that of the "directors of the penitentiary" is possibly the director of the department of rehabilitation and correction, a statutory department head role identified in R.C. 121.03, at subsection (Q). R.C. Chapter 5120 relates to the Department of Rehabilitation and Correction (DRC), providing under R.C. 5120.01 that the director is the executive head who has the power to prescribe rules and regulations, and who holds legal custody of inmates committed to the DRC. While R.C. Chapter 5145 generally concerns "the penitentiary," its current focus is on details related to managing the prison population, rather than the role of the director of the penitentiary.

In relation to Article VII, Section 3, R.C. 3.03 provides specific instructions for the governor's exercise of the power to appoint to fill a vacancy in office, with the advice and consent of the Senate.<sup>7</sup>

#### **Amendments, Proposed Amendments, and Other Review**

In the 1970s, the Ohio Constitutional Revision Commission (1970s Commission), recommended the repeal of Sections 2 and 3, finding them to be obsolete. As the committee of the 1970s Commission noted, the sections derived from a time when nearly all appointing power was vested in the legislature, so that the provisions were deemed necessary to allow a transfer of that

power to the governor, with the advice and consent of the Senate. However, the 1970s Commission observed that the office of the directors of the penitentiary is no longer in existence. The Commission report further noted that, by the 1970s, the only state institution that could be considered a “benevolent institution,” the Ohio Soldiers’ and Sailors’ Orphans’ Home, was governed by a statutory five-member board of trustees appointed by the governor with the advice and consent of the Senate. Thus, neither Section 2 nor Section 3 was deemed to be necessary for the state to carry out functions related to the incarceration of prisoners or the support of state “benevolent institutions.”

### **Litigation Involving the Provision**

*In re Hamil*, 69 Ohio St. 2d 97, 437 N.E.2d 317 (1982), invited the Supreme Court of Ohio to consider whether a “benevolent institution” included a private psychiatric facility. In that case, the juvenile court found a 13-year-old charged with delinquency to be a mentally ill person in need of hospitalization at a state facility. When the superintendent at the state facility determined a more appropriate placement was at a private facility, the court ordered the juvenile’s private placement and further ordered that the state would be responsible for the full expense of his care, with reimbursement by his parents to the extent of their insurance coverage and ability to pay. On appeal, the Court held the juvenile court had acted beyond the scope of its jurisdiction in ordering the state to pay the cost of care of a juvenile in a private psychiatric hospital.

Acknowledging Article VII, Section 1’s requirement that state institutions of this kind “shall always be fostered and supported,” the Court interpreted this mandate as indicating the state’s “strong responsibility to care for citizens placed in its public institutions.” *Id.*, 69 Ohio St. 2d at 99, 431 N.E.2d at 318. However, the Court observed that, historically, the phrase “benevolent institution” has been used to refer to state-owned and operated institutions, not private institutions. *Id.*, 69 Ohio St. 2d at 100, 431 N.E.2d at 318. Therefore, the Court found, “no justification exists \* \* \* for imposing a similar duty upon the state to care for persons confined to privately operated facilities over which the state has no control.” *Id.*, 69 Ohio St. 2d at 99, 431 N.E.2d at 318.

### **Presentations and Resources Considered**

#### *Furderer Presentation*

On March 9, 2017, the Education, Public Institutions, and Local Government Committee heard a presentation by Darin Furderer, who is a corrections analyst at the Correctional Institution Inspection Committee, on the leadership arrangements for correctional facilities and the use of the term “director.”

Mr. Furderer noted the title of “director” is not used to refer to the head of the penitentiary. He added that the DRC currently uses the term “warden” to refer to a person in charge of an adult correctional facility, and the Department of Youth Services uses the term “superintendent” to refer to a person in charge of a youth correctional facility.

### **Discussion and Consideration by the Education, Public Institutions, and Local Government Committee**

The Education, Public Institutions, and Local Government Committee noted that the governor appoints a “director” of DRC, who is the head of the department rather than the head of the penitentiary. The DRC director then appoints the persons who run the correctional facilities.

Committee members agreed the sections appear to be obsolete, noting that they focus on who appoints the heads of these institutions, an issue that has been settled for a long time and is not relevant to any present procedure.

### **Action by the Education, Public Institutions, and Local Government Committee**

After formal consideration by the Education, Public Institutions, and Local Government Committee on April 13, 2017, and May 11, 2017, the committee voted unanimously to recommend repeal of Article VII, Sections 2 and 3.

### **Presentations to the Commission**

On May 11, 2017, and on June 8, 2017, Ed Gilbert, chair of the Education, Public Institutions, and Local Government Committee, presented a report and recommendation for Article VII, Sections 2 and 3, indicating the history and purpose of the provision, describing the presentation to the committee, and discussing the committee’s deliberations on the question of whether the sections were obsolete.

### **Action by the Commission**

At the Commission meeting held June 8, 2017, Commission member Ed Gilbert moved to adopt the report and recommendation for Article VII, Sections 2 and 3, a motion that was seconded by Commission member Karla Bell. Upon a roll call vote, the motion passed, by a vote of 23 in favor, with none opposed, and seven absent.

### **Conclusion**

The Ohio Constitutional Modernization Commission recommends that Article VII, Sections 2 and 3 be repealed as obsolete.

## Date Adopted

After formal consideration by the Ohio Constitutional Modernization Commission on May 11, 2017, and June 8, 2017, the Commission voted to adopt the report and recommendation on June 8, 2017.



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Senator Charleta B. Tavares, Co-chair



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Representative Jonathan Dever, Co-chair

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## Endnotes

<sup>1</sup> An analysis of this debate, including a table of the participating delegates and an excerpt of the proceedings, is contained in a memorandum provided to the Committee. See O'Neill, Article VII (Public Institutions) at the 1851 Constitutional Convention (August 23, 2016). The discussion, in full, may be found in Ohio Convention Debates, pages 539-49, available at <http://quod.lib.umich.edu/m/moa/aev0639.0002.001?view=toc> (last visited Aug. 23, 2016).

<sup>2</sup> As originally introduced, Section 2 provided as follows:

The Directors of the Penitentiary, and the Trustees of the Benevolent Institutions, now elected by the General Assembly of the State, with such others as may be hereafter created by subsequent Legislative enactment shall, under this constitution, be appointed by the Governor, by and with the advice and consent of the Senate.

<sup>3</sup> See David M. Gold, *Judicial Elections and Judicial Review: Testing the Shugerman Thesis*, 40 Ohio N. L. Rev. 39, 51 (2013).

<sup>4</sup> See Barbara A. Terzian, *Ohio's Constitutional Conventions and Constitutions*, in *The History of Ohio Law* 40, 52 (Michael Les Benedict and John F. Winkler, eds., 2004).

<sup>5</sup> Currently, Section 3 provides: "The governor shall have power to fill all vacancies that may occur in the offices aforesaid, until the next session of the General Assembly, and, until a successor to his appointee shall be confirmed and qualified."

<sup>6</sup> As Steinglass and Scarselli note: "Over the course of five decades under the first constitution \* \* \* the people began to see the legislature as the source of many, if not most, of the problems of government, and the new constitution reflected this general distrust of legislative power. \* \* \* [T]he new constitution took the appointment power away from the General Assembly. All key executive branch officers became elected officials, as did all judges." Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution* 35 (2nd prtg. 2011).

<sup>7</sup> R.C. 3.03 provides:

When a vacancy in an office filled by appointment of the governor, with the advice and consent of the senate, occurs by expiration of term or otherwise during a regular session of the senate, the governor shall appoint a person to fill such vacancy and forthwith report such appointment to the senate. If such vacancy occurs when the senate is not in session, and no appointment has been made and confirmed in anticipation of such vacancy, the governor shall fill the vacancy and report

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the appointment to the next regular session of the senate, and, if the senate advises and consents thereto, such appointee shall hold the office for the full term, otherwise a new appointment shall be made. A person appointed by the governor when the senate is not in session or on or after the convening of the first regular session and more than ten days before the adjournment sine die of the second regular session to fill an office for which a fixed term expires or a vacancy otherwise occurs is considered qualified to fill such office until the senate before the adjournment sine die of its second regular session acts or fails to act upon such appointment pursuant to section 21 of Article III, Ohio Constitution.



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION

#### OHIO CONSTITUTION ARTICLE VIII SECTIONS 1, 2, AND 3

#### STATE DEBT

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The Ohio Constitutional Modernization Commission adopts this report and recommendation regarding Sections 1, 2, and 3 of Article VIII of the Ohio Constitution concerning state debt. It is issued pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*The Commission recommends that Article VIII, Sections 1 and 3 be retained in their current form, and that Section 2 be revised to eliminate an outdated reference.*

*Specifically, the Commission recommends retaining the \$750,000 debt limit in Section 1 because it is important to public perception of state spending, and because the limit has not created an obstacle to state fiscal planning or growth in the years since its adoption in 1851.*

*The Commission further recommends a revision to Section 2 that would remove a reference to the Sinking Fund based on the Commission's separate recommendation that sections of Article VIII creating the Sinking Fund and the Sinking Fund Commission be repealed.*

*Finally, the Commission recommends Section 3 be retained in its current form for the reason that it emphasizes a public policy encouraging debt avoidance and sound financial practice.*

#### **Background**

Article VIII deals with public debt and public works, and was adopted as part of the 1851 constitution. As proposed by delegates to the 1851 Constitutional Convention, Article VIII, Sections 1, 2, and 3 bar the state from incurring debt except in limited circumstances, primarily involving cash flow and military invasions and other emergencies.

Section 1 sets a strict limit on the dollar amount of debt the state may incur, providing:

The state may contract debts to supply casual deficits or failures in revenues, or to meet expenses not otherwise provided for; but the aggregate amount of such debts, direct and contingent, whether contracted by virtue of one or more acts of the General Assembly, or at different periods of time, shall never exceed seven hundred and fifty thousand dollars; and the money, arising from the creation of such debts, shall be applied to the purpose for which it was obtained, or to repay the debts so contracted, and to no other purpose whatever.

Section 2 recognizes that civil unrest could necessitate exceeding the \$750,000 debt limit created in Section 1, and so provides:

In addition to the above limited power, the state may contract debts to repel invasion, suppress insurrection, defend the state in war, or to redeem the present outstanding indebtedness of the state; but the money, arising from the contracting of such debts, shall be applied to the purpose for which it was raised, or to repay such debts, and to no other purpose whatever; and all debts, incurred to redeem the present outstanding indebtedness of the state, shall be so contracted as to be payable by the sinking fund, hereinafter provided for, as the same shall accumulate.

Emphasizing the importance of the limits set in Sections 1 and 2, Section 3 provides:

Except the debts above specified in sections one and two of this article, no debt whatever shall hereafter be created by or on behalf of the state.

### **Amendments, Proposed Amendments, and Other Review**

The Ohio Constitutional Revision Commission (1970s Commission) studied Article VIII in depth and made extensive recommendations concerning how the state incurs debt.<sup>1</sup> The 1970s Commission recommended the repeal of the \$750,000 debt limitation in Article VIII, Section 1, replacing it with a limit based on six percent of the average annual revenue of the state.<sup>2</sup> In its December 31, 1972 report, the 1970s Commission proposed the following changes in relation to Article VIII, Sections 1 through 3:

- Established “a constitutional debt formula, based on a moving average of state revenues, by which the state, by a three fifths (3/5) vote of the General Assembly, could incur debt for capital improvement purposes. The proposed formula would in effect limit the amount of money which could be spent to repay such debt to six per cent (6%) of the base, which is the average of the revenues of the state, as defined in the Constitution, for the then preceding two fiscal years. The proposed formula would also limit the amount of the principal of new debt which could be issued in any fiscal year to eight per cent (8%) of the base, and require that a specific part of the total be repaid every fiscal year.”

- Continued “the authority of the state to contract debt outside the debt limit to repel invasion, suppress insurrection, and defend the state in war.”
- Authorized “short-term borrowing by the state to meet appropriations and require[d] that money borrowed for this purpose be repaid within the fiscal year in which it is borrowed.”
- Required “voter approval in a referendum for incurring debt outside the debt limit or for purposes other than capital improvements.”
- Required “the General Assembly to prescribe the methods and procedures for evidencing, refunding, and retiring state debt, and to provide for its full and timely payment.”
- Required “the General Assembly to perform certain functions of a technical nature in connection with the state's bonded debt, and impose certain duties on the Treasurer of State in regard to it.”
- Permitted “that state debt be contracted, and the credit of the state be extended, only for a public purpose declared by the General Assembly in the law authorizing such debt or use of credit.” \* \* \*<sup>3</sup>

Some of these recommendations were the subject of the General Assembly’s 1977 ballot proposal that, among other actions, would have eliminated the \$750,000 debt limitation in Section 1, as well as the debt restrictions contained in Sections 2 and 3. As presented on the November 8, 1977 ballot, Issue 4 stated:

“PROPOSED CONSTITUTIONAL AMENDMENT

To adopt Section 1 of Article VIII and repeal Sections 1, 2, 2b, 2c, 2d, 2e, 2f, 2g, 2h, 3, 7, 9, and 10 of Article VIII and Section 6 of Article XII of the Constitution of Ohio

1. To repeal the general state constitutional debt limit of \$750,000 and replace it with authority to incur debt for capital improvements by a two-thirds majority vote of each house of the general assembly within specified limitations directly related to state revenues.
2. To permit the state to contract debt without limitation on amount of purpose, in addition to the authority specified above, if that debt is submitted to a vote of the electors by a three-fifths majority vote of each house of the general assembly and approved by a majority of the electors voting on the question.
3. To require the general assembly to retire at least 4% of the state’s indebtedness each year.

4. To permit the state to borrow funds to meet a current year's appropriations if any such loan is repaid out of that year's revenues.
5. To repeal part of the constitutional requirements relating to a sinking fund and to require that the general assembly provide for the repayment of state debt.
6. To enumerate purposes and amounts for which the first \$640 million of capital improvement debt would have to be appropriated.

(Proposed by Resolution of the General Assembly of Ohio)"<sup>4</sup>

Issue 4 was overwhelmingly defeated by a margin of 72.5 percent to 27.5 percent, and there has been no effort since to revise Article VIII, Sections 1, 2, or 3.<sup>5</sup>

### **Litigation Involving the Provisions**

The Supreme Court of Ohio has issued two influential decisions regarding these sections of Article VIII.

In *State ex rel. Shkurti v. Withrow*, 32 Ohio St.3d 424, 513 N.E.2d 1332 (1987), the Court concluded Section 2's reference to the "present outstanding indebtedness of the state" was meant to address the state's fiscal status in 1851. In *Shkurti*, the General Assembly had enacted legislation directing the treasurer of state to issue bonds to repay outstanding advances by the federal government to the Ohio unemployment compensation program. When the treasurer refused to issue the bonds because doing so was not constitutionally authorized, the director of the Office of Budget and Management (OBM), brought an action in mandamus to compel the issuance of the bonds. Rejecting the argument that Section 2 authorized the bond issuance because the intent was to relieve the "present outstanding indebtedness of the state," the Court found the sole purpose of Section 2's exception to the Article VIII debt restrictions was to pay down the debt that existed in 1851:

First, the precise modification of "outstanding indebtedness" by the definite article "the," and the adjective "present," virtually compels this conclusion. Second, examination of the relevant constitutional debates convinces us that the then outstanding debt concerned the framers. They debated the wisdom of the sinking fund procedure for the retirement of that debt, the equity and practicality of relatively early retirement of the debt versus more extended retirement periods and, consequently, the amount that should be committed annually to the sinking fund to retire the principal and interest on the debt. The debates do not indicate any broader purpose for this exception.

*Id.*, 32 Ohio St.3d at 426, 513 N.E.2d at 1334.

*State ex rel. Ohio Funds Mgmt. Bd. v. Walker*, 55 Ohio St.3d 1, 561 N.E.2d 927 (1990), presented another opportunity for the Court to consider Sections 1, 2, and 3 of Article VIII. In that case, the General Assembly sought to address General Revenue Fund cash flow issues by

enacting R.C. 113.31 *et seq.*, legislation that created the Ohio Funds Management Board (“the Board”) and authorized the state treasurer, at the recommendation of the Board, to issue “revenue anticipation notes.” As part of this procedure, the statute required the director of OBM to provide relevant financial data to the Board and the treasurer, and the OBM director refused, arguing that doing so would allow the issuance of the “revenue anticipation notes,” which are a form of state debt prohibited by Article VIII, Sections 1 and 3. The Board then pursued an action in mandamus, arguing the notes were not debt because they would not be designated as a debt, would not be guaranteed by the faith and credit of the state, and would be paid only from a special repayment fund. The Board further asserted that future taxes would not be levied to pay the notes, that taxes had already been levied, and that the issuance of the notes and the appropriation of monies to pay the notes would occur in the same fiscal year. The Court disagreed, holding that the statutory scheme that created the Board and authorized the issuance of the notes was unconstitutional:

This court, in its history of reviewing Sections 1, 2, and 3 of Article VIII of the Ohio Constitution, has been a watchful guardian of the concern of the framers of these constitutional prohibitions against the creation of state debt not authorized by the Constitution, and we feel constrained to again give heed to such concerns. There have been few exceptions to the constitutional constraints of Sections 1 and 3 of Article VIII allowed by this court. In essence such exceptions have been those financial transactions involving the erection or construction of a revenue-producing public building or facility, whose proceeds were placed in a “special fund.” [Citations omitted.]

\* \* \*

However, both parties agree that a “special fund” obligation is not involved in the instant case. No bonds are to be issued pursuant to this new law, no facilities will be provided or constructed with the note proceeds, and no income will be generated by any facility to retire the obligations. The notes will be retired by tax revenues.

*Id.*, 55 Ohio St.3d at 9, 561 N.E.2d at 934.

Observing that pre-existing statutes afforded the necessary devices for addressing cash flow issues, the Court held the procedure set out in R.C. 113.31 *et seq.* was unconstitutional because the scheme authorized state debt in derogation of Article VIII, Sections 1 and 2. *Id.*, 55 Ohio St.3d at 7, 11; 561 N.E.2d at 932, 935-36.

## **Presentations and Resources Considered**

### *Metcalf Presentation*

Seth Metcalf, deputy treasurer and executive counsel for the Ohio Treasurer of State, presented to the Finance, Taxation, and Economic Development Committee on May 8, 2014, March 12, 2015, and March 10, 2016. Mr. Metcalf pointed out that Section 1’s \$750,000 debt limitation,

representing 46 percent of the state's general revenue expenditures at the time the limit was set, is no longer meaningful and could be raised. He did not suggest a specific figure, but pointed out that today's debt of \$10.93 billion, as constitutionally authorized by the electors of the state, represents approximately 38 percent of the state's general revenue expenditures.

As a supplement to an increased overall debt limitation, Mr. Metcalf pointed to the adoption in 1999 of Article VIII, Section 17, which contains a sliding scale under which the total debt service of the state is limited to five percent of the total estimated revenues of the state for the general revenue fund. He also pointed out that this approach would not tie borrowing to specific purposes, thus giving the General Assembly flexibility as to how to use the public debt.

### *Briffault Presentation*

On June 4, 2015, Professor Richard Briffault of the Columbia University Law School, provided ideas for modernizing Article VIII to eliminate obsolete provisions and to prevent the need for provisions that might become obsolete in the future.

Prof. Briffault indicated that debt provisions began to be placed in state constitutions in the 1840s as a result of economic distress caused by excessive state borrowing to finance the construction of canals, turnpikes, and railroads. He described how states adopted provisions limiting state governments in their financial transactions, including limiting their ability to invest, to take an equity share in private enterprises, to lend credit, and to act as a surety. Limitations were also placed on the amount of debt that could be accumulated, as well as the procedures for entering into that debt. Prof. Briffault noted that many states, including Ohio, still have dollar caps on debt that are the same as they were in the 1840s or 1850s.

Describing the different ways states have dealt with the subject of state debt, Prof. Briffault recognized some states' approach of using a constitutional ban on debt. While those limits are considered low today, they were not necessarily low at the time of adoption. To get around the low limits, state constitutions may allow exceptions for invasion, wartime, or emergencies. He said these limitations generally apply to long-term debt, which doesn't have to be paid within the year in which it was issued, but exempt short-term debt, revenue bonds, and other nonguaranteed debt. Prof. Briffault noted that no state has learned to live without debt, with the result that, if the state constitution prohibits debt, states will amend their constitutions to allow it. The real debt limit then becomes the complicated nature of enacting a constitutional amendment, according to Prof. Briffault.

Describing other approaches states have taken, Prof. Briffault said it is possible to have a constitution with no debt limit, with the state legislative body amending the debt limit, rather than the voters doing so through an amendment process. He said another approach to debt issuance involves legislative approval followed by voter approval by a simple majority. Prof. Briffault said in this model, the procedure is for classic guaranteed debt, and doesn't cover short-term debt, revenue bonds, or non-guaranteed debt. He described another approach, in which states impose a flexible limit, or "carrying capacity," on debt. In that model, the constitution makers think the state can carry a certain amount of debt and that voter approval is not needed. He said one way states calculate this "carrying capacity" is by considering debt service as a

percentage of state revenues based upon a rolling three- or five-year average. A final approach identified by Prof. Briffault is where a state calculates the acceptable amount of debt or debt service based upon a percentage of state revenues, and then requires voter approval to go beyond that limit.

Summarizing these approaches, Prof. Briffault identified two “big pictures.” One approach is where the legislature proposes and voters decide, based on the notion that debt is long term and the decision to borrow requires a constitutional amendment. He said the other, “carrying capacity,” approach is binding, but recognizes that some financial arrangements are technical, and should not be decided by voters on a ballot proposition basis but left to the legislature to determine how much debt to devote to state enterprises. Prof. Briffault noted that some states have combined these two models.

### *Keen Presentation*

On October 8, 2015, Timothy S. Keen, director of OBM, provided an in-depth analysis of the history and purpose of Article VIII, as well as suggestions for modernizing its debt provisions.

Mr. Keen said Ohio’s earliest debt was issued by the Ohio Canal Commission in 1825 to finance the canal system, with the General Assembly in 1837 passing the Ohio Loan Law intended to assist in the building of additional canals by loaning up to one-third of the cost of construction to Ohio businesses that were able to raise the remaining costs. In practice, however, most of the loans went to railroad companies, spurring railroad growth in the state that competed with the canal business. Mr. Keen indicated that the end result of the debt issuance was an improved transportation system, but the debt also over-extended the treasury and the state had to borrow money to meet its expenses. Mr. Keen noted that, by 1839, Ohio had a deficit of more than one quarter of a million dollars and the Ohio Loan Law was repealed the next year. After reforms of the state’s taxation and tax collection system in 1846, the debt was refinanced and Ohio was able to service the debt, but the concern over debt was a subject of discussion at the Constitutional Convention of 1850-1851. Mr. Keen pointed out that this concern is the source of the \$750,000 debt limit in Article VIII, Section 1.

Mr. Keen continued that Section 2, as well as select other sections of Article VIII, expressly authorizes the purposes and amounts for which state debt may be issued, while Section 3 prohibits any other debt except that which has been expressly authorized. Further, he said, Section 4 prohibits the state from lending its aid and credit, and Section 5 prohibits the state from assuming the debts of any political subdivision or corporation. Mr. Keen concluded that the state’s challenging financial history at the time of enactment of Article VIII explains Ohio’s conservative approach to debt, debt authorization, and debt repayment.

Turning to the present-day approach to state debt, Mr. Keen noted that, by 22 constitutional amendments approved from 1921 to the present, Ohio voters have expressly authorized the incurrence of state debt for specific categories of capital facilities, to support research and development activities, and provide bonuses for Ohio’s war veterans. He said, currently, general obligation debt is authorized to be incurred for highways, K-12 and higher education facilities,

local public works infrastructure, natural resources, parks and conservation, and third frontier and coal research and development.

He said non-general obligation lease-appropriation debt is authorized to provide facilities for housing branches and agencies of state government and their functions, including state office buildings, correctional and juvenile detention facilities, and cultural, historical and sports facilities; mental health and developmental disability facilities; and parks and recreational facilities.

Mr. Keen emphasized that Article VIII's framework for authorizing debt has served the state exceptionally well for more than 150 years. He said the process of asking voters to review and approve bond authorizations sets an appropriately high bar for committing the tax resources of the state over the long term, adding that Ohio's long tradition of requiring voter approval ensures that debt is proposed only for essential needs, and those needs must be explained and presented to voters for their careful consideration. He complimented voters, calling them "worthy arbiters," based on their having approved 26 and rejected 17 Article VIII debt-related ballot issues since 1900. As a result, Mr. Keen said he would not recommend wholesale reform to Article VIII, and advocated retaining the \$750,000 debt limit in Section 1 because it forms the basis of Ohio's balanced budget requirement.

#### *Azoff Presentation*

On April 14, 2016, the committee heard a presentation by Jonathan Azoff, director of the Office of Debt Management and senior counsel to the Ohio Treasurer of State, on the role of his office in relation to state debt.

Mr. Azoff indicated the treasurer's office supports changing the reference to the sinking fund in Section 2 to the word "state." He said this recommendation is based on the fact that a true "sinking fund" no longer exists, further noting that Sections 7 through 11 of Article VIII are recommended for repeal because the state no longer utilizes a sinking fund, with the duties of the Sinking Fund Commission now being performed by the treasurer's office.

#### *Kauffman Presentation*

Kurt Kauffman, acting assistant director of the Office of Budget and Management (OBM), appeared before the committee on April 14, 2016 to provide comment related to Article VIII.

In addition to his other comments, Mr. Kauffman said OBM supports the proposal to retain Article VIII, Sections 1 and 3 in their current form, and to revise Section 2 only to eliminate what would be an outdated reference to the Commissioners of the Sinking Fund.

#### *Additional Presentations*

In addition to the major presentations by Mr. Metcalf, Prof. Briffault, Mr. Keen, Mr. Azoff, and Mr. Kauffman, as recounted above, the committee benefited from comments by Gregory W. Stype of Squire Patton Boggs (US) LLP, who serves as bond counsel to the Ohio Public

Facilities Commission; and Steven H. Steinglass, senior policy advisor to the Ohio Constitutional Modernization Commission.

On December 10, 2015, Mr. Steinglass pointed out that the framers of the 1851 constitution did not see the \$750,000 limit as a ceiling on borrowing, but rather as part of a constitutional framework that sought to bar incurring debt. He noted that the practice of incurring debt through specific constitutional authorizations did not begin until the 20<sup>th</sup> century. At the same meeting, Mr. Stype clarified that the \$750,000 limitation set out in Article VIII, Section 1, is not so much a limit on capital financing, as it is a limit on borrowing to contract debts to supply “casual deficits or failures in revenue, or to meet expenses not otherwise provided for.” Mr. Stype also noted that, in contrast to some other states, Ohio has long managed its cash flow needs in each fiscal year by using a “total operating fund” approach, rather than borrowing to meet cash flow needs.<sup>6</sup>

### **Discussion and Consideration**

In reviewing Article VIII, Section 1, the Finance, Taxation, and Economic Development Committee discussed whether to recommend retaining or modernizing the \$750,000 debt limit, which dates from 1851. Although the dollar amount of the debt limit is outdated, the committee concluded the limit is not an obstacle to state economic growth because voters have approved amendments to Article VIII authorizing the issuance of debt in excess of that amount. Thus, the committee decided to recommend retention of the \$750,000 debt limit in Section 1.

With regard to Section 2, the committee recognized the need to retain the state’s ability to contract debt in the event of a calamity such as war or insurrection. However, based on the committee’s decision to recommend repeal of sections relating to the Sinking Fund and the Sinking Fund Commission, the committee agreed the Sinking Fund reference should be removed from Section 2.

Regarding Section 3, the committee agreed that it was important to maintain that section’s emphasis on avoiding debt, recognizing that all state debt ultimately must be approved by the voters. Thus, the committee concluded it would be appropriate to retain Section 3 in its current form.

### **Action by the Finance, Taxation, and Economic Development Committee**

After formal consideration by the Finance, Taxation, and Economic Development Committee on April 14, 2016 and May 12, 2016, the committee voted on May 12, 2016 to issue a report and recommendation recommending that Article VIII, Sections 1, and 3 be retained in their current form, but that Section 2 be revised to remove the reference to the Sinking Fund, replacing it with a reference to “the state.”

### **Presentation to the Commission**

On June 9, 2016, on behalf of the Finance, Taxation, and Economic Development Committee, committee Chair Doug Cole appeared before the Commission to present the committee’s report

and recommendation, by which it recommended retention of Article VIII, Sections 1 and 3 in their current form, and an alteration to Section 2 to remove reference to the Sinking Fund.

Chair Cole explained the history and purpose of the provisions, emphasizing that, although the debt limit is outdated, proposing a higher limit is problematic, and expression of a debt limit is important to the public's perception of state spending. He said the low debt limit has not been an obstacle to the achievement of state financial goals because other provisions in the constitution allow the state to incur debt to meet its needs. Chair Cole also noted the committee's conclusion that Section 2's specific reference to the Sinking Fund as a source for paying down state debt is outdated and should be replaced with the more generic word "state." Finally, he expressed the committee's observation that Section 3 expresses and emphasizes a laudable policy of debt avoidance.

On September 8, 2016, on behalf of the Finance, Taxation, and Economic Development Committee, Executive Director Steven C. Hollon appeared before the Commission to provide a second presentation of the committee's report and recommendation. Mr. Hollon noted the report and recommendation's expression that Sections 1, 2, and 3 were intended to encourage careful stewardship of state financial resources, reiterating the committee's view that the sections remain relevant for this reason. Mr. Hollon again noted that Section 2's reference to the Sinking Fund was being recommended for removal due to the fact that the state no longer uses the Sinking Fund to pay down state debt.

### **Action by the Commission**

At the Commission meeting held September 8, 2016, Commission member Herb Asher moved to adopt the report and recommendation for Article VIII, Sections 1, 2, and 3, a motion that was seconded by Commission member Jo Ann Davidson.

A roll call vote was taken, and the motion passed unanimously by a vote of 25 to zero.

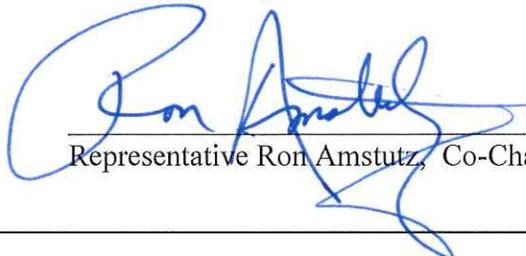
### **Conclusion**

The Ohio Constitutional Modernization Commission concludes that Article VIII, Sections 1 and 3 should be retained, and that Section 2 should be altered in order to remove reference to the Sinking Fund, replacing it with a generic reference to "the state."

### **Date Adopted**

After formal consideration by the Ohio Constitutional Modernization Commission on June 9, 2016, and September 8, 2016, the Commission voted to adopt the report and recommendation on September 8, 2016.

  
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Senator Charleta B. Tavares, Co-Chair

  
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Representative Ron Amstutz, Co-Chair

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## Endnotes

<sup>1</sup> Ohio Constitutional Revision Commission Recommendations for Amendments to the Ohio Constitution, Part 2, State Debt (Dec. 31, 1972),

<http://www.lsc.ohio.gov/ocrc/recommendations%20pt2%20state%20debt.pdf> (last visited Feb. 5, 2016).

<sup>2</sup> *Id.* at 23-31.

<sup>3</sup> *Id.* at 12-13.

<sup>4</sup> Source: Youngstown *Vindicator*, Nov. 6, 1977. Available at:

<https://news.google.com/newspapers?id=zfRJAAAAIBAJ&sjid=sYQMAAAAIBAJ&pg=2945,1851669&hl=en>  
(last visited March 28, 2016).

<sup>5</sup> See <http://www.sos.state.oh.us/sos/elections/Research/electResultsMain/1970-1979OfficialElectionResults/GenElect110877.aspx> (last visited March 28, 2016); and

<http://www.sos.state.oh.us/sos/upload/elections/historical/issuehist.pdf> (last visited March 28, 2016).

Meanwhile, voters have approved multiple constitutional amendments authorizing the issuance of state debt for the purposes of subsidizing low cost housing (Section 14, approved Nov. 2, 1982; Section 16, approved Nov. 6, 1990); financing coal research (Section 15, approved Nov. 5, 1985); financing local government efforts to improve roads, water, sewer, and other infrastructure (Section 2k, approved Nov. 3, 1987); improving parks, conservation and natural resources (Section 2l, approved Nov. 2, 1993); funding public works and highways (Section 2m, approved Nov. 7, 1995); funding school facilities (Section 2n, Section 17, approved Nov. 2, 1999); funding environmental conservation projects (Section 2o, approved Nov. 7, 2000; Section 2q, approved Nov. 4, 2008); creating jobs and stimulating economic growth (Section 2p, approved Nov. 8, 2005; amendment approved May 4, 2010); compensating veterans of the Persian Gulf, Afghanistan and Iraq Conflicts (Section 2r, approved Nov. 3, 2009); and for capital improvements (Section 2s, approved May 6, 2014). Source: Ohio Constitution Law and History Table of Proposed Amendments, Cleveland-Marshall College of Law Library, available at:

<http://guides.law.csuohio.edu/ohioconstitution/ohioconstitutionamendmentstable> (last visited March 28, 2016).

<sup>6</sup> R.C. 126.06 describes this process, providing:

The total operating fund consists of all funds in the state treasury except the auto registration distribution fund, local motor vehicle license tax fund, development bond retirement fund, facilities establishment fund, gasoline excise tax fund, higher education improvement fund, highway improvement bond retirement fund, highway capital improvement fund, improvements bond retirement fund, mental health facilities improvement fund, parks and recreation improvement fund, public improvements bond retirement fund, school district income tax fund, state agency facilities improvement fund, state and local government highway distribution fund, state highway safety fund, Vietnam conflict compensation fund, any other fund determined by the director of budget and management to be a bond fund or bond retirement fund, and such portion of the highway operating fund as is determined by the director of budget and management and the director of transportation to be restricted by Section 5a of Article XII, Ohio Constitution.

When determining the availability of money in the total operating fund to pay claims chargeable to a fund contained within the total operating fund, the director of budget and management shall use the same procedures and criteria the director employs in determining the availability of money in a fund contained within the total operating fund. The director may establish limits on the negative cash balance of the general revenue fund within the total operating fund, but in no case shall the negative cash balance of the general revenue fund exceed ten per cent of the total revenue of the general revenue fund in the preceding fiscal year.



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION

#### OHIO CONSTITUTION ARTICLE VIII SECTIONS 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2i, 2j, 2k AND PROPOSED SECTIONS 2t AND 18

#### AUTHORIZATION OF DEBT OBLIGATIONS

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The Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article VIII of the Ohio Constitution concerning the authorization of debt obligations. It is issued pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*The Commission recommends that Sections 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2j, and 2k, dealing with authorization of debt obligations, be repealed for the reason that all involve bonds that have been fully issued and paid off, or for which bonding authority has lapsed due to the passage of time.*

*Further, in order to protect the holders of any outstanding bonds or obligations issued under the authority of Sections 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2j, or 2k, the Commission recommends the adoption of new Section 18, either through language proposed in Attachment A, or through substantially similar language. The new provision would require that any obligation entered into by the state under the authority of any section of Article VIII that is later repealed remains in full force and effect and continues to be secured in accordance with the original terms of the obligation.*

*Finally, the Commission recommends the adoption of a new Section 2t, either through language proposed in Attachment B, or through substantially similar language, to authorize the issuance of general obligation bonds that could be used to refund obligations previously issued under the authority of Section 2i, and to issue new general obligation bonds for purposes related to facilities for mental health and developmental disabilities, parks and recreation, and housing branches and agencies of state government, as set forth in Section 2i.*

## Background

Article VIII deals with public debt and public works, and was adopted as part of the 1851 constitution.

Delegates to the 1851 Constitutional Convention sought to limit the actions of the General Assembly in obligating the financial interests of the state so as to avoid problems that had arisen when the state extended its credit to private interests, and to prevent another debt crisis, such as the one resulting from the construction of the state's transportation system.<sup>1</sup> As proposed by delegates to the 1851 Constitutional Convention, Article VIII initially barred the state from incurring debt except in limited circumstances, primarily involving cash flow and military invasions and other emergencies. *See* Article VIII, Sections 1, 2, and 3.

For nearly one hundred years, from the adoption of the 1851 constitution through 1947, the voters of the state approved just one constitutional provision authorizing the issuance of additional debt. That occurred in 1921, when the voters approved Section 2a, a provision that authorized debt for establishing a system of adjusted compensation for Ohio veterans of World War I.<sup>2</sup> Section 2a was later repealed in 1953.

Then, over a forty year period, from 1947 through 1987, voters approved ten constitutional provisions within Article VIII authorizing the creation of additional debt. The ten sections, as discussed herein, include Sections 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2i, 2j, and 2k.

Section 2b concerns the authorization of debt relating to adjusted compensation for service in World War II. It was adopted in 1947 and established a system of compensation for World War II veterans and their survivors by allowing the state to issue up to \$300 million in state bonds. To receive benefits, veterans had to be residents of the state for at least one year before entering service. Qualifying veterans or their survivors could receive up to \$400 in benefits. Veterans who served in the Merchant Marine, who were confined in penal institutions, or who were dishonorably discharged were ineligible. This provision required applications for payment to veterans or their survivors to be made before July 1, 1950.

Section 2c concerns the authorization of debt to construct the state highway system. It was adopted in 1953 and allowed the state to incur debt of up to \$500 million through the sale of bonds for the building and improvement of the state highway system. Section 2c was the first amendment to allow the state to incur debt for internal improvements, and is one of six amendments in Article VIII specifically providing funds for highways and roads.<sup>3</sup> No debt could be incurred under this section past March 1962, and all debt incurred under this authority had to be retired by 1972.

Section 2d concerns the authorization of debt for the payment of Korean Conflict bonuses. It was adopted in 1956 for the purpose of compensating Ohio veterans of the Korean Conflict who served on active duty from June 25, 1950 through July 19, 1953. The provision authorized the creation of the Korean Conflict Compensation Fund, funded through the sale of up to \$90 million in bonds and an initial transfer of \$4 million from the World War II fund established under Section 2b. The provision also created the Korean Conflict Compensation Bond Retirement

Fund to retire the debt on the bonds. As with the World War II fund, veterans or their survivors were eligible; however, veterans who served in the Merchant Marines, were confined in penal institutions, or were dishonorably discharged were not. All applications for compensation under this provision had to be made prior to January 1, 1959.

Section 2e relates to securing funds for public buildings. The section was adopted in 1955 to create a capital improvements bond retirement fund that would allocate up to \$150 million for building and improving structures at state penal, mental health, and welfare institutions, and at public schools and state-supported colleges and universities. The bonds and other obligations issued under this section had to be issued by December 1964. In addition, this section provided for the establishment of a state excise tax on cigarettes to pay any deficit in the fund.<sup>4</sup>

Section 2f authorizes the issuance of debt for school classrooms, support for universities, for recreation and conservation, and for state buildings. This section, adopted in 1963, funded many of the same projects referred to in Section 2e, including capital improvement projects for state-supported colleges and universities, as well as state penal, mental health, and welfare institutions. The section also permitted funds to be used for the establishment of parks and recreational areas and for the conservation of natural resources. Obligations issued under the authority of this section could not exceed \$250 million and had to mature in thirty years or less. The debt incurred under this section was to be retired through funds raised by the state's license, fuel, income, and property taxes, as well as through the excise tax on cigarettes established under section 2e, which could be collected through December 31, 1972, or until all the debt was retired.

Section 2g, approved by voters in 1964, allowed the state to issue debt up to \$500 million for highway and road construction. The revenues raised were to be used for the construction and repair of major state thoroughfares and urban extensions in the state's highway system. Retirement of the debt to finance these projects was to be made through fees and taxes, such as vehicle license and registration fees, and fuel and excise taxes. This section requires the entire debt to be discharged no later than 1989.

Section 2h authorizes the issuance of debt for development, specifically permitting the state to raise revenue in an amount up to \$290 million from the sale of bonds and other obligations to pay for state development projects. This section, adopted in 1965, allowed the state to spend funds on state-supported institutions of higher learning, with an emphasis on research and development, and for state projects dealing with flood control, state parks, and natural resource conservation. Funds also could be used to assist political subdivisions in building and extending water and sewage lines. The cutoff date for issuing obligations under this section was December 31, 1970, and all obligations issued under this section had to mature in thirty years or less.

Section 2i, approved by voters in 1968, relates to the state's ability to issue revenue bonds, sometimes referred to as lease-appropriation bonds, which are not supported by the full faith and credit of the state.<sup>5</sup> Specifically, the fifth paragraph of Article VIII, Section 2i authorizes the issuance of "revenue obligations and other obligations, *the owners or holders of which are not given the right to have excises or taxes levied by the general assembly for the payment of principal thereof or interest thereon*, for \* \* \* capital improvements for mental hygiene and retardation, parks and recreation, and housing of branches and agencies of state government,

which obligations \* \* \* shall not be deemed to be debts or bonded indebtedness of the state under other provisions of this Constitution.” [Emphasis added.] In lieu of a pledge of the state’s taxing power, payment of debt service on these obligations is legally “secured by a pledge under law, without necessity for further appropriation, of all or such portion as the general assembly authorizes of” any charges or other revenues or receipts that the state generates through the facilities that were financed with the debt. Notwithstanding this language, the actual source of payment of debt service on all obligations that have been issued for these purposes under Section 2i has been two-year lease-rental appropriations made by the General Assembly in each biennial state budget.<sup>6</sup>

Section 2j authorizes the creation of a compensation fund for Vietnam Conflict veterans and their survivors. It was adopted in 1973. To be eligible for compensation, veterans had to have served on active duty between August 5, 1964 and July 1, 1973, in the Republic of Vietnam or in hostile areas of Southeast Asia. The initial administrative costs of the fund were to be covered from the remaining balance of the Korean Conflict funds created by Section 2d, with the remaining revenues to be raised through the sale of up to \$300 million in bonds and other obligations. No bonds were to be issued after April 1977, and all applications for compensation had to be filed by January 1, 1978. As with the other amendments creating funds for war veterans and their survivors, compensation was not available for veterans who served in the Merchant Marine, were confined in penal institutions, or were dishonorably discharged.

Section 2k, adopted in 1987, was another amendment used to raise revenue for capital improvements to local public infrastructure. Section 2k provides that not more than \$120 million could be raised per calendar year, and that the total debt could not exceed \$1.2 billion with the condition that all obligations must mature within thirty years.

### **Amendments, Proposed Amendments, and Other Review**

The nine bond-authorizing sections recommended for repeal have never been amended.

The Ohio Constitutional Revision Commission (1970s Commission) studied Article VIII in depth and made extensive recommendations concerning how the state incurs debt.<sup>7</sup> The 1970s Commission recommended the repeal of the \$750,000 debt limitation in Article VIII, Section 1, replacing it with a limit based on six percent of the average annual revenue of the state.<sup>8</sup> It also recommended the repeal of seven obsolete debt-authorizing sections of Article VIII, Sections 2b, 2c, 2d, 2e, 2f, 2g, and 2h.<sup>9</sup>

The 1970s Commission recognized that the repeal of Sections 2b through 2h could adversely affect persons who held interest coupons or unredeemed bonds.<sup>10</sup> Therefore, the 1970s Commission included in its proposal a provision that would protect those who had vested interests in the bonds issued under the provisions being repealed.<sup>11</sup>

In November 1977, the General Assembly presented to voters a ballot issue that, if approved, would have repealed Sections 2b, 2c, 2d, 2e, 2f, 2g, and 2h, among other sections. However, Issue 4 was overwhelmingly defeated by a margin of 72.5 percent to 27.5 percent, and there has been no effort since to repeal those sections of Article VIII.<sup>12</sup>

## Litigation Involving the Provisions

No significant litigation has centered on the nine obsolete provisions being recommended for repeal. However, there has been some litigation involving Article VIII that is worthy of note.

An early recognition of the 1851 constitution's restriction on the state's ability to incur debt is set forth in *State v. Medbery*, 7 Ohio St. 522 (1857), in which the Ohio Supreme Court determined a five-year state public works contract, in the absence of revenue or appropriations by the General Assembly to fund the contract, created a debt obligation in violation of Article VIII, Sections 1 and 3.

The Court generally has upheld the adoption of constitutionally-based exceptions to the limitations on incurring debt. *See, e.g., Kasch v. Miller*, 104 Ohio St. 281, 135 N.E. 813 (1922), at syllabus (where statute provides that an improvement is to be paid for by the issue and sale of state bonds, with the principal and interest to be paid by revenues derived from the improvement, a state debt is not incurred within the purview of the state constitution).

The Court also has recognized the status of revenue bonds. In *State ex rel. Pub. Institutional Bldg. Auth. v. Griffith*, 135 Ohio St. 604, 22 N.E.2d 200 (1939), at syllabus paragraph 1, the Court held that the \$750,000 debt limitation only applies to debt for which the state assumes the risk of default; thus, it is not applicable to revenue bonds. More recently, in *State ex rel. Ohio Funds Mgmt. Bd. v. Walker*, 55 Ohio St.3d 1, 561 N.E.2d 927 (1990), the court reviewed the limitations on borrowing in Article VIII, holding that borrowing for short-term cash flow is state debt within the meaning of the limitations in Article VIII, Sections 1 and 3, and further rejecting the use of revenue bonds to finance short-term deficiencies in tax revenue. *Id.*, 55 Ohio St. 3d at 7, 561 N.E.2d at 932. *Accord State ex rel. Shkurti v. Withrow*, 32 Ohio St.3d 424, 513 N.E.2d 1332.

## Presentations and Resources Considered

### *Metcalf Presentation*

Seth Metcalf, deputy treasurer and executive counsel for the Ohio Treasurer of State, presented to the Finance, Taxation, and Economic Development Committee on May 8, 2014, March 12, 2015, and March 10, 2016. In addition to reviewing the history of Article VIII, including the \$750,000 limitation in Section 1, with the difficulties inherent in needing to go to the ballot for approval of additional borrowing. Although he identified areas of possible reform, Mr. Metcalf expressed that the state framework for authorizing debt has served the state exceptionally well.

Mr. Metcalf pointed out that the \$750,000 debt limitation, representing 46 percent of the state's general revenue expenditures at the time the limit was set, is no longer meaningful and could be raised. He did not suggest a specific figure, but pointed out that today's debt of \$10.93 billion, as constitutionally authorized by the electors of the state, represents approximately 38 percent of the state's general revenue expenditures.

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On June 4, 2015, Professor Richard Briffault of the Columbia University Law School, provided ideas for modernizing Article VIII to eliminate obsolete provisions and to prevent the need for provisions that might become obsolete in the future.

Prof. Briffault indicated that debt provisions began to be placed in state constitutions in the 1840s as a result of economic distress caused by excessive state borrowing to finance the construction of canals, turnpikes, and railroads. He described how states adopted provisions limiting state governments in their financial transactions, including limiting their ability to invest, to take an equity share in private enterprises, to lend credit, and to act as a surety. Limitations were also placed on the amount of debt that could be accumulated, as well as the procedures for entering into that debt. Prof. Briffault noted that many states, including Ohio, still have dollar caps on debt that are the same as they were in the 1840s or 1850s.

Describing the different ways states have dealt with the subject of state debt, Prof. Briffault recognized some states' approach of using a constitutional ban on debt. While those limits are considered low today, they were not necessarily low at the time of adoption. To get around the low limits, state constitutions may allow exceptions for invasion, wartime, or emergencies. He said these limitations generally apply to long-term debt, which doesn't have to be paid within the year in which it was issued, but exempt short-term debt, revenue bonds, and other nonguaranteed debt. Prof. Briffault noted that no state has learned to live without debt, with the result that, if the state constitution prohibits debt, states will amend their constitutions to allow it. The real debt limit then becomes the complicated nature of enacting a constitutional amendment, according to Prof. Briffault.

Describing other approaches states have taken, Prof. Briffault said it is possible to have a constitution with no debt limit, with the state legislative body amending the debt limit, rather than the voters doing so through an amendment process. He said another approach to debt issuance involves legislative approval followed by voter approval by a simple majority. Prof. Briffault said in this model, the procedure is for classic guaranteed debt, and doesn't cover short-term debt, revenue bonds, or non-guaranteed debt. He described another approach, in which states impose a flexible limit, or "carrying capacity," on debt. In that model, the constitution makers think the state can carry a certain amount of debt and that voter approval is not needed. He said one way states calculate this "carrying capacity" is by considering debt service as a percentage of state revenues based upon a rolling three- or five-year average. A final approach identified by Prof. Briffault is where a state calculates the acceptable amount of debt or debt service based upon a percentage of state revenues, and then requires voter approval to go beyond that limit.

Summarizing these approaches, Prof. Briffault identified two “big pictures.” One approach is where the legislature proposes and voters decide, based on the notion that debt is long term and the decision to borrow requires a constitutional amendment. He said the other, “carrying capacity,” approach is binding, but recognizes that some financial arrangements are technical, and should not be decided by voters on a ballot proposition basis but left to the legislature to determine how much debt to devote to state enterprises. Prof. Briffault noted that some states have combined these two models.

### *Keen Presentation*

On October 8, 2015, Timothy S. Keen, director of the Ohio Office of Budget and Management, provided an in-depth analysis of the history and purpose of Article VIII, as well as suggestions for modernizing its debt provisions.

Mr. Keen said Ohio’s earliest debt was issued by the Ohio Canal Commission in 1825 to finance the canal system, with the General Assembly in 1837 passing the Ohio Loan Law intended to assist in the building of additional canals by loaning up to one-third of the cost of construction to Ohio businesses that were able to raise the remaining costs. In practice, however, most of the loans went to railroad companies, spurring railroad growth in the state that competed with the canal business. Mr. Keen indicated that the end result of the debt issuance was an improved transportation system, but the debt also over-extended the treasury and the state had to borrow money to meet its expenses. Mr. Keen noted that, by 1839, Ohio had a deficit of more than one quarter of a million dollars and the Ohio Loan Law was repealed the next year. After reforms of the state’s taxation and tax collection system in 1846, the debt was refinanced and Ohio was able to service the debt, but the concern over debt was a subject of discussion at the Constitutional Convention of 1850-1851. Mr. Keen pointed out that this concern is the source of the \$750,000 debt limit in Article VIII, Section 1.

Mr. Keen continued that Section 2, as well as select other sections of Article VIII, expressly authorizes the purposes and amounts for which state debt may be issued, while Section 3 prohibits any other debt except that which has been expressly authorized. Further, he said, Section 4 prohibits the state from lending its aid and credit, and Section 5 prohibits the state from assuming the debts of any political subdivision or corporation. Mr. Keen concluded that the state’s challenging financial history at the time of enactment of Article VIII explains Ohio’s conservative approach to debt, debt authorization, and debt repayment.

Turning to the present-day approach to state debt, Mr. Keen noted that, by 22 constitutional amendments approved from 1921 to the present, Ohio voters have expressly authorized the incurrence of state debt for specific categories of capital facilities, to support research and development activities, and provide bonuses for Ohio’s war veterans. He said, currently, general obligation debt is authorized to be incurred for highways, K-12 and higher education facilities, local public works infrastructure, natural resources, parks and conservation, and third frontier and coal research and development.

He said non-general obligation lease-appropriation debt is authorized to provide facilities for housing branches and agencies of state government and their functions, including state office

buildings, correctional and juvenile detention facilities, and cultural, historical and sports facilities; mental health and developmental disability facilities; and parks and recreational facilities.

Mr. Keen emphasized that Article VIII's framework for authorizing debt has served the state exceptionally well for more than 150 years. He said the process of asking voters to review and approve bond authorizations sets an appropriately high bar for committing the tax resources of the state over the long term, adding that Ohio's long tradition of requiring voter approval ensures that debt is proposed only for essential needs, and those needs must be explained and presented to voters for their careful consideration. He complimented voters, calling them "worthy arbiters," based on their having approved 26 and rejected 17 Article VIII debt-related ballot issues since 1900.

As a result, Mr. Keen said he would not recommend wholesale reform. He noted the credit agencies' ratings emphasize Ohio's conservative debt practice, with Ohio's credit rating being in the second highest possible category, known as "AA+," which keeps the interest rates paid on state bonds very low. Mr. Keen added that, since 1973, constitutional amendments authorizing new state debt have generally provided for general obligation security, but that the state still issues several categories of lease-appropriation debt under Section 2i, a section approved by the voters in 1968. He said that while this debt is functionally no different from the state's perspective, the subject-to-appropriation requirement lowers its credit rating to "AA" and, as a result, the state pays a higher rate of interest, typically ranging from 0.1 percent to 0.3 percent, versus its general obligation counterpart. Because of this, Mr. Keen suggested that the lease-appropriation debt authorization provisions of Section 2i for housing branches and agencies of state government, and for mental health, developmental disability, and parks and recreation facilities, be replaced with a general obligation authorization for those purposes. He estimated that, for each \$100 million of debt issued over 20 years, this change to general obligation security would save state taxpayers \$1.5 to \$4 million over the life of the debt.

In relation to the question of whether to recommend repeal or removal of inactive bond authorization sections, Mr. Keen said while he has no concern with allowing those provisions to remain, elimination of inactive sections could be viewed as helpful cleanup, noting this last occurred when Section 2a, authorizing compensation payments to World War I veterans, was repealed in 1953. He further observed that the 1970s Commission recommended the repeal or modification of additional sections within Article VIII, although only Section 12, providing for a superintendent of public works, was later repealed. Mr. Keen identified current sections for possible repeal as including 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2j, and 2k.

As part of his presentation, Mr. Keen proposed the committee recommend the repeal of the nine obsolete bond-authorizing provisions, plus five other provisions concerning the Commissioners of the Sinking Fund.<sup>13</sup> In addition, Mr. Keen proposed authorizing the conversion of lease authorization/revenue bonds authorized by Section 2i to general obligation bonds in order to obtain more favorable interest rates.

### *Azoff Presentation*

On April 14, 2016, Jonathan Azoff, director of the Office of Debt Management and senior counsel to the Ohio Treasurer of State, presented to the committee on the role of his office in relation to state debt.

In advocating that the committee recommend the use of the lease-appropriation debt rather than general obligation debt, Mr. Azoff said if the state were to default on a general obligation bond, bond holders would have the ability to bring an action to force the state to increase revenues, but lease-appropriation debt does not provide that remedy. Instead, he said, with lease-appropriation debt, the state's obligation to pay bondholders is entirely contingent on the General Assembly appropriating the funds needed to pay the debt service in its biennial budget.

Mr. Azoff noted that lease-appropriation debt provides the state flexibility in the event of a fiscal emergency. He said the state pays only slightly more interest when it borrows on a lease-appropriation basis, and that investors are "familiar and comfortable with the state's lease-appropriation credit, and are willing to loan money on that basis for a similar rate, even though they lose the ability to force the state to raise revenue to repay the debt."

Mr. Azoff asserted that the utility of lease-appropriation debt offsets other concerns, including that general obligation debt places more of a burden on taxpayers.

### *Kauffman Presentation*

Kurt Kauffman, acting assistant director of the Office of Budget and Management (OBM), spoke to the committee on April 14, 2016 regarding Article VIII.

Mr. Kauffman said OBM supports the proposal to repeal the identified inactive bond issuance sections and to protect the holders of any outstanding bonds issued under those sections by confirming the bonds continue to be secured pursuant to their original terms. He said OBM also strongly supports modernizing the lease-appropriation debt authorizations of Section 2i by replacing them with a general obligation debt authorization. He noted this change would be consistent with all GRF-backed debt authorizations passed by the voters since 1973, and would save taxpayer dollars by improving the credit rating and thus lowering the interest cost on all future issuances of debt for these purposes.

### *Additional Presentations*

In addition to the major presentations by Mr. Metcalf, Prof. Briffault, Mr. Keen, Mr. Azoff, and Mr. Kauffman, as recounted above, the committee benefited from comments by Gregory W. Stype of Squire Patton Boggs (US) LLP, who serves as bond counsel to the Ohio Public Facilities Commission; and Steven H. Steinglass, senior policy advisor to the Ohio Constitutional Modernization Commission.

On June 13, 2013, Mr. Kauffman presented an introduction to the topic of state debt, including limitation on debt, debt authorizations, and the sinking fund provisions. Mr. Kauffman was supported in his presentation by Mr. Stype.

On December 10, 2015, Mr. Steinglass pointed out that the framers of the 1851 constitution did not see the \$750,000 limit as a ceiling on borrowing, but rather as part of a constitutional framework that sought to bar incurring debt. He noted that the practice of incurring debt through specific constitutional authorizations did not begin until the 20<sup>th</sup> century. At the same meeting, Mr. Stype clarified that the \$750,000 limitation set out in Article VIII, Section 1, is not so much a limit on capital financing, as it is a limit on borrowing to contract debts to supply “casual deficits or failures in revenue, or to meet expenses not otherwise provided for.” Mr. Stype also noted that, in contrast to some other states, Ohio has long managed its cash flow needs in each fiscal year by using a “total operating fund” approach, rather than borrowing to meet cash flow needs.<sup>14</sup>

### **Discussion and Consideration**

In reviewing Article VIII, Sections 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2j, and 2k, the Finance, Taxation, and Economic Development Committee discussed whether it should recommend that the state follow the precedent established in 1953, when it repealed Article VIII, Section 2a (dealing with authorization for the issuance of bonds for the benefit of Ohio veterans who served in World War I). The committee also considered whether it is appropriate to leave these provisions in the constitution primarily as a historical reference, even if they are now obsolete, or whether it is better to clear out these provisions that are no longer of any force or effect, so as to make the constitution more readable, and by extension, more transparent.

The committee also discussed whether to recommend adoption of a new section that would recognize the state’s duty to fulfill any obligations issued under the authority of Sections 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2j, and 2k that remain outstanding at the time of the repeal of those sections. This proposed new section also would acknowledge the duty to fulfill obligations issued under the authority of future debt authorization provisions. Such an amendment would prevent adverse consequences to persons holding unredeemed interest coupons and unredeemed bonds, both currently and in the future.

In addition, the committee discussed whether to recommend a new constitutional provision that would allow the General Assembly to authorize the issuance of general obligation bonds for the purposes described in the fifth paragraph of Article VIII, Section 2i. During its discussion, the committee considered whether including a new provision for this purpose would enable the state to obtain more favorable interest rates on the debt.

Finally, the committee considered the potential effect of the repeal of the noted provisions on the length of the constitution. The Ohio Constitution contains approximately 54,000 words, making it the tenth longest state constitution in the nation. The nine provisions at Article VIII, Sections 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2j, and 2k contain approximately 12,000 words. The inclusion of new provisions addressing continuing obligations to bondholders would add no more than 1,000

words. Thus, the committee considered that these changes would shorten the constitution by more than 11,000 words, or approximately 20 percent of its current length.

### **Action by the Finance, Taxation, and Economic Development Committee**

After formal consideration by the Finance, Taxation, and Economic Development Committee on April 14, 2016 and May 12, 2016, the committee voted on May 12, 2016 to issue a report and recommendation recommending that Article VIII, Sections 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2j, and 2k be repealed, that a new Section 18 be adopted to protect the holders of any outstanding bonds or obligations issued under the authority of Sections 2b through 2h, 2k, and 2j, and that a new Section 2t be adopted to authorize the issuance of general obligation bonds that could be used to refund obligations previously issued under the authority of Section 2i and to issue new general obligation bonds for purposes set out in Section 2i.

### **Presentation to the Commission**

On June 9, 2016, on behalf of the Finance, Taxation, and Economic Development Committee, committee Chair Doug Cole appeared before the Commission to present the committee's report and recommendation, by which it recommended repeal of Article VIII, Sections 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2j, and 2k, and the adoption of a new Section 18 and Section 2t. Chair Cole explained the history and purpose of the provisions, indicating that the committee determined it would be appropriate to repeal Article VIII, Sections 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2j, and 2k, to adopt new Section 18 to address any outstanding bonds or obligations, and adopt new Section 2t to permit general obligation bonds to be issued for purposes described in Section 2i.

On September 8, 2016, on behalf of the Finance, Taxation, and Economic Development Committee, Executive Director Steven C. Hollon appeared before the Commission to provide a second presentation of the committee's report and recommendation. Mr. Hollon indicated the report and recommendation outlines the purpose of the sections, noting that the lapse of the bonding authority and the passage of time have rendered Sections 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2j, and 2k obsolete. Mr. Hollon further noted that the report and recommendation supports the adoption of a new Section 2t and a new Section 18 to address concerns related to Section 2i and to protect potential holders of outstanding bonds from any adverse consequences related to the repeal of the obsolete sections.

### **Action by the Commission**

At the Commission meeting held September 8, 2016, Commission member Kathleen Trafford moved to adopt the report and recommendation for Article VIII, Sections 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2i, 2j, 2k, and proposed Sections 18 and 2t, a motion that was seconded by Commission member Bob Taft.

After general discussion, a roll call vote was taken, and the motion passed unanimously by a vote of 26 to zero.

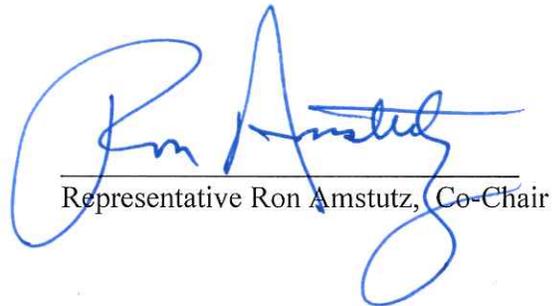
## Conclusion

The Ohio Constitutional Modernization Commission concludes that Article VIII, Sections 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2j, and 2k should be repealed, and that proposed Sections 18 and 2t should be adopted.

## Date Adopted

After formal consideration by the Ohio Constitutional Modernization Commission on June 9, 2016, and September 8, 2016, the Commission voted to adopt the report and recommendation on September 8, 2016.

  
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Senator Charleta B. Tavares, Co-Chair

  
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Representative Ron Amstutz, Co-Chair

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## Endnotes

<sup>1</sup> Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution* 233 (2<sup>nd</sup> prtg. 2011).

Ohio was not unique in facing the economic consequences of overspending on transportation infrastructure, nor in adopting constitutional limitations on state debt as a result. By 1860, 19 states had constitutional debt limitations, and by the early 20<sup>th</sup> Century, nearly all state constitutions contained such limitations. Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 Rutgers L.J. 907, 917, citing B. U. Ratchford, *American State Debts* (1941); Alberta M. Sbragia, *Debt Wish, Entrepreneurial Cities, U.S. Federalism, and Economic Development* (1996). See also Richard Briffault, “State and Local Finance,” in *State Constitutions for the Twenty-first Century* (G. Alan Tarr & Robert F. Williams, eds. New York: SUNY Press. 2006); Stewart E. Sterk & Elizabeth S. Goldman, *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 Wis. L.Rev. 1301 (1991).

For more on the history of the 1850-51 Constitutional Convention in relation to the state debt provisions in Article VIII, see David M. Gold, *Public Aid to Private Enterprise Under the Ohio Constitution: Sections 4, 6, and 13 of Article VIII in Historical Perspective*, 16 U. Tol. L.Rev. 405 (1984-85).

<sup>2</sup> The text of repealed Section 2a may be found at: Page’s Ohio Rev. Code Ann., 518 (Carl L. Meier & John L. Mason, eds. 1953).

<sup>3</sup> Steinglass & Scarselli, *supra* at 242.

<sup>4</sup> *Id.* at 248: “Despite the title given to this section by the secretary of state, this section has nothing to do with securing funds for highway construction. In fact, section 2e specifically excludes ‘highways’ from the projects that can be funded.”

<sup>5</sup> For an example of a provision pledging the “full faith and credit” of the state, see Oh. Const. art. VIII § 2n(C) (“Obligations issued under this section are general obligations of the state. The full faith and credit, revenue, and taxing power of the state shall be pledged to the payment of debt service on those outstanding obligations as it

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becomes due.”); *See also State ex. rel. Pub. Institutional Bldg. Auth. v. Griffith*, 135 Ohio St. 604, 22 N.E.2d 200 (1939).

<sup>6</sup> *See, e.g.*, Legislative Service Commission, *A Guidebook for Ohio Legislators*, Ch. 8, “*The Ohio Budget Process*,” (14<sup>th</sup> ed. 2015-16), <http://www.lsc.ohio.gov/guidebook/> (last visited Feb. 8, 2016).

<sup>7</sup> Ohio Constitutional Revision Commission Recommendations for Amendments to the Ohio Constitution, Part 2, State Debt (Dec. 31, 1972), <http://www.lsc.ohio.gov/ocrc/recommendations%20pt2%20state%20debt.pdf> (last visited Feb. 5, 2016).

<sup>8</sup> *Id.* at 23-31.

<sup>9</sup> *Id.* at 11, 13.

<sup>10</sup> Ohio Constitutional Revision Commission Recommendations for Amendments to the Ohio Constitution, Part 2, State Debt, 42-43 (Dec. 31, 1972), <http://www.lsc.ohio.gov/ocrc/recommendations%20pt2%20state%20debt.pdf> (last visited Feb. 5, 2016).

<sup>11</sup> *Id.* That provision reads as follows:

All obligations of the state issued under authority of any section of Article VIII of the Constitution of Ohio repealed by this amendment, or under authority of any law enacted pursuant to or validated by any such section, which obligations are outstanding on the date of the adoption of this amendment, shall remain valid and enforceable obligations of the state according to their terms and conditions. Any law enacted pursuant to or validated by any section of Article VIII of this Constitution repealed by this amendment shall remain valid and enforceable as if such section had not been repealed. The repeal of such sections and the adoption of this amendment shall not be deemed to impair, diminish, or restrict the rights or benefits of any holder or owner of any such obligations, nor any liability, covenant, or pledge of the state with respect thereto, including those for the levy and collection of taxes, the maintenance of funds, and the appropriation and application of money.

<sup>12</sup> *See* <http://www.sos.state.oh.us/sos/elections/Research/electResultsMain/1970-1979OfficialElectionResults/GenElect110877.aspx> (last visited March 28, 2016); and <http://www.sos.state.oh.us/sos/upload/elections/historical/issuehist.pdf> (last visited March 28, 2016).

Meanwhile, voters have approved multiple constitutional amendments authorizing the issuance of state debt for the purposes of subsidizing low cost housing (Section 14, approved Nov. 2, 1982; Section 16, approved Nov. 6, 1990); financing coal research (Section 15, approved Nov. 5, 1985); financing local government efforts to improve roads, water, sewer, and other infrastructure (Section 2k, approved Nov. 3, 1987); improving parks, conservation and natural resources (Section 2l, approved Nov. 2, 1993); funding public works and highways (Section 2m, approved Nov. 7, 1995); funding school facilities (Section 2n, Section 17, approved Nov. 2, 1999); funding environmental conservation projects (Section 2o, approved Nov. 7, 2000; Section 2q, approved Nov. 4, 2008); creating jobs and stimulating economic growth (Section 2p, approved Nov. 8, 2005; amendment approved May 4, 2010); compensating veterans of the Persian Gulf, Afghanistan and Iraq Conflicts (Section 2r, approved Nov. 3, 2009); and for capital improvements (Section 2s, approved May 6, 2014). Source: Ohio Constitution Law and History Table of Proposed Amendments, Cleveland-Marshall College of Law Library, available at: <http://guides.law.csuohio.edu/ohioconstitution/ohioconstitutionamendmentstable> (last visited March 28, 2016).

<sup>13</sup> Although Mr. Keen proposed a repeal of sections of Article VIII related to the Sinking Fund, this report and recommendation does not address the Sinking Fund provisions. The committee is issuing a separate report and recommendation addressing constitutional provisions related to the Sinking Fund.

<sup>14</sup> R.C. 126.06 provides:

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The total operating fund consists of all funds in the state treasury except the auto registration distribution fund, local motor vehicle license tax fund, development bond retirement fund, facilities establishment fund, gasoline excise tax fund, higher education improvement fund, highway improvement bond retirement fund, highway capital improvement fund, improvements bond retirement fund, mental health facilities improvement fund, parks and recreation improvement fund, public improvements bond retirement fund, school district income tax fund, state agency facilities improvement fund, state and local government highway distribution fund, state highway safety fund, Vietnam conflict compensation fund, any other fund determined by the director of budget and management to be a bond fund or bond retirement fund, and such portion of the highway operating fund as is determined by the director of budget and management and the director of transportation to be restricted by Section 5a of Article XII, Ohio Constitution.

When determining the availability of money in the total operating fund to pay claims chargeable to a fund contained within the total operating fund, the director of budget and management shall use the same procedures and criteria the director employs in determining the availability of money in a fund contained within the total operating fund. The director may establish limits on the negative cash balance of the general revenue fund within the total operating fund, but in no case shall the negative cash balance of the general revenue fund exceed ten per cent of the total revenue of the general revenue fund in the preceding fiscal year.

**ATTACHMENT A**

ARTICLE VIII

Section 18. If any section of Article VIII that authorizes the issuance of debt or other obligation is repealed, any outstanding debt or other obligation issued under authority of the section prior to its repeal shall remain in full force and effect and continue to be secured in accordance with its original terms.

## ATTACHMENT B

### ARTICLE VIII

Section 2t. (A) The General Assembly may provide by law, subject to the limitations of and in accordance with this section, for the issuance of bonds and other obligations of the state for the purpose of paying costs for facilities for mental health and developmental disabilities, parks and recreation, and housing of branches and agencies of state government, and to refund obligations previously issued under the authority of the fifth paragraph of Section 2i of Article VIII for these purposes (which Section 2i referred to “mental health and developmental disabilities” as “mental hygiene and retardation”).

(B) Each obligation issued under division (A) of section shall mature no later than the thirty-first day of December of the twenty-fifth calendar year after its issuance, except that obligations issued to refund other obligations shall mature not later than the thirty-first day of December of the twenty-fifth calendar year after the year in which the original obligation to pay was issued or entered into.

(C) Obligations issued under division (A) of this section shall be general obligations of the state. The full faith and credit, revenue, and taxing power of the state shall be pledged to the payment of debt service on those outstanding obligations as it becomes due, and bond retirement fund provisions shall be made for payment of that debt service. Provision shall be made by law for the sufficiency and appropriation, for purposes of paying debt service, of excises, taxes, and revenues so pledged or committed to debt service, and for covenants to continue the levy, collection, and application of sufficient excises, taxes, and revenues to the extent needed for that purpose. Notwithstanding section 22 of Article II of this constitution, no further act of

appropriation shall be necessary for that purpose. The obligations and provisions for the payment of debt service on them are not subject to Sections 5, 6, and 11 of Article XII of this constitution. Moneys referred to in Section 5a of Article XII of this constitution may not be pledged or used for the payment of that debt service.

(D) In the case of the issuance of any of those obligations as bond anticipation notes, provision shall be made by law or in the bond or note proceedings for the establishment and maintenance, during the period the notes are outstanding, of special funds into which there shall be paid, from the sources authorized for payment of the bonds anticipated, the amount that would have been sufficient to pay the principal that would have been payable on those bonds during that period if bonds maturing serially in each year over the maximum period of maturity referred to in division (B) of this section had been issued without the prior issuance of the notes. The special funds and investment income on them shall be used solely for the payment of principal of those notes or of the bonds anticipated.

(E) Obligations issued under, or pursuant to, this section, their transfer, and the principal, interest, interest equivalent, and other income or accreted amounts on them, including any profit made on their sale, exchange, or other disposition, shall at all times be free from taxation within the state.

(F) This section shall be implemented in the manner and to the extent provided by the General Assembly by law, including provision for the procedure for incurring, refunding, retiring, and evidencing obligations referred to in this section. The total principal amount of obligations issued under division (A) shall be determined by the General Assembly, subject to the limitation provided for in section 17 of this article.

(G) The authorizations in this section are in addition to, cumulative with, and not a limitation on, authorizations contained in other sections of this article; are in addition to, cumulative with, and not a limitation on, the authority of the General Assembly under other provisions of this constitution; and do not impair any law previously enacted by the General Assembly.

(H) As used in this section:

(1) "Costs" includes, without limitation, the costs of acquisition, construction, improvement, expansion, planning, and equipping.

(2) "Debt service" means the principal and interest and other accreted amounts payable on the obligations referred to.



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION

#### OHIO CONSTITUTION ARTICLE VIII SECTIONS 2l, 2m, 2n, 2o, 2p, 2q, 2r, AND 2s

#### ADDITIONAL AUTHORIZATION OF DEBT OBLIGATIONS

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The Ohio Constitutional Modernization Commission adopts this report and recommendation regarding Sections 2l, 2m, 2n, 2o, 2p, 2q, 2r, and 2s of Article VIII of the Ohio Constitution concerning public debt and public works. It is issued pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*The Commission recommends that Sections 2l, 2m, 2n, 2o, 2p, 2q, 2r, and 2s of Article VIII dealing with authorization of debt obligations be retained in their present form.*

#### **Background**

Article VIII deals with public debt and public works, and was adopted as part of the 1851 constitution.

Delegates to the 1851 Constitutional Convention sought to limit the actions of the General Assembly in obligating the financial interests of the state so as to avoid problems that had arisen when the state extended its credit to private interests and to prevent another debt crisis, such as the one resulting from the construction of the state's transportation system.<sup>1</sup> As proposed by delegates to the 1851 Constitutional Convention, Article VIII initially barred the state from incurring debt in excess of \$750,000, except in limited circumstances, primarily involving cash flow and military invasions and other emergencies. *See* Article VIII, Sections 1, 2, and 3.

From the adoption of the 1851 Constitution through 1947, the voters of the state approved just one constitutional provision authorizing the issuance of additional debt. That occurred in 1921, when the voters approved section 2a authorizing debt for establishing a system of adjusted compensation for Ohio veterans of World War I.<sup>2</sup> From 1947 through 1987, voters subsequently adopted other constitutional provisions authorizing the issuance of state debt for purposes that included compensation to veterans of World War II and the Korean and Vietnam Conflicts; construction of the state highway system, public buildings, and local public infrastructure; and

the preservation and conservation of natural resources and the establishment of state recreational areas. These sections, enumerated as Sections 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2j, and 2k, through a separate report and recommendation, have been recommended for repeal based on their obsolescence.

Beginning with Section 2l in 1993, voters approved eight additional constitutional provisions within Article VIII authorizing the creation of debt, which are Sections 2l, 2m, 2n, 2o, 2p, 2q, 2r, and 2s. In contrast to Sections 2b, 2c, 2d, 2e, 2f, 2h, 2j, and 2k, the sections covered in this report and recommendation do not involve bonds that have been fully issued and paid off, or their bonding authority has not yet lapsed.<sup>3</sup>

Section 2l authorizes the issuance of bonds and other obligations to finance the costs of capital improvements to state and local parks, land and water recreation facilities, soil and water restoration and protection, land and water management, fish and wildlife resource management, and other projects that enhance the use and enjoyment of natural resources. Adopted in 1993, the provision contains a statement of purpose that the capital improvements are necessary and appropriate to improve the quality of life of the people of Ohio, to ensure public health, safety and welfare, and to enhance employment opportunities. The section permits the state to support, by grants or contributions, capital improvements of this nature that are undertaken by local government entities. Significantly, the section exempts the bonds issued pursuant to its authority from operation of other constitutional provisions that strictly limit debt, or that limit the state's ability to enter into cooperative financial arrangements with private enterprise or local government.

Section 2m similarly provides for the issuance of bonds and other obligations to finance public infrastructure capital improvements of municipal corporations, counties, townships, and other governmental entities, and for highway capital improvements. The section defines "public infrastructure capital improvements" as being limited to roads and bridges, wastewater treatment and water supply systems, solid waste disposal facilities, and storm water and sanitary collection, storage, and treatment facilities, including costs related to real property, facilities, and equipment. Adopted in 1995, the section updates and modifies Section 2k, which had limited debt for public infrastructure to not more than \$120 million per calendar year, with the total debt not to exceed \$1.2 billion and a requirement that all obligations must mature within thirty years. Under Section 2m, the state is authorized to issue an additional \$1.2 billion, with no infrastructure obligations to be issued under Section 2m until at least \$1.2 billion aggregate principal amount of obligations have been issued pursuant to Section 2k. The provision also requires the use, where practicable, of Ohio products, materials, services, and labor for projects financed under Section 2m.

Section 2n authorizes debt issuance for the purpose of funding public school facilities for both K-12 and for state-supported and state-assisted institutions of higher education. Adopted in 1999, Section 2n also provides that net state lottery proceeds may be pledged or used to pay the debt service on bonds issued under the provision for K-12 educational purposes. As acknowledged by the Ohio Supreme Court in *DeRolph v. State*, 93 Ohio St.3d 309, 2001-Ohio-1343, 754 N.E.2d 1184 (*DeRolph III*), Section 2n enhanced the state's ability to issue bonds to fund schools, and was proposed and adopted subsequent to Court's decision in *DeRolph v. State*,

78 Ohio St.3d 193, 208, 1997-Ohio-84, 677 N.E.2d 733, 744 (*DeRolph I*).<sup>4</sup> In *DeRolph I*, a majority of the Court concluded that state funding of schools is not adequate if school districts lack sufficient funds to provide a safe and healthy learning environment. Division (F) of Section 2n limits the total principal amount of obligations issued to an amount determined by the General Assembly, subject to the limitation provided in Section 17, which was adopted by voters on the same ballot. Article VIII, Section 17 provides, in part, that direct obligations of the state may not be issued if the amount needed in a future fiscal year to service the direct obligation debt exceeds five percent of the total estimated state revenue for the issuing year. Thus, the amount of debt issued under Section 2n for a given year is limited to five percent of the total estimated revenues of the state from the General Revenue Fund and from net state lottery proceeds for that year.

Section 2o, adopted in 2000, authorizes bonds for environmental, conservation, preservation, and revitalization projects in order to protect water and natural resources, preserve natural areas and farmlands, improve urban areas, clean up pollution, and enhance the use and enjoyment of natural areas and resources. Under the provision, while the full faith and credit of the state is pledged to conservation projects, it is not pledged to revitalization projects, the bonds for which are designated to be repaid from “all or such portion of designated revenues and receipts of the state as the General Assembly authorizes.” Section 2o(B)(2). The section requires the General Assembly to provide by law for limitations on the granting or lending of proceeds of these obligations to parties to pay costs of cleanup or remediation of contamination for which they are determined to be responsible. The section allows the state to provide grants, loans, or other support to finance projects undertaken by local government, or by non-profit organizations at the direction of local government, exempting such obligations from application of constitutional sections that limit or prohibit such arrangements. As with Section 2n, Section 17’s five percent limitation on the amount of debt issued applies.

Section 2p relates to bonds for economic and educational purposes and local government projects, specifically for the purpose of capital improvements to infrastructure, and for research and development in support of Ohio industry, commerce, and business. Adopted in 2005, the section was amended in 2010 to expand the Third Frontier program, an initiative designed to encourage state economic growth through grants and loans to private industry and educational institutions. The 2010 amendment continued the funding approved in 2005. The section allows the General Assembly to provide by law for the issuance of general obligation bonds and other obligations for the purpose of financing related projects, with prescribed limitations on the dollar amount to be issued in fulfillment of the purposes of the provision.

Section 2q, adopted in 2008 and titled the “Clean Ohio Fund Amendment,” authorizes the General Assembly to issue up to \$200 million in bonds for conservation and preservation of natural areas, farmlands, park and recreation facilities, and to support other natural areas and natural resource management projects. The provision also authorizes the issuance of bonds up to \$200 million for environmental revitalization and cleanup projects. Section 2q limits the amount borrowed in any one fiscal year to \$50 million, plus the principal amount of obligations that, in any prior fiscal year, could have been issued but were not.

Section 2r was adopted in 2009 to provide compensation to the veterans of the Persian Gulf, Afghanistan, and Iraq Conflicts, and their survivors. To be eligible for compensation, veterans

had to have served on active duty in one or more of those locations during the specified time periods. Unlike previous war veteran compensation amendments, Section 2r authorizes the Public Facilities Commission, rather than the Sinking Fund Commission, to issue and sell bonds and other obligations to fund payment, pledging the state's full faith and credit, revenue, and taxing power to pay the debt service. Additionally, the section gives responsibility to the Ohio Department of Veterans Services for paying compensation and adopting rules regarding amounts, residency, or other relevant factors, in accordance with Revised Code Chapter 119.

Section 2s, adopted in 2014, authorized the General Assembly to issue bonds to finance public infrastructure capital improvements of municipal corporations, counties, townships, and other governmental entities, with the improvements being limited to roads and bridges, wastewater treatment and water supply systems, solid waste disposal facilities, and storm water and sanitary collection, storage, and treatment facilities. With broad, nearly unanimous bipartisan support in the General Assembly, the ballot measure was submitted to voters on May 6, 2014, and was approved by a margin of 65.11 percent to 34.89 percent.<sup>5</sup>

### **Amendments, Proposed Amendments, and Other Review**

Sections 2l, 2m, 2n, 2o, 2p, 2q, 2r, and 2s, are of relatively recent adoption and have not been amended.

### **Litigation Involving the Provisions**

There has been no litigation involving Article VIII, Sections 2l, 2m, 2n, 2o, 2p, 2q, 2r, or 2s.

The Ohio Supreme Court generally has upheld the adoption of constitutionally-based exceptions to the limitations on incurring debt. *See, e.g., Kasch v. Miller*, 104 Ohio St. 281, 135 N.E. 813 (1922), at syllabus (where statute provides that an improvement is to be paid for by the issue and sale of state bonds, with the principal and interest to be paid by revenues derived from the improvement, a state debt is not incurred within the purview of the state constitution).

### **Presentations and Resources Considered**

#### *Metcalf Presentation*

Seth Metcalf, deputy treasurer and executive counsel for the Ohio Treasurer of State, presented to the Finance, Taxation, and Economic Development Committee on May 8, 2014, March 12, 2015, and March 10, 2016. In addition to reviewing the history of Article VIII, including the \$750,000 limitation in Section 1, Mr. Metcalf noted the difficulties inherent in needing to go to the ballot for approval of additional borrowing. Although he identified areas of possible reform, Mr. Metcalf expressed that the state framework for authorizing debt has served the state exceptionally well.

As a supplement to an increased overall debt limitation, Mr. Metcalf pointed to the adoption in 1999 of Article VIII, Section 17, which contains a sliding scale under which the total debt service of the state is limited to five percent of the total estimated revenues of the state for the

general revenue fund. He also pointed out that this approach would not tie borrowing to specific purposes, thus giving the General Assembly flexibility as to how to use the public debt.

### *Briffault Presentation*

On June 4, 2015, Professor Richard Briffault of the Columbia University Law School, provided ideas for modernizing Article VIII to eliminate obsolete provisions and to prevent the need for provisions that might become obsolete in the future.

Describing the different ways states have dealt with the subject of state debt, Prof. Briffault recognized some states' approach of using a constitutional ban on debt. While those limits are considered low today, they were not necessarily low at the time of adoption. Prof. Briffault noted that no state has learned to live without debt, with the result that, if the state constitution prohibits debt, states will amend their constitutions to allow it. The real debt limit then becomes the complicated nature of enacting a constitutional amendment, according to Prof. Briffault.

### *Keen Presentation*

On October 8, 2015, Timothy S. Keen, director of the Ohio Office of Budget and Management, provided an in-depth analysis of the history and purpose of Article VIII, as well as suggestions for modernizing its debt provisions.

Mr. Keen noted that, by 22 constitutional amendments approved from 1921 to the present, Ohio voters have expressly authorized the incurrence of state debt for specific categories of capital facilities, to support research and development activities, and provide bonuses for Ohio's war veterans. He said, currently, general obligation debt is authorized to be incurred for highways, K-12 and higher education facilities, local public works infrastructure, natural resources, parks and conservation, and third frontier and coal research and development.

Mr. Keen emphasized that Article VIII's framework for authorizing debt has served the state exceptionally well for more than 150 years. He said the process of asking voters to review and approve bond authorizations sets an appropriately high bar for committing the tax resources of the state over the long term, adding that Ohio's long tradition of requiring voter approval ensures that debt is proposed only for essential needs, and those needs must be explained and presented to voters for their careful consideration. He complimented voters, calling them "worthy arbiters," based on their having approved 26 and rejected 17 Article VIII debt-related ballot issues since 1900.

### **Discussion and Consideration**

In reviewing Article VIII, Sections 2l, 2m, 2n, 2o, 2p, 2q, 2r, and 2s, the Finance, Taxation, and Economic Development Committee discussed whether the provisions should be retained because their bonding authority remains current, and for the reason that the bonds issued pursuant to their authority have not been paid off. The committee also considered, but left for future resolution, the concept of a constitutional amendment allowing for the automatic retirement of bond

authority provisions once they become obsolete, so as to relieve the need to go to the ballot to repeal expired provisions.

### **Action by the Finance, Taxation, and Economic Development Committee**

After formal consideration by the Finance, Taxation, and Economic Development Committee on November 10, 2016, the committee voted on November 10, 2016 to issue a report and recommendation recommending that Article VIII, Sections 2l, 2m, 2n, 2o, 2p, 2q, 2r, and 2s be retained in their current form.

### **Presentation to the Commission**

On December 15, 2016, on behalf of the Finance, Taxation, and Economic Development Committee, committee Chair Doug Cole appeared before the Commission to present the committee's report and recommendation, by which it recommended retaining Article VIII, Sections 2l, 2m, 2n, 2o, 2p, 2q, 2r, and 2s in their present form. Chair Cole explained the history and purpose of the provisions, indicating that the committee determined it would be appropriate to retain them because they are relatively recent, and because the bonds they authorize are still outstanding.

On March 9, 2017, Mr. Cole provided a second presentation of the report and recommendation, indicating the sections covered by the report and recommendation contrast with other debt authorization sections in Article VIII in that they still have outstanding bonding amounts and are still in use, therefore the report recommends retaining Sections 2l through 2s. Mr. Cole indicated the report and recommendation outlines that the sections authorize debt to fund projects relating to state infrastructure, and that the sections are relatively recent and, for the most part, have not been amended. He said the report indicates there has been no litigation relating to the sections and concludes that because the bonds are still outstanding, the committee did not recommend change.

### **Action by the Commission**

At the Commission meeting held March 9, 2017, Commission member Ed Gilbert moved to adopt the report and recommendation for Article VIII, Sections 2l, 2m, 2n, 2o, 2p, 2q, 2r, and 2s, a motion that was seconded by Senator Bill Coley.

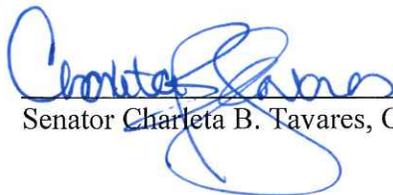
A roll call vote was taken, and the motion passed unanimously, by a vote of 21 in favor, with none opposed, one abstention, and seven absent.

### **Conclusion**

The Ohio Constitutional Modernization Commission concludes that Article VIII, Sections 2l, 2m, 2n, 2o, 2p, 2q, 2r, and 2s should be retained in their current form.

## Date Adopted

After formal consideration by the Ohio Constitutional Modernization Commission on December 15, 2016, and March 9, 2017, the Commission voted to issue this report and recommendation on March 9, 2017.



Senator Charleta B. Tavares, Co-chair



Representative Jonathan Dever, Co-chair

## Endnotes

<sup>1</sup> Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution* 233 (2<sup>nd</sup> prtg. 2011). Ohio was not unique in facing the economic consequences of overspending on transportation infrastructure, nor in adopting constitutional limitations on state debt as a result. By 1860, 19 states had constitutional debt limitations, and by the early 20<sup>th</sup> Century, nearly all state constitutions contained such limitations. Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 Rutgers L.J. 907, 917, citing B. U. Ratchford, *American State Debts* (1941); Alberta M. Sbragia, *Debt Wish, Entrepreneurial Cities, U.S. Federalism, and Economic Development* (1996). See also Richard Briffault, "State and Local Finance," in *State Constitutions for the Twenty-first Century* (G. Alan Tarr & Robert F. Williams, eds. New York: SUNY Press. 2006); Stewart E. Sterk & Elizabeth S. Goldman, *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 Wis. L.Rev. 1301 (1991).

For more on the history of the 1850-51 Constitutional Convention in relation to the state debt provisions in Article VIII, see David M. Gold, *Public Aid to Private Enterprise Under the Ohio Constitution: Sections 4, 6, and 13 of Article VIII in Historical Perspective*, 16 U. Tol. L.Rev. 405 (1984-85).

<sup>2</sup> Section 2a was later repealed in 1953. The text of repealed Section 2a may be found at: Page's Ohio Rev. Code Ann., 518 (Carl L. Meier & John L. Mason, eds. 1953).

<sup>3</sup> The committee's review of Section 2p is not included in this report and recommendation, but will be included in the committee's consideration of Article VIII, Sections 4, 5, and 6.

<sup>4</sup> In *DeRolph III*, the Court observed:

One recent development with significant potential is that the state has enhanced its ability to issue bonds to pay part of the state share of the costs of local projects. In *DeRolph II*, 89 Ohio St. 3d at 14, 728 N.E.2d at 1004, this court noted that Senate Joint Resolution No. 1 placed on the November 2, 1999 ballot a proposal, approved by Ohio voters, to amend the Ohio Constitution "to allow the state to issue general obligation bonds to pay for school facilities." See, principally, Section 2n, Article VIII, Ohio Constitution; see, also, 1997 Am.Sub.S.B. No. 102, Section 8, 147 Ohio Laws, Part IV, 7417. The deposition of Randall A. Fischer, executive director of the Ohio School Facilities Commission, reveals that these bonds are being issued. However, it is unclear from the record before us how effectively the bonds are being utilized and whether the state has fully taken advantage of the opportunities presented by bond issuance. Our state could benefit greatly if our legislators were able to exercise additional vision to put in place plans that would make bonds a more efficacious method of paying for school facilities.

*DeRolph III*, 93 Ohio St.3d at 368, 754 N.E.2d at 1235.

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<sup>5</sup> See <http://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2014Results.aspx> (last visited May 25, 2016).



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION

#### OHIO CONSTITUTION ARTICLE VIII SECTIONS 7, 8, 9, 10, AND 11

#### THE SINKING FUND AND THE SINKING FUND COMMISSION

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The Ohio Constitutional Modernization Commission adopts this report and recommendation regarding Article VIII, Sections 7, 8, 9, 10, and 11 of the Ohio Constitution concerning the Sinking Fund and the Sinking Fund Commission. It is issued pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*The Commission recommends that Sections 7 through 11 of Article VIII dealing with the Sinking Fund and the duties of the Sinking Fund Commission be repealed for the reason that the state no longer utilizes a fund identified as "the Sinking Fund," and the duties of the Sinking Fund Commission are being performed by other state officers and agencies. These provisions include Section 7, creating the Sinking Fund; Section 8, listing the members of the Sinking Fund Commission; and Sections 9, 10, and 11, outlining the duties of the Sinking Fund Commission.*

#### **Background**

Article VIII deals with public debt and public works, and was adopted as part of the 1851 constitution.

In addition to placing a limitation on the actions of the General Assembly in incurring debt, through the adoption of Article VIII, Sections 1, 2, and 3, delegates to the 1851 Constitutional Convention also adopted five sections designed to assure that any debt that was incurred by the state would be paid off responsibly through the creation and operation of a Sinking Fund. The use of such a fund was a popular method of paying off debt by the states in the 19<sup>th</sup> century.<sup>1</sup> The five sections that directly relate to the Sinking Fund include Sections 7, 8, 9, 10, and 11.

Section 7 creates the "Sinking Fund" for the purpose of paying accruing interest on public debt. This section provides that the fund will annually reduce the principal by a sum of not less than \$100,000, increased yearly by compounding at six percent per year. The source of the fund is

described as the net annual income of the public works and stocks owned by the state, any other funds or resources provided by law, and further sums to be raised by taxation as may be required. Section 7 provides as follows:

The faith of the state being pledged for the payment of its public debt, in order to provide therefor, there shall be created a sinking fund, which shall be sufficient to pay the accruing interest on such debt, and, annually, to reduce the principal thereof, by a sum not less than one hundred thousand dollars, increased yearly, and each and every year, by compounding, at the rate of six per cent per annum. The said sinking fund shall consist, of the net annual income of the public works and stocks owned by the state, of any other funds or resources that are, or may be, provided by law, and of such further sum, to be raised by taxation, as may be required for the purposes aforesaid.

Section 8 creates a supervisory body known as “The Commissioners of the Sinking Fund,” consisting of the governor, the treasurer of state, the auditor of state, the secretary of state, and the attorney general. Although originally part of the 1851 constitution, the provision was amended in 1947 to add the governor and state treasurer to the board.<sup>2</sup> Section 8 reads:

The governor, treasurer of state, auditor of state, secretary of state, and attorney general, are hereby created a board of commissioners, to be styled, “The Commissioners of the Sinking Fund”.

Section 9 prescribes that a biennial report shall be issued by the commissioners before each session of the General Assembly. The report, which is to include information about the amount in the fund from all sources except taxation, is to be provided to the governor, who then transmits the information to the General Assembly. Relying on this information, the General Assembly is directed to make all necessary provision for raising and disbursing the fund in pursuance of the provisions of Article VIII. Section 9 states:

The commissioners of the sinking fund shall, immediately preceding each regular session of the general assembly, make an estimate of the probable amount of the fund, provided for in the seventh section of this article, from all sources except from taxation, and report the same, together with all their proceedings relative to said fund and the public debt, to the governor, who shall transmit the same with his regular message, to the general assembly; and the general assembly shall make all necessary provision for raising and disbursing said sinking fund, in pursuance of the provisions of this article.

Section 10 states that the commissioners shall apply the fund, along with other moneys appropriated by the General Assembly, to the payment of interest as due, as well as to the redemption of the principal of the public debt. Section 10 excludes state school and trust funds from this directive. Section 10 provides:

It shall be the duty of the said commissioners faithfully to apply said fund, together with all moneys that may be, by the general assembly, appropriated to

that object, to the payment of the interest, as it becomes due, and the redemption of the principal of the public debt of the state, excepting only, the school and trust funds held by the state.

Section 11 provides that the commissioners shall issue a semi-annual report describing the proceedings of the Sinking Fund Commission, to be published by the governor and communicated to the General Assembly. This report is in addition to the biennial report required by Section 9. Pursuant to Section 11:

The said commissioners shall, semi-annually, make a full and detailed report of their proceedings to the governor, who shall, immediately, cause the same to be published, and shall also communicate the same to the general assembly, forthwith, if it be in session, and if not, then at its first session after such report shall be made.

### **Amendments, Proposed Amendments, and Other Review**

The five provisions concerning the Sinking Fund Commission were adopted in 1851, with their only amendment occurring in 1947, when Article VIII, Section 8, was adopted to add the governor and the state treasurer to the commission.<sup>3</sup> Therefore, the commission now includes all five statewide officeholders.

The Ohio Constitutional Revision Commission (1970s Commission) studied Article VIII in depth and made extensive recommendations concerning how the state incurs debt.<sup>4</sup> The 1970s Commission recommended the repeal of unnecessary provisions concerning the Sinking Fund and the Commissioners of the Sinking Fund, explaining:

The Commission proposes the repeal of Sections 7 through 11 of Article VIII, which deal with the Commissioners of the Sinking Fund and their duties, and the Sinking Fund itself. Whatever justification these sections might have had at one time, in the Commission's view they no longer serve a useful constitutional purpose. The very concept of the sinking fund, in which large sums of money are accumulated until they are needed to pay bonds at maturity, has fallen into disfavor. Today, the bond which is the norm for public financing is the serial bond: "State and local debt nowadays is almost always in serial form, that is, when the debt is incurred, provision is made for annual retirement of the principal, so that the annual carrying charge for a twenty-year issue includes a sum sufficient to redeem, say, one-twentieth of the principal, as well as a sum of interest." [citing James A. Maxwell, *Financing State and Local Governments*, rev. ed. (Washington, The Brookings Institution, 1969) p. 185.] However, in suggesting the deletion of sections relating to the Sinking Fund, the Commission is not suggesting that the General Assembly should not have the power to establish either a sinking fund or a sinking fund commission, should it desire to do so, and hence Section 1 of the proposed Article VIII would provide ample authority to do so. The deletion of these sections is recommended only because the Commission believes that these sections are not needed in the Constitution.<sup>5</sup>

In November 1977, the General Assembly submitted a ballot issue to the voters that, among other changes, proposed repealing Sections 7, 9, and 10 dealing with the Sinking Fund. However, voters rejected Issue 4 by a margin of 72.5 percent to 27.5 percent, with an over one million vote difference.<sup>6</sup>

### **Litigation Involving the Provisions**

There has been no litigation directly related to Sections 7, 8, 9, 10, and 11.

### **Presentations and Resources Considered**

#### *Metcalf Presentations*

Seth Metcalf, deputy treasurer and executive counsel for the Ohio Treasurer of State, presented to the Finance, Taxation, and Economic Development Committee on May 8, 2014, March 12, 2015, and March 10, 2016. In addition to reviewing the history of Article VIII, including the \$750,000 debt limitation in Section 1, Mr. Metcalf addressed the role of the Sinking Fund Commission. Originally adopted as a safeguard, he said the commission is no longer playing an active role in managing the payment of the debt. In fact, Mr. Metcalf noted that the commission has not been an active issuer of state debt since 2001. Mr. Metcalf suggested the state should continue to involve the five statewide executive officeholders in the debt issuance process, further opining that the constitutional references to the Sinking Fund should be replaced with references to the state treasurer, or to the Ohio Public Facilities Commission, which currently issues most of the state's general obligation debt and is comprised of those five statewide officeholders and the director of the Office of Budget and Management (OBM).<sup>7</sup>

#### *Keen Presentation*

On October 8, 2015, Timothy S. Keen, director of OBM, provided an in-depth analysis of the history and purpose of Article VIII, as well as suggestions for modernizing its debt provisions.

For the purpose of improving efficiency, Mr. Keen advocated eliminating Sections 7 through 11. He noted that the Commissioners of the Sinking Fund – originally consisting of the attorney general, auditor and secretary of state – were established in 1851 to administer a fund that would pay-off, or “sink,” the state's then-existing canal and railroad debt, and to report their activities and progress to the governor and General Assembly. Over the years, the duties of the commissioners expanded to include administering and issuing many types of state debt, with the governor and treasurer being added to the commission in 1947. In the 1950s, new state bond programs began to use dedicated bond service funds separate from the sinking fund, with debt service payments effectuated by the treasurer and OBM. Then, in 2001, the General Assembly transferred bond issuance authority from the commissioners to the Ohio Public Facilities Commission. As a result of these changes, all of the functions historically performed by the Commissioners of the Sinking Fund are now performed by other state entities, indicating that the sinking fund provisions of Article VIII are viable candidates for repeal.

### *Azoff Presentation*

Jonathan Azoff, director of the Office of Debt Management and senior counsel to the Ohio Treasurer of State, presented to the committee on April 14, 2016 regarding the role of his office in relation to state debt.

Among the changes recommended for Article VIII, Mr. Azoff proposed the reference to the sinking fund in Section 2 should be changed to the word “state.” He said this recommendation is based on the fact that a true “sinking fund” no longer exists. Mr. Azoff further indicated his office supports the repeal of Sections 7 through 11 of Article VIII for the reason that the state no longer utilizes a sinking fund, with the duties of the Sinking Fund Commission now being performed by the treasurer’s office. However, Mr. Azoff expressed the concern that removal of Sections 7 through 11 without replacement language clarifying who should perform those same duties would be detrimental to the interests of public accountability. He expressed that the committee’s review provides the opportunity to recommend constitutional amendments that would reflect current statutory procedures.

In this regard, Mr. Azoff described that his office performs the ongoing roles and responsibilities of the Sinking Fund Commission, including paying debt service on the state’s general obligation debt from the Commissioners of the Sinking Fund’s designated bond service funds, and fulfilling the treasurer’s reporting role as a member of the Commission of the Sinking Fund. He noted that the Office of Debt Management’s operating expenses are funded through the Commissioners of the Sinking Fund GRF line item in the Treasurer of State’s operating budget. As a result, Mr. Azoff urged the committee to recommend the retention of constitutional authorization for the performance of the Sinking Fund Commissioners’ duties.

### *Kauffman Presentation*

On April 14, 2016, Kurt Kauffman, acting assistant director of the Office of Budget and Management (OBM), appeared before the committee to provide comment related to Article VIII.

Mr. Kauffman said OBM supports the repeal of Sections 7 through 11 of Article VIII, because all of the functions historically performed by the Commissioners of the Sinking Fund are now defunct or, in the case of the Sinking Fund report required under Section 11, performed by other state entities. Mr. Kauffman reiterated Mr. Keen’s suggestion that the debt reporting requirement be replaced by a new provision that would assign necessary debt reporting functions to the state treasurer.

Addressing a suggestion by Seth Metcalf, deputy treasurer, that removing the Sinking Fund would compromise public accountability in the debt issuance process, Mr. Kauffman said OBM does not share that concern, instead acknowledging that the interests of the public are protected by the fact that citizens always must approve debt authorization by voting for constitutional amendments. He noted multiple steps that protect public participation, among them that voters must approve a ballot issue, that the General Assembly’s legislative process welcomes public comment, and that the PFC holds open meetings for the purpose of passing bond issuance resolutions.

Mr. Kauffman said these multiple opportunities for consideration of public comment protect the interests of public accountability, adding that unnecessary changes would risk creating uncertainty and confusion in the municipal bond market.

Finally, Mr. Kauffman said OBM supports the proposal to retain Article VIII, Sections 1 and 3 in their current form, and to revise Section 2 only to eliminate what would be an outdated reference to the Commissioners of the Sinking Fund.

### **Discussion and Consideration**

In reviewing the provisions relating to the Sinking Fund and the Commissioners of the Sinking Fund, the Finance, Taxation, and Economic Development Committee considered whether the provisions are obsolete for the reason that the widespread use of bonds for the purpose of raising funds, and the transfer of the duties of the commissioners to other state agencies, has left the Sinking Fund Commission with little to do. In considering this concern, the committee found it persuasive that the commissioners have not met since 2008, and that many of the duties assigned to the commissioners are now performed by other state officers and agencies.

The committee concluded that Sections 7 through 11 are obsolete for the reason that the purpose of the Sinking Fund and duties of the Sinking Fund Commission have been replaced by other state entities primarily through (i) authorizations contained in constitutional amendments approved by the electors of the state; and (ii) by statutory enactment made pursuant to the authorizations contained in these subsequent constitutional amendments.<sup>8</sup>

### **Action by the Finance, Taxation, and Economic Development Committee**

After formal consideration by the Finance, Taxation, and Economic Development Committee on April 14, 2016 and May 12, 2016, the committee voted on May 12, 2016 to issue a report and recommendation recommending that Article VIII, Sections 7, 8, 9, 10, and 11 be repealed.

### **Presentation to the Commission**

On June 9, 2016, on behalf of the Finance, Taxation, and Economic Development Committee, committee Chair Doug Cole appeared before the Commission to present the committee's report and recommendation, by which it recommended repeal of Article VIII, Sections 7, 8, 9, 10, and 11. Chair Cole explained the history and purpose of the provisions, emphasizing the Sinking Fund and the Sinking Fund Commission are no longer utilized to manage state debt, and indicating that the committee determined it would be appropriate to repeal Article VIII, Sections 7 through 11 as obsolete provisions.

On September 8, 2016, on behalf of the Finance, Taxation, and Economic Development Committee, Executive Director Steven C. Hollon appeared before the Commission to provide a second presentation of the committee's report and recommendation. Mr. Hollon described that the Sinking Fund was no longer being used as a method for the state to pay down state debt, and that the Sinking Fund Commission's duties had been undertaken by other state officers and

agencies. Thus, Mr. Hollon indicated the report and recommendation recommends the repeal of Sections 7 through 11.

### Action by the Commission

At the Commission meeting held September 8, 2016, Commission member Dennis Mulvihill moved to adopt the report and recommendation for Article VIII, Sections 7, 8, 9, 10, and 11, a motion that was seconded by Commission member Patrick F. Fischer.

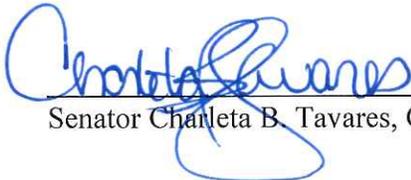
A roll call vote was taken, and the motion passed unanimously by a vote of 26 to zero.

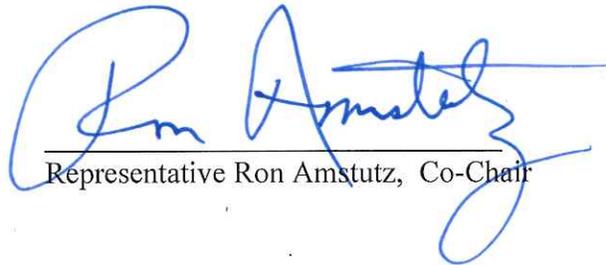
### Conclusion

The Ohio Constitutional Modernization Commission concludes that Article VIII, Sections 7, 8, 9, 10, and 11 should be repealed.

### Date Adopted

After formal consideration by the Ohio Constitutional Modernization Commission on June 9, 2016, and September 8, 2016, the Commission voted to adopt the report and recommendation on September 8, 2016.

  
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Senator Charleta B. Tavares, Co-Chair

  
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Representative Ron Amstutz, Co-Chair

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### Endnotes

<sup>1</sup> See, e.g., Henry C. Adams, *Public Debts: An Essay in the Science of Finance* 384 (New York: D. Appleton 1890). For a discussion of the history of the use of the sinking fund, see Donald F. Swanson and Andrew P. Trout, *Alexander Hamilton's Hidden Sinking Fund*, 49 *William and Mary Quarterly* 108 (1992).

<sup>2</sup> Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution* 275 (2<sup>nd</sup> prtg. 2011).

<sup>3</sup> *Id.* at 275, app. B.

<sup>4</sup> Ohio Constitutional Revision Commission Recommendations for Amendments to the Ohio Constitution, Part 2, State Debt (Dec. 31, 1972), <http://www.lsc.ohio.gov/ocrc/recommendations%20pt2%20state%20debt.pdf> (last visited Feb. 5, 2016).

<sup>5</sup> *Id.* at 39-40.

<sup>6</sup> Steinglass & Scarselli, *supra* at app. B.

On the November 8, 1977 ballot, Issue 4 stated:

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“PROPOSED CONSTITUTIONAL AMENDMENT

To adopt Section 1 of Article VIII and repeal Sections 1, 2, 2b, 2c, 2d, 2e, 2f, 2g, 2h, 3, 7, 9, and 10 of Article VIII and Section 6 of Article XII of the Constitution of Ohio

1. To repeal the general state constitutional debt limit of \$750,000 and replace it with authority to incur debt for capital improvements by a two-thirds majority vote of each house of the general assembly within specified limitations directly related to state revenues.
2. To permit the state to contract debt without limitation on amount of purpose, in addition to the authority specified above, if that debt is submitted to a vote of the electors by a three-fifths majority vote of each house of the general assembly and approved by a majority of the electors voting on the question.
3. To require the general assembly to retire at least 4% of the state’s indebtedness each year.
4. To permit the state to borrow funds to meet a current year’s appropriations if any such loan is repaid out of that year’s revenues.
5. To repeal part of the constitutional requirements relating to a sinking fund and to require that the general assembly provide for the repayment of state debt.
6. To enumerate purposes and amounts for which the first \$640 million of capital improvement debt would have to be appropriated.

(Proposed by Resolution of the General Assembly of Ohio)”

Source: Youngstown *Vindicator*, Nov. 6, 1977. Available at:  
<https://news.google.com/newspapers?id=zfRJAAAIBAJ&sjid=sYQMAAAAIBAJ&pg=2945,1851669&hl=en>  
(last visited March 28, 2016).

<sup>7</sup> R.C. 151.02. *See also*, <http://obm.ohio.gov/BondsInvestors/publicfacilities.aspx> (last visited Feb. 8, 2016).

<sup>8</sup> Based on its recommendation to eliminate the Sinking Fund and related provisions, the committee concluded it is appropriate to remove reference to the Sinking Fund in Section 2, replacing it with a generic phrase allowing the state to pay state indebtedness. A description of that review and conclusion is set forth in a separate report and recommendation relating to Article VIII, Sections 1, 2, and 3, titled “State Debt.”

The committee further recommended that, if the General Assembly should place a ballot issue before the voters to repeal Sections 7, 8, 9, 10, and 11 of Article VIII, the ballot issue should also contain a proposal to revise Section 2 to delete reference to the Sinking Fund.



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### ADDENDUM TO REPORT AND RECOMMENDATION

### OHIO CONSTITUTION ARTICLE VIII SECTIONS 7, 8, 9, 10, AND 11

### THE SINKING FUND AND THE SINKING FUND COMMISSION

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The Ohio Constitutional Modernization Commission previously adopted a report and recommendation regarding Article VIII, Sections 7, 8, 9, 10, and 11 of the Ohio Constitution concerning the Sinking Fund and the Sinking Fund Commission. In sum, that report and recommendation called for repeal of those provisions in Ohio's constitution addressing the creation, composition, duties and responsibilities of the Sinking Fund Commission, for the reason that the duties of the Sinking Fund Commission are being performed by other state officers and agencies.

This memorandum is an addendum to that previous report and recommendation. The purpose of this addendum is to report to the General Assembly the sense of the Commission that, in the event the General Assembly elects to move forward with this proposed amendment, the General Assembly should consider addressing, as well, who will have responsibility for debt reporting functions. In particular, Section 9 of Article VIII provides that the Sinking Fund Commission must prepare a biennial report, which is to include certain information about the Sinking Fund. While the state no longer utilizes a Sinking Fund *per se*, the state does incur bonded indebtedness for which repayment occurs over time, and which is subject to certain constitutional limitations as set forth in various other provisions in Article VIII.

In order to provide Ohio's citizens and the General Assembly ongoing access to information regarding the state of Ohio's indebtedness, the Commission urges that, if the General Assembly moves forward with that report and recommendation, then the General Assembly also take steps to assign to the treasurer of the state an obligation to provide biennial reporting regarding the aggregate outstanding debt of the state. The Commission takes no position on whether the General Assembly should assign that responsibility to the treasurer by statute, or instead by proposing a constitutional amendment to Ohio's voters. Likewise, the Commission takes no position on the appropriate specific contents of such a report. The Commission believes, however, that debt reporting is an important function, and that the General Assembly should take steps to insure the ongoing availability of such information.

### **Presentation to the Commission**

On June 8, 2017, Douglas R. Cole, chair of the Finance, Taxation, and Economic Development Committee, presented this addendum to the report and recommendation for Article VIII, Sections 7, 8, 9, 10, and 11.

### **Action by the Commission**

At the Commission meeting held June 8, 2017, Commission member Doug Cole moved to recommend that the General Assembly accept the addendum to the report and recommendation for Article VIII, Sections 7, 8, 9, 10, and 11, a motion that was seconded. Upon a voice vote, the motion passed unanimously.

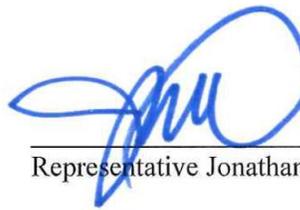
### **Conclusion**

The Ohio Constitutional Modernization Commission hereby recommends an addendum to its recommendation that Article VIII, Sections 7 through 11 be repealed as obsolete.

### **Date Adopted**

The Commission voted to recommend that the General Assembly accept the addendum to its report and recommendation on June 8, 2017.

  
\_\_\_\_\_  
Senator Charleta B. Favares, Co-chair

  
\_\_\_\_\_  
Representative Jonathan Dever, Co-chair

# **Appendix 2**

## **Ohio Constitutional Modernization Commission**

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**Committee Recommendations  
Not Endorsed by the Commission**

## **Committee Recommendations Not Endorsed by the Commission**

These committee-only recommendations are included for completeness of the record. They represent issues that received significant discussion and for which recommendations were made by subject matter committees, but they are not official recommendations of the Commission.

Constitutional provision	Topic
All	Gender Neutral Language
Art. I, § 10	Grand Juries
Art. II, §§ 1–1i, 15, 17	Initiative and Referendum
Art. II, § 2	State Legislator Term Limits
Art. V, § 6	Mental Capacity to Vote



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION OF THE COORDINATING COMMITTEE

### OHIO CONSTITUTION

### GENDER-NEUTRAL LANGUAGE

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The Coordinating Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding the incorporation of gender neutral language in the Ohio Constitution. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*The committee recommends that gender-specific language currently in the constitution be replaced with gender-neutral language, if appropriate, as part of one comprehensive amendment.*

#### **Background**

The constitution currently contains numerous examples of gender-specific nouns and pronouns used in situations where a gender-neutral word would be appropriate. This language is scattered throughout multiple articles and sections of the constitution. There are a few examples of both genders (e.g., "he or she") being used in more recent constitutional amendments, but its usage is inconsistent.

In 1975, the issue of gender-specific language in the constitution was raised to the Ohio Constitutional Revision Commission (1970s Commission) by the National Organization for Women.<sup>1</sup> However, the Education and Bill of Rights Committee of the 1970s Commission did not believe there was a "demonstrated need" to change gender-specific language:

Changes for the sake of modernizing language or spelling, omitting obsolete provisions, rearranging, and similar matters are not recommended. A proposal to change sex-specific words – for the most part, the use of the masculine gender – to neutral words or to rewrite the sections involved so that references to a particular gender could be eliminated was rejected.<sup>2</sup>

Also during the 1970s, the issue of gender-specific language was raised to the Task Force for the Implementation of the Equal Rights Amendment (Task Force).<sup>3</sup> The primary purpose of the Task Force, established by Governor John Gilligan in 1974,<sup>4</sup> was to review the Revised Code and recommend both language and substantive adjustments to accomplish the purpose of making the effect of state law equal for both men and women.<sup>5</sup> While the Task Force did recommend gender-specific language changes for the Revised Code,<sup>6</sup> it did not discuss the Ohio Constitution at all, likely due to the fact that the 1970s Commission was operating simultaneously.

## **Presentations and Resources Considered**

### *Steinglass Memoranda*

The committee received two memoranda from Senior Policy Advisor Steven H. Steinglass identifying gender-specific words currently in the text of the Ohio Constitution.

The first memo, dated September 26, 2016, identified where gender-specific pronouns occur in various provisions of the constitution. Additionally, the memo described two possible approaches to changing gender-specific language to be gender-neutral. The first approach was for the General Assembly to create a single, comprehensive amendment that proposes changes to the specific wording, and to submit the amendment to the voters. The second approach was to delegate the responsibility for making the specific language changes to a particular entity. The memo provided the example of Vermont, which delegated this task to its Supreme Court.

The second memo, dated October 18, 2016, supplemented the September memo by adding examples of gender-specific nouns and suggesting specific wording changes to make both the pronouns and nouns gender-neutral.

### *Gawronski Presentation*

On March 9, 2017, Christopher Gawronski, legal intern for the Commission, presented to the committee on the topic of how other states have addressed a need to provide gender neutral language in their state constitutions.

Mr. Gawronski indicated that, since 1974, numerous states have attempted to adjust the language of their constitutions in order to make some or all of the constitutional provisions gender-neutral. He said 13 such attempts made it to ballot, where ten passed and three were defeated. Describing how the constitutional language was changed, Mr. Gawronski said states have approached the task in three basic ways. He said some states use a legislative proposal, by which the legislature proposes specific gender-neutral language amendments to the constitution to be approved by voters. He said other states have made the changes through a constitutional convention or commission process, in which the legislature or citizens created a body to generally revise the constitution, including gender-neutral language, for approval by voters. Finally, he said, gender neutralization has been accomplished by delegation, by which states have proposed a constitutional amendment that delegates the task of revising the constitution to be gender-neutral to an existing office or entity without additional voter approval.

Further describing the process, Mr. Gawronski said that, in states following the legislative proposal approach, the legislature proposed the specific gender-neutral language as a constitutional amendment in accordance with the amendment procedures of their constitutions. He noted in some states only the language in certain sections of the constitution, rather than the whole constitution, was addressed in conjunction with other changes being made in those sections. In all cases, he said the proposed changes required voter approval.

Mr. Gawronski described that the states using the convention or commission approach did not accomplish the change through legislative proposal, but rather drafted new language to be gender neutral, and the substitute provisions were adopted as a part of the task of rewriting the constitution or proposing a series of substantive changes.

He said two states have approached the process of updating constitutional language by proposing to delegate the responsibility to a particular state office or entity: the state supreme court (Vermont) or the secretary of state (Nebraska). He noted that, in both cases, the delegation was proposed as a constitutional amendment that needed to be approved by the voters. Once approved, the specified office or entity would be responsible for making non-substantive language changes purely for the purpose of replacing gendered language with gender-neutral language and publishing a revised constitution without further approval from the voters.

## **Discussion and Consideration**

In considering the general issue of how to make the constitution's language gender-neutral, the committee first decided to separate the question of changing current constitutional language from ensuring that future constitutional amendments maintain gender-neutrality. The committee assigned the question of ensuring that future amendments are gender-neutral to the Constitutional Revision and Updating Committee as part of its discussion on the initiative process. After additional consideration, the committee decided to retain for itself the question of how to address changing the current constitutional language to be gender-neutral.

After receiving the memos and presentation, the committee felt that a single, comprehensive amendment would be the best approach to making changes to the current constitutional language. Committee members pointed out that the existing gender-specific language includes both nouns and pronouns that require modification. The committee agreed to provide a list of examples of existing gender-specific language as part of its report and recommendation (see Attachment A).

Some members were concerned with the mechanics of proposing a single amendment due to the single-subject rule for amendments, and the requirement for notice and publication of all proposed amendments. The committee was assured that a single amendment to change all gender-specific language would be considered a single subject, even though it would mean a modification to multiple sections of the constitution. However, the publication of all modified sections might be required, which may result in significant costs.

Members also discussed the general approach to be taken to selecting replacement language, wondering, for example, whether "he" would simply be replaced with "he or she." It was pointed out that the Legislative Service Commission (LSC) would be drafting the amendment for

consideration by the General Assembly, so the suggestion was made to allow LSC to propose the specific language for the amendment using the same approach that it uses in drafting language for the Revised Code.

## **Conclusion**

The Coordinating Committee concludes that all instances of gender-specific language in the constitution should be replaced with gender-neutral language as part of a single, comprehensive amendment.

## **Date Issued**

After formal consideration by the Coordinating Committee on April 13, 2017, and May 11, 2017, the committee voted to issue this report and recommendation on May 11, 2017.

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## **Endnotes**

<sup>1</sup> Ohio Constitutional Revision Commission (1970-1977), Proceedings / Research, Vol. 8, at 4374-4378, <http://www.lsc.ohio.gov/ocrc/v8%20pgs%203850-4328%20judiciary%204329-4394%20education-bill%20of%20rights.pdf> (last visited Apr. 4, 2017).

<sup>2</sup> Ohio Constitutional Revision Commission (1970-1977), Recommendations for Amendments to the Ohio Constitution, Part 11, The Bill of Rights, 10 (Apr. 15, 1976), <http://www.lsc.ohio.gov/ocrc/recommendations%20pt11%20bill%20of%20rights.pdf> (last visited Mar. 30, 2017).

<sup>3</sup> *A Report by the Ohio Task Force for the Implementation of the Equal Rights Amendment* (1975).

<sup>4</sup> *Id.* at vi.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at viii-xvii (summary of the Task Force's recommendations).

## Examples of Gender-Specific Language in the Ohio Constitution

Art.	Sec.	Gender-specific term	Location of term within current constitutional provision
I	1	men	All <b>men</b> are, by nature, free and independent, * * *
I	7	men, his	<ul style="list-style-type: none"> <li>All <b>men</b> have a natural and infeasible right * * *</li> <li>No person shall be compelled * * * against <b>his</b> consent * * *</li> <li>No religious test * * * on account of <b>his</b> religious belief * * *</li> </ul>
I	10	his, him, himself	<ul style="list-style-type: none"> <li>* * * attendance of witnesses in <b>his</b> behalf * * *</li> <li>* * * but <b>his</b> failure to testify * * *</li> <li>* * * cause of the accusation against <b>him</b> * * *</li> <li>* * * be a witness against <b>himself</b> * * *</li> </ul>
I	11	his	Every citizen may freely speak, write, and publish <b>his</b> sentiments on all subjects, * * *
I	16	him, his	All courts shall be open, and every person, for an injury done <b>him</b> in <b>his</b> land, * * *
II	1g	his, himself, he	<ul style="list-style-type: none"> <li>* * * after <b>his</b> name the date of signing and <b>his</b> place of residence.</li> <li>* * * or township of <b>his</b> residence.</li> <li>* * * the street and number, if any, of <b>his</b> residence * * *</li> <li>* * * written in ink, each signer for <b>himself</b>.</li> <li>To each part of such petition * * * that <b>he</b> witnessed * * *</li> </ul>
II	4	he	<ul style="list-style-type: none"> <li>No member of the general assembly shall, during the term for which <b>he</b> was elected, unless during such term <b>he</b> resigns therefrom, * * *</li> <li>No member of the general assembly shall, during the term for which <b>he</b> was elected, or for one year * * *, during the term for which <b>he</b> was elected.</li> </ul>
II	5	he	No person hereafter convicted of an embezzlement * * *, until <b>he</b> shall have accounted for, and paid such money into the treasury.
II	11	he	<ul style="list-style-type: none"> <li>No person shall be elected * * *, unless <b>he</b> meets the qualifications set forth in this Constitution * * *</li> <li>* * * for the term for which <b>he</b> was so elected.</li> </ul>
II	15	his	(E) * * * forthwith to the governor for <b>his</b> approval.
II	16	he, his, him	<ul style="list-style-type: none"> <li>If the governor approves an act, <b>he</b> shall sign it, * * *</li> <li>If <b>he</b> does not approve it, <b>he</b> shall return it with <b>his</b> objections in writing * * *</li> <li>* * * after being presented to <b>him</b>, it becomes law in like manner as if <b>he</b> had signed it * * *</li> <li>* * * after such adjournment, it is filed by <b>him</b>, with <b>his</b> objections * * *</li> </ul>

			<ul style="list-style-type: none"> <li>• * * * every bill not returned by <b>him</b> to the house of origin that becomes law without <b>his</b> signature.</li> </ul>
II	20	his	* * * salary of any officer during <b>his</b> existing term * * *
II	33	material men	Laws may be passed to secure to mechanics, artisans, laborers, sub-contractors and <b>material men</b> , their just dues * * *
II	35	workmen	For the purpose of providing compensation to <b>workmen</b> and their dependents, * * *
II	37	workmen	* * * for <b>workmen</b> engaged on any public work * * *
III	1b	him	The lieutenant governor shall perform such duties in the executive department as are assigned to <b>him</b> by the governor and as are prescribed by law.
III	2	his	The auditor of state shall hold <b>his</b> office for a term of two years from the second Monday of January, 1961 to the second Monday of January, 1963 and thereafter shall hold <b>his</b> office for a four year term.
III	6	he	<b>He</b> may require information, in writing, * * *
III	7	he	<b>He</b> shall communicate at every session, by message, to the general assembly, the condition of the state, and recommend such measures as <b>he</b> shall deem expedient.
III	9	he	In case of disagreement between the two houses, in respect to the time of adjournment, <b>he</b> shall have power to adjourn the general assembly to such time as <b>he</b> may think proper, but not beyond the regular meetings thereof.
III	10	he	<b>He</b> shall be commander-in-chief of the military and naval forces of the state, except when they shall be called into the service of the United States.
III	12	him	There shall be a seal of the state, which shall be kept by the governor, and used by <b>him</b> officially; and shall be called "The Great Seal of the State of Ohio."
III	20	his	* * * with <b>his</b> message to the General Assembly.
IV	5	him	(C) The chief justice of the supreme court or any judge of that court designated by <b>him</b> shall pass upon the disqualification * * *
IV	6	his, he	(A) (3) * * *, and each judge of a court of common pleas or division thereof shall reside during <b>his</b> term of office in the county, district, or subdivision in which <b>his</b> court is located * * * (C) No person shall be elected or appointed to any judicial office if on or before the day when <b>he</b> shall assume the office and enter upon the discharge of its duties <b>he</b> shall have attained the age of seventy years. Any voluntarily retired judge, or any judge who is retired under this section, may be assigned with <b>his</b> consent, * * * computed upon a per diem basis, in addition to any retirement benefits to which <b>he</b> may be entitled.
IV	13	he	In case the office of any judge shall become vacant, before the

			expiration of the regular term for which <b>he</b> was elected, * * *.
IV	23	he	* * * until the end of the term for which <b>he</b> was elected.
V	1	he	* * * shall cease to be an elector unless <b>he</b> again registers to vote.
V	2a	his	* * * in no other way than by indicating <b>his</b> vote for each candidate separately from the indication of <b>his</b> vote for any other candidate.
V	7	his	Each candidate for such delegate shall state <b>his</b> first and second choices for the presidency, but the name of no candidate for the presidency shall be so used without <b>his</b> written authority.
V	9	he or she	* * * a person who is elected to an office in a regularly scheduled general election and resigns prior to the completion of the term for which <b>he or she</b> was elected, shall be considered to have served the full term in that office.
VII	3*		* * * until a successor to <b>his</b> appointee shall be confirmed and qualified.
VIII	2b*	he, his	<ul style="list-style-type: none"> <li>* * * and <b>he</b> shall make the transfer of one million dollars each month to the World War II compensation * * *</li> <li>* * * the tax lists of <b>his</b> county for the year in which such levy is made and shall place same for collection on the tax duplicates of <b>his</b> county * * *</li> <li>* * * if such deceased person's death was service-connected and in line of duty, <b>his</b> survivors as hereinbefore designated, * * *</li> </ul>
VIII	2d*	his	<ul style="list-style-type: none"> <li>* * * the tax lists of <b>his</b> county for the year in which such levy is made and shall place the same for collection on the tax duplicates of <b>his</b> county * * *</li> <li>* * * by the Veterans Administration of the United States government, <b>his</b> survivors as herein designated, * * *</li> </ul>
VIII	2j	his	<ul style="list-style-type: none"> <li>* * * result of injuries or illness sustained in Vietnam service <b>his</b> survivors as herein designated, * * *</li> <li>* * * and receiving a bonus of an equal amount upon <b>his</b> being released or located.</li> </ul>
VIII	9	his	* * * transmit the same with <b>his</b> regular message, * * *
XI	12	he	Repealed eff. Jan. 1, 2021
XIII	3	him or her	* * * but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by <b>him or her</b> * * *
XIII	5	men	* * * which compensation shall be ascertained by a jury of twelve <b>men</b> , in a court of record, as shall be prescribed by law.

\* These sections have been recommended for repeal by other committees



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

#### OHIO CONSTITUTION ARTICLE I, SECTION 10

#### THE GRAND JURY

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The Judicial Branch and Administration of Justice Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article I, Section 10 of the Ohio Constitution concerning the requirement of a grand jury indictment for felony crimes. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*The committee recommends that Article I, Section 10 of the Ohio Constitution be amended to remove the reference to the grand jury.*

*The committee further recommends that the reference to the grand jury in Section 10 be placed in a new provision, Section 10b.*

*Finally, the committee recommends that the new Section 10b include provision for a grand jury legal advisor and the creation of a right of the accused to a transcript of grand jury witness testimony under certain circumstances.*

*The new Section 10b would be divided into three separate parts that would consist of subdivision (A) expressing the original language regarding the grand jury from Section 10, subdivision (B) creating and describing the role of the grand jury legal advisor, and subdivision (C) relating to the requirement of a transcript.*

*The committee proposes that the new Section 10b would state as follows:*

*(A) Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise*

*infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law.*

*(B) Whenever a grand jury is impaneled, there shall be an independent counsel appointed as provided by law to advise the members of the grand jury regarding matters brought before it. Independent counsel shall be selected from among those persons admitted to the practice of law in this State.*

*(C) A record of all grand jury proceedings shall be made, and the accused shall have a right to the record of the grand jury testimony of any witness who is called to testify at the trial of the accused; but provision may be made by law regulating the form of the record and the process of releasing any part of the record.*

## **Background**

Article I, Section 10 reads as follows:

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

The Bill of Rights as set forth in Article I is a declaration of rights and liberties similar to those contained in the United States Constitution.

Many of the concepts memorialized in Section 10, including the requirement of a grand jury indictment for felony crime, date from the 1802 constitution. In the 1802 constitution, Section 10 was part of the Bill of Rights that was contained in Article VIII. Section 10 read:



That no person arrested or confined in jail shall be treated with unnecessary rigor or be put to answer any criminal charge but by presentment, indictment, or impeachment.

Section 11 of the 1802 constitution provided additional rights of the accused, stating:

That in all criminal prosecutions, the accused hath a right to be heard by himself and counsel; to demand the nature and cause of the accusations against him and to have a copy thereof; to meet the witnesses face to face; to have compulsory process for obtaining witnesses in his favor; and in prosecutions by indictment or presentment a speedy public trial by an impartial jury of the County or District in which the offense shall have been committed; and shall not be compelled to give evidence against himself, nor shall he be twice put in jeopardy for the same offense.

The 1851 Constitution moved the Bill of Rights to Article I, and combined aspects of prior Sections 10 and 11 into one Section 10, which read:

Except in cases of impeachment, and cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, in cases of petit larceny and other inferior offenses, no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; be the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed; nor shall any person be compelled, in any criminal case, to be a witness against himself, or be twice put in jeopardy for the same offense.

The 1912 Constitutional Convention resulted in several changes to the grand jury portion of the 1851 provision. First, the categorical reference to “cases of petit larceny and other inferior offenses,” was clarified to mean “cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary.” The 1912 convention also added a reference to the ability of the General Assembly to enact laws related to the total number of grand jurors, and the number of grand jurors needed to issue an indictment.

Other parts of Section 10 were changed in 1912, including allowing the General Assembly to enact laws related to taking and using witness depositions, and adding that the failure of the accused to testify at trial may be the subject of comment by counsel. Section 10 also requires that the accused be allowed to appear and defend in person, and sets out the right to counsel, the right to demand details about the accusation, to have a copy of the charges, to face witnesses, to have defense witnesses compelled to attend, to have a speedy trial by an impartial jury, the right against self-incrimination (nevertheless allowing comment regarding the accused’s failure to testify), and the protection against double jeopardy. The section further specifies provision may be made by law for deposing witnesses. In short, the lengthy section encompasses many of the



procedural safeguards enumerated in the United States Constitution, specifically in the Fifth and Sixth Amendments.<sup>1</sup>

Originating in 12<sup>th</sup> century England under the reign of King Henry II, grand juries were a way for citizens to note suspicious behavior and then, as jurors, report on suspected crime to the rest of the jury.<sup>2</sup> This system helped centralize policing power with the king, power that otherwise would have been held by the church or barons. By the 17<sup>th</sup> century, grand juries were viewed as a way of shielding the innocent against criminal charges.<sup>3</sup> Resembling the system used today, the government was required to get an indictment from a grand jury before prosecuting. Thus, the grand jury evolved from being a “tool of the crown” to “defender of individual rights,” a transformation helped by two famous refusals of a London grand jury to indict the Earl of Shaftesbury on a dubious treason charge in 1667. The resulting rule of law, that freemen are entitled to have their neighbors review the charges against them before the government can indict, was brought to the colonies with British citizens who, when their relationship with England soured, used the process to nullify despised English laws and deny indictment to dissenters. The most famous example of this was newspaper editor John Peter Zenger, who was arrested for libel in 1743 based on his criticisms of the New York royal governor. Three grand juries refused to indict him, and, although royal forces would still put him on trial after an information proceeding, a trial jury acquitted him.

After independence, the United States Constitution’s framers considered grand juries to be so vital to due process that the institution was enshrined in the Fifth Amendment: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger \* \* \*.” As described by the United States Supreme Court in *U.S. v. Calandra*, 414 U.S. 338, 342-343 (1974):

The institution of the grand jury is deeply rooted in Anglo-American history. [Footnote omitted.] In England, the grand jury served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action. In this country the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by “a presentment or indictment of a Grand Jury.” Cf. *Costello v. United States*, 350 U.S. 359, 361-362 (1956). The grand jury’s historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions. *Branzburg v. Hayes*, 408 U.S. 665, 686-687 (1972).

Many states, including New York, Ohio, Maine, and Alaska, institutionalized grand juries in their own constitutions, using language almost identical to the Fifth Amendment.



## Amendments, Proposed Amendments, and Other Review

The Ohio Constitutional Revision Commission (1970s Commission) created a special “Committee to Study the Grand Jury and Civil Trial Juries” to consider the purpose and function of grand juries. As described in the 1970s Commission report, that committee determined “there are some classes of cases in which the grand jury could serve a useful purpose,” including “cases that have complex fact patterns or a large number of potential defendants, such as conspiracies or instances of governmental corruption; cases which involve use of force by police or other cases which tend to arouse community sentiment; and sex offenses and other types of cases in which either the identity of the complaining witness or the identity of the person being investigated should be kept secret in the interest of justice unless the facts reveal that prosecution is warranted.”

The 1970s Commission recommended that the reference to the grand jury in Article I, Section 10 be moved to a new Section 10a, which would read:

Section 10a. Except in cases arising in the armed forces of the United States, or in the militia when in actual service in time of war or public danger, felony prosecutions shall be initiated only by information, unless the accused or the state demands a grand jury hearing. A person accused of a felony has a right to a hearing to determine probable cause. The General Assembly shall provide by law the time and procedure for making a demand for a grand jury hearing. In the absence of such demand, the hearing to determine probable cause shall be by a court of record. At either such hearing before a court or at a grand jury hearing, the state shall inform the court or the jury, as the case may be, of evidence of which it is aware that reasonably tends to negate the guilt of an accused or of a person under investigation. The inadvertent omission by the state to inform the court or the jury of evidence which reasonably tends to negate guilt, in accordance with the requirements of this section, does not impair the validity of the criminal process or give rise to liability.

A person has the right to the presence and advice of counsel while testifying at a grand jury hearing. The advice of counsel is limited to matters affecting the right of a person not to be a witness against himself and the right of a person not to testify in such respects as the General Assembly may provide by law.

In contrast to existing Section 10, which prevented a felony prosecution “unless on presentment or indictment of a grand jury,” the recommended change required all felony prosecutions to proceed by information unless either the accused or the state demanded a grand jury hearing.<sup>4</sup>

The recommendation thus rendered the information or complaint the primary method of initiating felony prosecutions, allowed those accused of a felony the right to a probable cause hearing, required the prosecutor to reveal to either the court or the grand jury any exculpatory evidence, and permitted grand jury witnesses to have counsel present to advise on matters of privilege.



The 1970s Commission described the rationale behind the recommended change as being to simplify the process, since the existing practice allowed both a preliminary hearing in the municipal or county court to determine probable cause, and a grand jury hearing if the person is bound over to the common pleas court – where again probable cause is determined. Thus, the goal of the suggested change was to provide either for a preliminary hearing or a grand jury hearing, but not both. The 1970s Commission also explained that the purpose of recommending the provision of a right to counsel to grand jury witnesses was to recognize the need to safeguard the rights of a witness who also may be the target of the criminal investigation. However, the recommended right only extended to allowing counsel in the grand jury room during the witness’s testimony and only for the purpose of advising on the witness’s privilege against self-incrimination.

The 1970s Commission’s recommendation for grand jury reform failed to result in a joint recommendation by the General Assembly and was not presented to voters.

### **Litigation Involving the Provision**

The Ohio Supreme Court, following the language of the indictment clause, has ruled the grand jury to be a required entitlement of a person accused of a felony. *State v. Sellards*, 17 Ohio St.3d 169, 478 N.E.2d 781 (1985).

### **Presentations and Resources Considered**

#### *Williams Presentations*

Senator Sandra Williams first appeared before the committee on July 9, 2015 to discuss her view that the grand jury should be replaced by a preliminary hearing system. She expressed concern over the lack of transparency in grand jury procedures and the perception that the authority of the prosecutor is unchecked. Sen. Williams noted that, despite generally high indictment rates, grand juries frequently fail to indict police officers, indicating the discretion given to the prosecutor allows for favoritism toward law enforcement. She said if Ohio does not want to eliminate grand juries, the state may consider having a special prosecutor who would handle cases involving the police.

On February 11, 2016, Sen. Williams again presented to the committee, outlining legislation she introduced related to the use of grand juries. Identifying recommendations she would like the committee to support, Sen. Williams advocated requiring the attorney general to appoint a special prosecutor to investigate and, where necessary, charge a suspect in cases involving a law enforcement officer’s use of lethal force against an unarmed suspect.

Sen. Williams also advocated the court appointment of an independent grand jury counsel to advise the grand jury on procedures and legal standards. Sen. Williams said an independent counsel would have specific guidelines for interacting with jurors, asserting that the prosecutor should not be the jury’s only source of legal guidance. She said this would be another way to provide transparency, removing as it does the current ambiguity caused by allowing the prosecutor to be both active participant and referee.



Describing how this system would work in the grand jury room, Sen. Williams said the prosecutor would be able to present the case and offer his opinion on possible charges that apply, as determined by the evidence presented, but jurors' questions would be answered by the independent counsel, who could explain the proceedings based on law. Sen. Williams added that the independent counsel would be selected by the presiding judge of the local common pleas court, and the length of service of the counsel would be determined by law.

Sen. Williams also recommended that the General Assembly or Supreme Court expand the rules and set standards allowing access to grand jury transcripts. She said an additional reform would allow those directly impacted by a grand jury outcome to request the transcript. If there are concerns about witness privacy, Sen. Williams said sensitive information could be redacted.

Sen. Williams additionally advocated a provision allowing the creation of an independent panel or official for the purpose of reviewing grand jury proceedings when questions arise, a practice she said is useful in cases in which there is a significant question whether the prosecutor is overcharging or undercharging. She said this recommendation would retain the need for secrecy while allowing review if there is a question whether the prosecutor is conducting the investigation in good faith.

Sen. Williams acknowledged the secrecy component has been an integral part of the grand jury process, but said modern realities demand that there be some way to review the proceedings in cases in which there is significant public interest, where the public may feel justice is being circumvented, or where motives are viewed as politically expedient. She said when it comes to high profile cases, the secrecy of the process and, in many cases, the evidence presented, no longer retains the need to be secret. She said the current grand jury system in Ohio operates without any mechanism to review the process.

### *Gilchrist Presentation*

Also on July 9, 2015, Professor Gregory M. Gilchrist of the University of Toledo College of Law addressed the committee on the history of the grand jury. Prof. Gilchrist described that historically the grand jury served as a shield to protect the individual citizen, noting that in colonial times the grand jury thwarted royal prosecutors from bringing charges perceived as unjust. Today, he said, the procedure is largely in the control of the prosecution. He observed that, because grand juries serve for a period of months, jurors get to know the prosecutor on a day-to-day basis, and the prosecutor can serve as their only source for legal knowledge and information about the criminal justice system.

### *Gmoser and Murray Presentations*

On December 10, 2015, two county prosecutors offered their perspectives on the use of the grand jury. Both prosecutors advocated for retaining the grand jury system in its current form. Michael Gmoser, Butler County Prosecutor, said 98 percent of felony prosecutions in the criminal division of his office begin with a grand jury indictment, as opposed to a bill of information. He said, unlike the popular saying, there is nothing to be gained by "indicting a



ham sandwich,” adding that might be true as an exception to the rule, “but we should not change the whole system because of it.”<sup>5</sup> He said secrecy prevents the innocent person from being maligned and abused based on improper charges. He said prosecutors use the grand jury for investigatory purposes, so that, if the process becomes transparent, it will prevent opportunities for disclosure of crime.

Morris Murray, prosecutor for Defiance County, emphasized the grand jury process is “absolutely critical” to the fair and efficient administration of justice. Reading from the jury instructions that are provided to grand jurors at the time they are sworn by the judge, Mr. Murray described the grand jury as an “ancient and honored institution,” indicating that jurors take an oath in which they promise to keep secret everything that occurs in the grand jury room, both during their service and afterward.

On November 10, 2016, Mr. Murray again appeared before the committee, on behalf of the Ohio Prosecuting Attorneys Association, to provide additional perspective on the question of whether to change the grand jury process in Ohio as provided in Article I, Section 10.

Mr. Murray expressed continued support for the concept that the grand jury process “is a time honored and important piece of the criminal justice system not only in Ohio, but throughout the country.” He continued that grand juries take their oath seriously, and that jurors are instructed that if the evidence does not meet the probable cause standard they should not return an indictment.

Mr. Murray explained that prosecutors receive investigatory files from law enforcement agencies and review those investigations to make a preliminary assessment of the legal sufficiency to proceed. He emphasized that the statutory, ethical, and professional obligation of a prosecuting attorney is not simply to seek a conviction, but to seek justice. He said prosecutors are sworn officers of the court expected to comply with the ethical considerations and disciplinary rules established to ensure that lawyers conduct themselves professionally.

He commented that removing or diminishing the confidentiality of grand jury proceedings jeopardizes the purpose of the grand jury, and would remove an important protection for persons who are investigated but not ultimately indicted. He said confidentiality also protects witnesses from retribution or intimidation whether cases go forward or not.

Mr. Murray said the Ohio Prosecuting Attorneys Association is opposed to the concept of a grand jury legal advisor because that would add an unnecessary layer to the process. He said prosecutors are expected to provide instructions of law to the grand jury, providing evidence that proving the essential elements of the criminal violation. He said prosecutors must understand the rules of evidence, and how information may be impacted by those rules, and they have nothing to gain by submitting inadmissible evidence to a grand jury, or from withholding evidence that may prove or disprove allegations. In addition, he said, grand juries are instructed that they have the option to obtain further instructions or legal advice from the court, if they require it. He said adding an advisor attorney adds expense and bureaucracy.

Mr. Murray said if the concern is that prosecutors will pursue cases and seek indictments where they should not, or that they would fail to prosecute cases that should be prosecuted, the use of an advisor attorney will not address those concerns.

On January 12, 2017, Mr. Murray was present in the audience to answer questions by committee members. Asked whether prosecutors should be required to provide transcripts of grand jury witness testimony, Mr. Murray indicated the state has adopted “open file discovery,” in which prosecutors have to turn over everything they have, including statements outside the grand jury. He said his organization might be amenable to providing transcripts so long as the provision is drafted so as to protect witnesses who need protection.

### *Young Presentation*

On February 11, 2016, State Public Defender Tim Young presented to the committee. Mr. Young said grand juries are “a vital and important step in the criminal justice process.” However, he said, the unfettered, unchecked secrecy in the process sets it apart from the rest of the justice system and society’s basic ideals relating to government. Mr. Young proposed several reforms to the committee for improving the grand jury process, including that, after indictment, the testimony of trial witnesses should be made available to the court and counsel; that the secrecy requirement be eliminated in cases involving the conduct of a public official in the performance of official duties; and that, in the case of a police shooting, a separate independent authority be responsible for investigating and presenting the matter to the grand jury.

### *Hoffmeister Presentation*

On June 9, 2016, the committee heard a presentation by University of Dayton law professor Thaddeus Hoffmeister, who has written extensively about the grand jury system and particularly studied the Hawaii model of having a Grand Jury Legal Advisor (GJLA).

Professor Hoffmeister testified that the GJLA is a licensed attorney who neither advocates on behalf of nor represents anyone appearing before the grand jury, but serves as counsel to the grand jurors. The role of the GJLA is to provide grand jurors with unbiased answers to their questions, legal or otherwise.

He noted that historically the grand jury was an independent body, and the prosecutor had a limited role in the process. He said when communities were small and crimes were simple, the grand jurors actually were more knowledgeable than the prosecutor regarding both the law and the controversies giving rise to the investigations. Later, when the population grew and prosecutors became more specialized, the courts allowed the prosecutor to play a larger role in educating the grand jury.

Professor Hoffmeister advocated that introducing a GJLA to the process is one possible solution to restoring grand jury independence. He said the GJLA could be appointed by a common pleas judge who would also be responsible for settling any disputes between the GJLA and the prosecutor, which rarely arise. The GJLA’s main job would be to support grand jurors in their



determination of whether to issue an indictment. The GJLA would also be called upon to research and respond to questions posed by the grand jurors. However, there is no duty for the GJLA to present exculpatory evidence or to advise witnesses, which dramatically alters the traditional functions of the grand jury. Finally, the proposed GJLA typically serves for one or two year terms and is present during all grand jury proceedings.

Prof. Hoffmeister said the legal advisor is not permitted to ask questions, and is not with the jurors when they deliberate. When the advisor disagrees with the prosecutor regarding a legal interpretation, the dispute is presented to the common pleas judge who resolves the conflict, but that, in practice this is rare because the prosecutor and the GJLA usually work it out on their own.

### *Shimozono Presentation*

In September 2016, Attorney Kenneth J. Shimozono, a grand jury legal advisor in Hawaii, was available via telephonic conference call to answer the committee's questions on the grand jury process in his state. Mr. Shimozono described the relationship between prosecutors and grand jury legal advisors as generally professional and cordial. He said most grand jury counsel are former prosecutors who are now defense attorneys, or they are defense attorneys. Mr. Shimozono said it is the prosecutor's decision to present evidence as he sees fit, and the jury's questions are directed to the witnesses. Asked whether there is an attorney-client relationship between the legal advisor and the grand jury, Mr. Shimozono said he would not disclose the jury's questions to the prosecutor so he would believe they have an attorney-client relationship. He said his understanding is that the advisor is there to advise the grand jury, but the grand jury is not the client in the traditional sense. Mr. Shimozono said the duty is owed to the jurors and not to the defendant. He said the jurors would notify the legal advisor if they wanted to ask a question but were not allowed, adding that, in that instance, everyone goes in front of the administrative judge and puts it on the record in a hearing. But, he said, to his knowledge that has never happened.

Asked what would happen if the legal advisor provided a wrong answer, left out an element of the offense, or misinterpreted the law, resulting in the grand jury moving forward with an indictment, Mr. Shimozono said the remedy would be for the defense counsel to look at the transcript to see if there were improprieties, and, if so, file a motion to dismiss the indictment. But, he said, the error has to be material and, if the defendant were found guilty, the issue would be preserved for appeal.

Asked about the procedure for a defendant to get access to a transcript of the grand jury hearing, Mr. Shimozono said the defendant has to request the transcript, but no one challenges the request. He said supplying the transcript is "more of a given," so that the defendant requests the transcript from the court reporters' office and they pull the video and make a transcript. Or, he said, the defense can watch the video and see if there is an issue, and then ask for the hearing to be transcribed so it can be submitted to the court.

Asked whether the legal advisor is immune for actions taken during grand jury proceedings, Mr. Shimozono said he would believe so, but has not been told that specifically. He said legal



advisors are paid by the state, but are independent contractors, so he is not sure if they have complete immunity. He said even if the legal advisor is not immune, the state attorney general would step in to defend in that situation, similar to what occurs in relation to the public defender.

Summarizing the effectiveness of the system, Mr. Shimozone said having the grand jury legal advisor is helpful because it improves the process to have someone there who is more neutral. He said it also may help the grand jurors feel more comfortable that they are getting an unbiased view, so that they have more confidence in the process. He said they have found grand jurors take their duties seriously and they get better at performing their role as the year progresses. He said once the jury catches on to how things work they have fewer questions.

Asked whether he would advise another state to adopt a procedure like Hawaii's, Mr. Shimozone said he would recommend not adopting the system in its entirety. He said one thing that would make a difference is to require the grand jury counsel to sit through the entire proceedings to get a better grasp of what is going on. He said, under Hawaii's current system, in which the legal advisor is not always in the room, the jury may not realize something is improper and so would not bring it to the legal advisor's attention. He said, as a defense attorney, he would prefer that cases be brought through a preliminary hearing process. He said he has not seen abuse with the grand jury process, but, generally speaking, there was not a huge problem when he was a public defender, although sometimes there was a little more hearsay evidence than he thought was appropriate.

## **Discussion and Consideration**

Committee members expressed a variety of views on whether and how to reform the grand jury process. While committee members generally agreed that the grand jury process could allow prosecutors to exert undue influence on the grand jury's deliberations, and that the absence of transparency contributes to public concern over the grand jury's operation, some members were reluctant to conclude that reform was necessary or that constitutional change is necessary for reform.

Some committee members focused on the possibility of creating a separate procedure for cases involving police use-of-force. Such a procedure would allow or require appointment of a special prosecutor as a way of addressing concerns arising out of the perception that the working relationship between prosecutors and local police creates a conflict of interest. Some committee members expressed concern that creating a special procedure for such cases could have unintended consequences, and so were not in favor of treating police use-of-force cases differently.

Committee members generally agreed that, although there are problems in the grand jury system, they were not in favor of eliminating the constitutional requirement of a grand jury indictment for felony prosecutions.

The committee considered the concept of a grand jury legal advisor, with some members seeing a benefit in the appointment of an independent attorney to assist the grand jury. Although committee members found the idea to be interesting, they expressed concerns about how such a



system would work as a practical matter, particularly in smaller counties. Committee members also expressed that, although Hawaii provides for a grand jury legal advisor in its constitution, it may not be necessary for Ohio to create a constitutional provision allowing for a grand jury legal advisor; rather, such a system could be created by statute or court rule.

The committee also gave serious consideration to whether a constitutional provision is needed to grant the accused a right to a transcript of grand jury witness testimony. Some committee members expressed that denying the accused the opportunity to obtain the transcript of witness testimony might violate the right to confrontation, as well as due process rights. Believing the transcript issue touches on these fundamental rights, those committee members asserted constitutional language may be necessary to guarantee access to a transcript. While agreeing that access to a transcript is important, other committee members suggested the issue did not rise to the level of requiring a constitutional provision, instead asserting that the accused's interest in obtaining a transcript could be protected by statute.

## **Conclusion**

Committee members expressed concern over the role of prosecutors in the grand jury process, recognizing that, under the current system, the prosecutor is the only attorney in the room, and has sole control over what the grand jury is told about the law. Some committee members were concerned that this arrangement creates the risk that grand jurors could be given inaccurate information, or that their questions will not be objectively answered. Based on these concerns, a majority of the committee favored the system used in Hawaii, by which a neutral grand jury legal advisor is available to answer juror's questions. Thus, the committee recommends an amendment that would create the role of grand jury legal advisor. However, the committee would leave it to the legislature to address the details of appointment and funding of the legal advisor, as well as to specify issues such as the legal advisor's presence during the grand jury proceedings and immunity for official acts.

An additional concern of members was that, under current Criminal Rules 6 and 16, a criminal defendant does not have a right to a transcript of grand jury proceedings. In particular, members expressed support for the concept that criminal defendants should have access to transcripts of grand jury witness testimony in order to impeach witnesses in situations in which inconsistent testimony was provided during the grand jury proceedings. Although the committee felt that access to the grand jury record was an important principle to articulate, the committee felt that the details of how that access could be achieved was best addressed by statute or court rule, and so recommends that access would be afforded "as provided by law."

## **Date Issued**

After formal consideration by the Judicial Branch and Administration of Justice Committee on March 9, 2017, April 13, 2017, and May 11, 2017, the committee voted to issue this report and recommendation on May 11, 2017.



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## Endnotes

<sup>1</sup> The Fifth Amendment to the U.S. Constitution provides: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

The Sixth Amendment to the U.S. Constitution provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”

<sup>2</sup> For more on the history of grand juries, see, e.g., Ric Simmons, *Re-examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?* 82 B.U.L. Rev. 1 (2002); Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury’s Shield*, 98 J. Crim. L. & Criminology 1171 (2007-2008); Richard H. Helms, *The Early History of the Grand Jury and the Canon Law*, 50 U. Chicago L.Rev. 613 (1983).

<sup>3</sup> Beale, Sarah, et al., *Grand Jury Law & Practice* 1.2.

<sup>4</sup> As Bryan Garner has explained, the federal court system distinguishes between an indictment, an information, and a presentment:

Any offense punishable by death, or for imprisonment for more than one year or by hard labor, must be prosecuted by indictment; any other offense may be prosecuted by either an indictment or an information. Fed. R. Crim. P. 7(a). An information may be filed without leave of court by a prosecutor, who need not obtain the approval of a grand jury. An indictment, by contrast, is issuable only by a grand jury.

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Presentments are not used in American federal procedure; formerly, a presentment was ‘the notice taken, or statement made, by a grand jury of any offense or unlawful state of affairs from their own knowledge or observation, without any bill of indictment laid before them.’ [citation omitted].

Bryan Garner, *A Dictionary of Modern Legal Usage*, 438 (2d ed. 1995).

A “presentment” is an informal accusation returned by a grand jury on its own initiative, as opposed to an indictment, which results from a prosecutor’s presentation of charges to the grand jury. Both a presentment and an indictment result from actions by a grand jury. Ballentine’s Law Dictionary (3rd ed. 1969), available at LexisNexis.com (last visited Feb. 28, 2017).

Some states allow both a grand jury hearing and a preliminary hearing, but restrict the grand jury process to certain types of crimes or investigations.

<sup>5</sup> Mr. Gmoser’s “ham sandwich” remark is a reference to the famous comment by New York Chief Judge Sol Wachtler that New York district attorneys have so much influence on grand juries that they could get jurors to indict “a ham sandwich.” Marcia Kramer & Frank Lombardi, “New top state judge: Abolish grand juries & let us decide,” *New York Daily News*, Jan. 31, 1985. Available at: <http://www.nydailynews.com/news/politics/chief-judge-wanted-abolish-grand-juries-article-1.2025208> (last visited June 28, 2016).





## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION OF THE CONSTITUTIONAL REVISION AND UPDATING COMMITTEE

#### OHIO CONSTITUTION ARTICLE II, SECTIONS 1 to 1i, 15(G), and 17

#### THE OHIO STATUTORY AND CONSTITUTIONAL INITIATIVE

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The Constitutional Revision and Updating Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article II, Sections 1 to 1i, 15(G) and 17 of the Ohio Constitution concerning the statutory and constitutional initiative. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

The committee recommends that Article II, Sections 1 to 1i, 15(G), and 17, be amended to make changes in both the statutory and the constitutional initiative and to modernize, streamline, and make more transparent the provisions of Article II. The full text of the current provisions is in Attachment A and the full text of the proposed amendment is in Attachment B. This proposal does not make any substantive changes in the referendum or in the use of the initiative and referendum by the people of municipalities.

Article II, Sections 1 to 1g, currently contains some of the most confusing and difficult to understand language in the Ohio Constitution. In addition to the substantive changes designed to encourage the use of the statutory initiative as contrasted to the constitutional initiative, this report and recommendation proposes to make these provisions more readable by reorganizing this portion of Article II, by removing difficult to understand language, and by using appropriate subsections and divisions. It also proposes to create new Sections 1h and 1i, to add Section 15(G) to Section 15, and to move some provisions to the unused Section 17.

The report and recommendation:

- Makes the statutory initiative more user-friendly by eliminating the supplementary petition;

- Creates a five-year safe harbor in which initiated statutes can only be amended or repealed by the General Assembly with a two-thirds supermajority vote;
- Decreases the number of signatures required to initiate a statute from six percent to five percent but requiring the signatures to be submitted at the beginning of the process;
- Creates constitutional authority for the initial 1,000-signature petition presently in the Ohio Revised Code for the initiative and the referendum;
- Creates constitutional authority for the determination by the attorney general that the summary of the initiative and referendum is “fair and truthful”;
- Requires initiatives for statutes and for constitutional amendments to use gender-neutral language, where appropriate;
- Increases the passing percentage for proposed initiated constitutional amendments from 50 percent to 55 percent;
- Permits proposed initiated amendments to be on the general election ballot only in even-numbered years;
- Provides that the one amendment requirement for General Assembly-initiated constitutional amendments also applies to initiated constitutional amendments;
- Provides greater clarity by specifying the dates when proposed statutory and constitutional initiatives may be submitted to the voters; and
- Permits the General Assembly to modernize the signature-gathering process by using electronic means to gather signatures and to verify them either to supplement or replace current requirements.

### Summary of Affected Provisions of Current Constitution

This report and recommendation seeks to amend the following current provisions of Article II, which are summarized below.

#### Article II (Current Provisions)

Section 1	In Whom Power Vested	Provides that the legislative power of the state is vested in the General Assembly but reserves to the people the power to propose laws and amendments and to reject laws.
Section 1a	Initiative and Referendum to Amend Constitution	Permits the use of the initiative to amend the constitution and describes the process to be followed.
Section 1b	Initiative and Referendum to Enact Laws	Permits the use of the initiative to adopt statutes and describes the process to be followed.
Section 1c	Referendum to Challenge Laws Enacted by General Assembly	Permits the use of the referendum to challenge laws passed by the General Assembly and describes the process to be followed.
Section 1d	Emergency Laws; Not Subject to Referendum	Bars the use of the referendum to challenge laws providing for tax levies and emergency laws.

Section 1e	Powers; Limitations of Use	Bars the use of the statutory initiative to adopt laws classifying property or authorizing a single tax on land; limits the use of the constitutional initiative to create monopolies, to determine tax rates, and to confer special benefits.
Section 1f	Power of Municipalities	Guarantees the right of the initiative and referendum to the people of each municipality.
Section 1g	Petition Requirements and Preparation; Submission; Ballot Language; By Ohio Ballot Board	Describes the process of collecting signatures; gives the supreme court original and exclusive jurisdiction over challenges to petitions; establishes timeline for judicial review of petitions and signatures; describes the duties of the Ohio Ballot Board; describes the provisions as self-executing, but giving the GA authority to adopt laws that facilitate their operation.
Section 15	How Bills Shall Be Passed	Describes the constitutional requirements for passing bills.
Section 17	[open section]	

## Background<sup>1</sup>

Article II concerns the powers and duties of the legislative branch. Article II, Section 1 of the 1851 Constitution expressed the simple but fundamental concept that legislative power is vested in a legislative body. It read in its entirety: “[t]he legislative power of this state shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives.”<sup>2</sup>

The Ohio Constitutional Convention of 1912 proposed, and voters approved, the adoption of the indirect statutory initiative, the direct constitutional initiative and the referendum as part of a comprehensive direct democracy proposal.<sup>3</sup> The placement of the statutory and constitutional initiatives in Article II reflected the delegates’ view that the full legislative (and constitution-amending) power rested with the people, clarifying that the full power was not delegated to the General Assembly. Sections 1 to 1g of Article II now contains the detailed constitutional provisions concerning the initiative and the referendum. Despite amendments in the last century, the statutory and constitutional initiatives look very much today as they did when first adopted.

### *Indirect Statutory Initiative*

The constitution is silent on the steps to be taken before a petition for a proposed initiated statute is filed with the secretary of state, but the Ohio Revised Code requires that a petition signed by 1,000 qualified electors first be submitted to the attorney general along with the text of the proposed statute and a summary of it. *See* R.C. 3519.01(A). The attorney general then has ten days to determine whether “the summary is a fair and truthful statement of the proposed law \* \* \*.” *Id.*

If the attorney general certifies the summary as being a fair and truthful statement of the proposed law, the ballot board determines whether the petition contains only one proposed law.<sup>4</sup> Petitioners may not begin to collect signatures until after the certification by the attorney general and the determination by the ballot board.

The statutory initiative requires the filing of a petition signed by three percent of the total votes cast for the office of governor in the last gubernatorial election. In the event the secretary of state determines petitioners have not provided a sufficient number of signatures, petitioners have a ten-day period to obtain additional signatures on a supplemental form. *See* R.C. 3519.16(F).

The constitution contains geographic distribution requirements for the signatures. Petitions must include signatures with one-half of the required percentage from 44 of Ohio's 88 counties.<sup>5</sup> Thus, in 44 counties there must be signatures from at least 1.5 percent of the total votes cast for the office of governor in the last gubernatorial election.<sup>6</sup> To simplify this, the secretary of state's website lists the requisite percentages by county.<sup>7</sup>

Because Ohio has an indirect statutory initiative, the petition with the requisite signatures must be filed with the secretary of state at least ten days prior to the convening of a regular session of the General Assembly, which is the first Monday in January in odd-numbered years.<sup>8</sup> The secretary of state then sends the proposal for a new law to the General Assembly.

If the General Assembly fails to adopt the proposed law, amends it, or takes no action within four months from the date of its receipt of the petition, the petitioners may seek signatures on a supplementary petition demanding that the proposal be presented to the voters at the next regular or general election. As with the initial petition, the supplementary petition must contain signatures of three percent of the voters at the most recent gubernatorial election, subject to the same geographic distribution requirement. The petition must be filed with the secretary of state within 90 days after the General Assembly fails to adopt the proposed law, and not later than 125 days before the scheduled general election.<sup>9</sup> Given these deadlines, proponents of a proposed law will have approximately 60 days to gather signatures for their supplementary petition, if they wish to present a proposed statute to the voters in the same year that they presented it to the General Assembly.<sup>10</sup>

If the secretary of state determines that a petition contains an insufficient number of signatures, the petitioner has ten additional days to cure and submit additional signatures.<sup>11</sup> Under R.C. 3519.16(F), a petitioner must stop collecting additional signatures upon filing the petition until the secretary of state provides notice that petitioner may renew the collection of signatures.

If the voters approve a proposed initiated statute by a majority of votes on the issue, the law becomes effective 30 days after the election.<sup>12</sup> Any initiated statute approved by voters must conform to the requirements of the Ohio Constitution.<sup>13</sup> The governor may not veto a law adopted by initiative, but such laws are subject to the referendum and may be amended by the General Assembly.<sup>14</sup>

The statutory initiative may not be used to adopt legislation that would impose a single tax on land or establish a non-uniform classification system of property for purposes of taxation. This limitation, which is contained in Article II, Section 1e(A), provides:

The powers defined herein as the “initiative” and “referendum” shall not be used to pass a law authorizing any classification of property for the purpose of levying different rates of taxation thereon or of authorizing the levy of any single tax on land or land values or land sites at a higher rate or by a different rule than is or may be applied to improvements thereon or to personal property.<sup>15</sup>

Since the adoption of the constitutional amendment in 1912 permitting statutes to be initiated, proponents of legislation have used the statutory initiative to bring twelve proposed laws to the ballot, but the voters approved the proposed laws in only three instances.<sup>16</sup> It is not clear, however, how often the General Assembly adopted a law that had first been proposed by statutory initiative because no records are available tracking this and (by definition) no proposal went to the ballot.<sup>17</sup> Nor is it clear how much of a factor the threat of a statutory initiative played in the legislative process.

### *Constitutional Initiative*

Under the Ohio direct constitutional initiative, a petition signed by ten percent of the electors (with a 44-county geographic distribution requirement) may be submitted directly to the voters. Amendments that are approved by more than 50 percent of the voters voting on the proposed amendment are approved.

As with the statutory initiative, the direct constitutional initiative begins with the submission of a petition signed by 1,000 voters to the attorney general along with the text of the proposed statute and a summary of it for a “fair and truthful” determination. The ballot board then determines whether the petition contains only one proposed law.

Proposed amendments may only be on the fall general election ballot, and to make this deadline a petition with the requisite number of approved signatures must be filed at least 125 days prior to the general election (which means a filing deadline between June 30 and July 6, depending on the date of the general election).<sup>18</sup>

If the voters approve a proposed constitutional amendment, by a vote of a majority of those voting on the issue, the amendment becomes effective 30 days after the election.<sup>19</sup> If the voters approve conflicting amendments at the same election, the one with the highest number of affirmative votes becomes part of the constitution.<sup>20</sup>

The constitutional initiative may not be used to adopt amendments that create monopolies, that determine tax rates, or that confer special benefits unless the voters also respond affirmatively to a separate question of whether they approve that use of the initiative.<sup>21</sup>

Since 1913, Ohio voters have voted on 69 amendments proposed by the initiative, and the voters approved 18 or 26.1 percent of them. During this same period, the General Assembly proposed 154 amendments, and the voters approved 106 or 68.8 percent of them.

### *The Origins of the Initiative in Ohio - The 1912 Constitutional Convention*

Prior to 1912, efforts had been made in Ohio to get the General Assembly to adopt the initiative and referendum, but the efforts failed. Progressives, especially Herbert S. Bigelow, a minister from Cincinnati and the future president of the 1912 Constitutional Convention, looked to a constitutional convention, which in 1911 was subject to a mandatory 20-year vote.<sup>22</sup> The proposed constitutional call, which was put on the ballot on November 8, 1910, one year earlier than required, was supported by the Democratic and Republican Parties and by a surprisingly wide array of other interests, including the Direct Legislation League, Progressives, Labor, Municipal home rule supporters, the Ohio State Board of Commerce, the liquor interests, and the Ohio Woman Suffrage Association.<sup>23</sup> The voters approved the holding of a convention by an overwhelming vote of 693,263 to 67,718.<sup>24</sup>

The 1912 Ohio Constitutional Convention held in Columbus during the height of the Progressive Movement was a much-watched national event, and it included appearances by President William Howard Taft, former President Theodore Roosevelt, three-time presidential candidate William Jennings Bryan, California Governor Hiram Johnson, Ohio Governor Judson Harmon, and Cleveland Mayor Newton D. Baker.<sup>25</sup> Ultimately, in a successful effort to avoid the plight of the proposed 1874 Ohio Constitution (which had been defeated in an all-or-nothing up-and-down vote), the 1912 delegates proposed 42 amendments to the voters, who approved 34 of them.

In the non-partisan election that selected the 119 delegates to the convention, the most hotly contested issues involved the initiative and referendum,<sup>26</sup> and this was also the most hotly contested issue at the convention. The delegates, who convened on January 9, 1912 and adjourned on August 26, 1912, its 83<sup>rd</sup> legislative day, spent more time on the initiative and referendum than on any other topic, and there were 12 roll call votes on these issues during the debates.<sup>27</sup>

A majority of the delegates elected to the convention had pledged support for direct democracy before the start of the convention,<sup>28</sup> but during the debates there were sharp disagreements about the shape of direct democracy among its supporters. Ultimately, the delegates approved a compromise that rejected the use of a fixed number of required signatures on an at-large basis in favor of a fixed statewide percentage with a geographic distribution requirement – ten percent for constitutional initiatives and an initial three percent for the statutory initiative. They also proposed the use of an indirect statutory initiative (with the requirement of an additional three percent of signatures collected on a supplementary petition), but they rejected an effort by opponents of the statutory initiative to include a “poison pill” that would have removed the property tax exclusion and single-tax bar from the statutory initiative, thus preventing the statutory initiative from being used to enact the economic policies of the 19<sup>th</sup> century economist

Henry George.<sup>29</sup> Finally, the delegates rejected a proposal that would have permitted the initiative to be used to call constitutional conventions.<sup>30</sup>

Ultimately, the voters approved the amendment to adopt the statutory initiative, the constitutional initiative, and the referendum by a vote of 312,592 to 231,312.<sup>31</sup>

*The Constitutional Initiative in Ohio*<sup>32</sup>

The history of constitutional revision in Ohio has involved an expansion of the tools that are available for amending the constitution. As a result of the 1912 Constitutional Convention, constitutional amendments may now be proposed by a state constitutional convention, by a 60 percent vote of both branches of the General Assembly, and by a constitutional initiative. The most popular of the methods of proposing amendments has been proposals by the General Assembly. Regardless of the method used to propose amendments, no amendment is made to the Ohio Constitution unless approved by more than 50 percent of the voters voting on the proposed amendment.

The proponents of direct democracy had high hopes, and the constitutional initiative was used several times in the decade following the convention, most often in ten initiatives directly or indirectly involving liquor. But the results were disappointing, with voters approving only four of 17 proposed constitutional initiatives in ten-year period from 1912 to 1922.<sup>33</sup>

Beginning in the mid-1920s, the constitutional initiative fell into disuse, but it appears that the constitutional initiative has been making a comeback since the 1970s, although the number of approved constitutional initiatives is still relatively low. And in the last 25 years, the constitutional initiative has been used to adopt eight amendments to the Ohio Constitution on term limits (three amendments), a soft drink excise tax, same-sex marriage, the minimum wage, casino gambling, and healthcare.

Constitutional Initiatives on the Ohio Ballot by Decade – 1913 to 2016

	Pass	Fail	Total
1913 – 1919	4	10	14
1920s	0	5	5
1930s	3	5	8
1940s	2	0	2
1950s	0	1	1
1960s	0	1	1
1970s	1	10	11
1980S	0	7	7
1990S	4	2	6
2000S	3	8	11
2010-2016	1	2	3
Total	18	51	69

*Constitutional Initiatives in Ohio – Results, Margins of Victory, and Voter Turnout*

The Ohio Constitution has been amended 124 times since 1913; 106 of these amendments have been proposed by the General Assembly and 18 have been proposed by initiative. The breakdown that follows shows that the voters have approved 68.8 percent of the amendments proposed by the General Assembly but only 26.1 percent of the amendments proposed by the initiative.

Proposed Amendments – 1913 to 2015

	Initiative Petition	General Assembly	Total
Approved	18	106	124
Rejected	51	48	99
Total	69	154	223
Percent Approved	26.1	68.8	55.6

Amendments proposed by the General Assembly, by initiative, and by constitutional conventions must receive more than 50 percent of the vote on the issue to be approved.<sup>34</sup> Of the 18 amendments proposed by initiative, the approval vote was less than 55 percent on only five occasions. The only initiated amendment approved during the last 75 years with less than a 55 percent approval by the voters was the approval of casino gambling in 2009 by a 53 percent vote.<sup>35</sup>

Voter turnout on proposed initiated amendments (as compared to the turnout on other ballot items) has been high, and in the last 40 years, seven of the ten approved amendments proposed by initiative received at least 90 percent of the vote received on the higher turnout items on the ballot, with the only exceptions being the three amendments in 1992 on term limits, each of which had a turnout of 87 percent of the vote received on the higher turnout items on the ballot.<sup>36</sup>

*The Ohio Statutory Initiative in a National Context*<sup>37</sup>

Supplementary Petitions

There are 24 states with some form of initiative; 21 have the statutory initiative and 18 have the constitutional initiative.<sup>38</sup> Of the 18 states with a constitutional initiative, 15 also have the statutory initiative (with Florida, Illinois, and Mississippi having only the constitutional initiative). Of the 21 states with the statutory initiative, 15 also have the constitutional initiative; six states (Alaska, Idaho, Maine, Utah, Washington, and Wyoming) have only the statutory initiative.

Of the 21 states with the statutory initiative, six states, including Ohio, have the indirect statutory initiative. Two of these states – Utah and Washington – have both the direct and indirect statutory initiative but not the constitutional initiative.<sup>39</sup> Ohio is one of four states (along with Massachusetts, Michigan, and Nevada) that have both an indirect statutory initiative and a constitutional initiative.

Four of the remaining states – Ohio, Michigan, Massachusetts, and Nevada – have only an indirect statutory initiative in which the issue’s proponents must first submit their proposed statute to the state legislature. In these states, the proponents can take the matter to the ballot if the legislature fails to adopt the proposed statute. In Michigan and Nevada, the issue goes directly to the ballot if the legislature fails to act without the collection of additional signatures.<sup>40</sup> In Massachusetts, there is a modest additional signature requirement of .5 percent of the votes in the last gubernatorial election (in addition to the three percent required initially). In Ohio, the proponents of the original statute must file a supplementary petition with signatures of three percent of the vote in the last gubernatorial election.

The final two remaining states – Utah and Washington – have both a direct and indirect statutory initiative. In Utah, the initial signature requirement for direct statutory initiatives is ten percent of the votes for the office of president in the most recent presidential election. For the indirect statutory initiative, the proponents need only obtain signatures of five percent of the votes in the last presidential election, but they must get an additional five percent on a supplementary petition if the legislature does not adopt the proposed statute. In Washington, there is both a direct and indirect statutory initiative, and they both require the same number of signatures. In Washington, the proponents may put a proposed statute on the ballot without first presenting it to the legislature. Alternatively, the proponents may first present the proposed statute to the legislature and, if the legislature fails to adopt the proposed statute, the matter is automatically put on the ballot without the need to obtain additional signatures. The below chart summarizes the policies of states with the statutory initiative.

As this review demonstrates, Ohio is the only state that requires the collection of a substantial number of additional signatures on a supplementary petition as the exclusive way of placing a statutory initiative on the ballot.

Signature Requirements for the Statutory Initiative<sup>41</sup>

State	Signatures Required	Direct/Indirect and Signature
Alaska	10 percent of votes in last general election	Direct initiative only
Arizona	10 percent of votes for governor	Direct initiative only
Arkansas	8 percent of votes for governor	Direct initiative only
California	5 percent of votes for governor	Direct initiative only
Colorado	5 percent of votes for secretary of state	Direct initiative only
Idaho	6 percent of registered voters	Direct initiative only
Maine	10 percent of votes for governor	Direct initiative only
Massachusetts	3 percent of votes for governor	Indirect; additional .5 percent additional signatures to get to the ballot
Michigan	8 percent of vote for governor	Indirect; no additional signatures
Missouri	5 percent of vote for governor	Direct initiative only

Montana	5 percent of vote for governor	Direct initiative only
Nebraska	10 percent of vote in last general election	Direct initiative only
Nevada	5 percent of vote for governor	Indirect; no additional
North Dakota	2 percent of general population	Direct initiative only
Ohio	3 percent of votes for governor	Indirect; additional 3 percent to get to the ballot
Oklahoma	8 percent of votes for governor	Direct initiative only
Oregon	8 percent of votes for governor	Direct initiative only
Utah	10 percent of votes for governor (direct); 5 percent (indirect)	Additional 5 percent of votes for governor if using indirect
Washington	8 percent of voters for governor (direct and indirect)	Automatically to the ballot if using indirect
Wyoming	15 percent of votes in last general election	Direct initiative only

### Safe Harbor

To strengthen the statutory initiative, ten of the 21 states with the statutory initiative have a safe harbor provision that limits the ability of state legislatures to amend or repeal the initiated statutes approved by the voters.

### Limitations on the Power of the Legislature to Amend or Repeal Initiated Statutes

State	Actions that may be Taken by the Legislature
Alaska	No repeal within two years; amendment by majority vote any time
Arizona	3/4 vote to amend; amending legislation must “further the purpose” of the measure; legislature may not repeal an initiative
Arkansas	2/3 vote of the members of each house to amend or repeal
California	No amendment or repeal of an initiative statute by the legislature unless the initiative specifically permits it
Michigan	3/4 vote to amend or repeal
Nebraska	2/3 vote required to amend or repeal
Nevada	No amendment or repeal within three years of enactment
North Dakota	2/3 vote required to amend or repeal within seven years of effective date
Washington	2/3 vote required to amend or repeal within two years of enactment
Wyoming	No repeal within two years of effective date; amendment by majority vote anytime

### *The Ohio Constitutional Initiative in a National Context*<sup>42</sup>

Overwhelmingly, states require only a simple majority vote for the approval of constitutional amendments, and only two states – Florida and New Hampshire – have true across-the-board supermajority requirements. Florida does not have a statutory initiative but requires a 60 percent vote for legislatively-proposed amendments, for amendments proposed by initiative, and for

amendments put directly on the ballot by constitutional revision commissions under Florida's unique policy. Florida also requires a two-thirds vote on new taxes. New Hampshire, which also does not have a statutory initiative, requires a two-thirds vote for the approval of proposed amendments.<sup>43</sup> One state, Colorado, now requires a 55 percent vote but only on amendments proposed by initiative.

Aside from Florida and New Hampshire, three states with the constitutional initiative – Illinois, Nebraska, and Oregon – make limited use of supermajority requirements by requiring a percentage of votes at the election. Three states without the constitutional initiative – Minnesota, Tennessee, and Wyoming – require a majority of those voting at the election.

With one exception, the 18 states that have the constitutional initiative have the same percentage requirement for voter approval for both initiated and legislatively-proposed amendments. The only exception is Colorado, which on November 8, 2016, increased the percentage requirement on initiated amendments only from 50 percent to 55 percent.

One state, Nevada, requires approval by the voters at two consecutive general elections in even-numbered years.<sup>44</sup>

### *The Preference for the Constitutional Initiative in Ohio*

Ohio is one of only 14 states that have both the statutory initiative and a direct constitutional initiative, but Ohioans strongly prefer to use the constitutional initiative. Since 1912, there have been 81 initiatives presented to Ohio voters, of which 69 were constitutional initiatives and 12 were statutory initiatives. Thus, approximately 85 percent of all Ohio ballot initiatives are constitutional initiatives. Among the other states that have both the statutory and the direct constitutional initiative, some states have only 25 percent of petitioners using the constitutional initiative, and overall approximately 52 percent of initiated proposals in these states were constitutional initiatives.<sup>45</sup>

Although there is no authoritative explanation why Ohio is an outlier among the states that have both the statutory and constitutional initiative, the academic literature suggests that the cause is the existence of a demanding supplementary petition requirement (with a short time available to obtain additional signatures) and the absence of protection against legislative interference with initiated statutes.<sup>46</sup>

## **Amendments, Proposed Amendments, and Other Review**

### *Summary of Post-1912 Changes in the Initiative*

Since 1912, there have been ten proposed amendments to revise the provisions in Article II on the initiative and the referendum, and the voters approved six of them. Two of the amendments approved in 1918 and 1953 involved only the referendum; one approved in 2015 involved only the constitutional initiative. The other three amendments approved in 1971, 1978 and 2008,

addressed the procedures for gathering signatures and placing proposals on the ballot and affected both the statutory and constitutional initiative.

### *Review of Approved Amendments*

In 1918, voters approved an initiated amendment to Article II, Section 1 that would allow the ratification of federal constitutional amendments to be subjected to the referendum. This provision was then used to reject the state's ratification of the Eighteenth Amendment (establishing prohibition), but the United States Supreme Court in *Hawke v. Smith*, 253 U.S. 221 (1920), rejected this use of the referendum.

In 1953, voters approved a General Assembly-proposed amendment to repeal the referendum language in Section 1 that had been found unconstitutional in *Hawke*.

In 1971, the voters approved a General Assembly-proposed amendment to Section 1g to eliminate the requirement that all proposed amendments be mailed to electors, instead requiring notice by publication for five weeks in newspapers of general circulation. The amendment also eliminated the requirement that signers of initiative, supplementary, or referendum petitions place on such petitions the ward and precinct in which their voting residence is located.<sup>47</sup>

In 1978, voters approved a General Assembly-proposed amendment to Section 1g to expand the role of the ballot board (which had been created in 1974)<sup>48</sup> to amendments proposed by initiative. The amendment also reduced the number of times proposed initiatives must be advertised preceding the election, and aligned the requirements for circulating and signing initiative petitions with those for candidate petitions.<sup>49</sup> This proposal was based, in part, on recommendations from the Ohio Constitutional Revision Commission.<sup>50</sup>

In 2008 the voters approved a General Assembly-proposed amendment to revise sections 1a, 1b, 1c, and 1g to make changes in filing deadlines. The amendment required that a proposed initiated law or amendment be considered at the next general election if petitions are filed 125 days before the election (as contrasted to the prior 90-day deadline). It also established deadlines for boards of elections to determine the validity of petitions. Finally, with regard to legal challenges, the amendment gave the Ohio Supreme Court original and exclusive jurisdiction over challenges to petitions and signatures, and established expedited deadlines for court decisions.<sup>51</sup>

In 2015, the voters approved a General Assembly-proposed amendment that placed obstacles in the way of proposed initiated amendments that would create monopolies, determine tax rates, or confer special benefits not generally available to others.<sup>52</sup>

### *Review of Rejected Constitutional Amendments*

There have been four unsuccessful efforts to alter the initiative. Three involved attempts to use the constitutional initiative to alter the initiative itself and one involved an attempt by the General Assembly.

In 1915, the voters rejected a proposed initiated “Stability Amendment” supported by the liquor interests that would have created a six-year bar on proposing constitutional amendments that had been defeated twice.<sup>53</sup>

In 1923, the voters rejected an amendment proposed by the General Assembly that would have altered the requirement that proposed laws and amendments together with the arguments and explanations be mailed to each elector. The rejected amendment would have permitted the publication of this information.<sup>54</sup>

In 1939, Herbert S. Bigelow surfaced again and was the moving force behind a proposed amendment to substitute a fixed number of 50,000 signatures gathered at large to place a proposed statute on the ballot (without any requirement of a supplementary petition) and 100,000 signatures gathered at large to place a constitutional amendment on the ballot, thus eliminating the percentage requirement for signatures as well as the geographic distribution requirement.<sup>55</sup> The voters rejected this proposal by more than a 3:1 margin.<sup>56</sup>

And in 1976, the voters rejected an initiated amendment proposed by Ohioans for Utility Reform sought to “simplify” the initiative process by substituting a fixed number of 150,000 signatures to place a proposed law on the ballot (without any requirement of a supplementary petition) and 250,000 signatures to place a proposed constitutional amendment on the ballot. The proposal would have also eliminated the geographic distribution requirement. It would also have eliminated the provision of Section 1e barring the use of the statutory initiative to pass certain property tax matters.<sup>57</sup>

### *1970s Commission Proposals*

In 1974, the voters approved a General Assembly-proposed amendment, based on a 1973 recommendation from the Ohio Constitutional Revision Commission (1970s Commission), to create the ballot board and simplify the preparation of ballot language and information for voters about amendments proposed by the General Assembly but not those proposed by initiative.<sup>58</sup>

In 1975, the 1970s Commission made a far-ranging proposal to change both the constitutional and statutory initiative (including the elimination of the geographic distribution requirement)<sup>59</sup> and move the provisions on the initiative and referendum in Article II to a new Article XIV.<sup>60</sup> The General Assembly, however, put a more modest proposal on the ballot, but not until 1978, when the voters approved it.

### *Facilitating Legislation*

To strengthen the initiative and referendum, the delegates made the initiative “self-executing.”<sup>61</sup> But the delegates were also aware of the possible need to supplement the constitution provisions, and they gave the General Assembly the power to enact legislation to facilitate, but not limit or restrict, their operation.<sup>62</sup>

Under the “facilitating” provisions of the Ohio Revised Code, the proponent of an initiated constitutional amendment or law must first submit a written petition to the attorney general signed by 1,000 Ohio qualified electors.<sup>63</sup> The petition must include the full text of the proposed amendment or law as well as a summary of it.<sup>64</sup> The attorney general then reviews the submission and determines whether the summary is a “fair and truthful statement” of the proposal.<sup>65</sup> This review by the attorney general, which must be completed within ten days of receipt of the petition,<sup>66</sup> is non-substantive. Thus, it does not contemplate the attorney general addressing either the wisdom of the proposed amendment or law or whether, if approved by the voters, it would be constitutional.

## **Litigation Involving the Statutory and Constitutional Initiatives**

### *Pre-Election Judicial Review*

The Supreme Court of Ohio has rejected the availability of pre-election judicial review of the merits of ballot proposals. *See State ex rel. Cramer v. Brown*, 7 Ohio St.3d 5, 454 N.E.2d 1321 (1983) (“It is well-settled that this court will not consider, in an action to strike an issue from the ballot, a claim that the proposed amendment would be unconstitutional if approved, such claim being premature.”). Nonetheless, the court has provided pre-election review to remove from the ballot General Assembly-proposed constitutional amendments that violated the “one amendment” rule of Article XVI, Section 1. *See Roahrig v. Brown*, 30 Ohio St.2d 82, 282 N.E.2d 584 (1972).

### *One Amendment/Separate Vote Requirement*

The 1851 constitution included a one amendment, separate vote requirement under which constitutional amendments proposed by the General Assembly (as contrasted to those proposed by constitutional conventions) had to be submitted to the voters in such a way as to permit a vote “on each amendment, separately.”<sup>67</sup> This requirement was not included in the language adopting the constitutional initiative in 1912, but in 1978 the voters amended the constitution to provide that ballot language, including the presentation of amendments to be voted upon separately, was “subject to the same terms and conditions, as apply to issues submitted by the general assembly pursuant to Section 1 of Article XVI of this constitution \* \* \* .”<sup>68</sup>

The Ohio Supreme Court has not decided whether the 1978 amendment extended the one amendment, separate vote requirement to initiated amendments, but in *State ex rel. Ohio Liberty Council v. Brunner*, 125 Ohio St.3d 315, 2010-Ohio-1845, 928 N.E.2d 410, the court held that state law “imposes a similar requirement on citizen-initiated proposed constitutional amendments \* \* \* .”<sup>69</sup> The court then equated the constitutional and statutory requirements, stating that “[b]ecause this [statutory] separate-petition requirement is comparable to the separate-vote requirement for legislatively initiated constitutional amendments under Section 1, Article XVI of the Ohio Constitution, our precedent construing the constitutional provision is instructive in construing the statutory requirement.”<sup>70</sup> The court then held that the ballot board had acted inappropriately in dividing a proposed amendment concerning healthcare into two separate amendments.<sup>71</sup>

### *Statutory Initiative*

In *Ohio Mfrs. Assn. v. Ohioans for Drug Price Relief Act*, \_\_\_ Ohio St.3d \_\_\_, 2016-Ohio-5377, \_\_\_ N.E.3d \_\_\_, the court exercised original jurisdiction to invalidate enough signatures based on “overcounting” to keep a proposed initiated statute off the ballot. In a concurring opinion, Justice Judith L. French described the case as “highlight[ing] the unworkable timeline that Article II, Sections 1b and 1g impose and the need to amend it.”

There has not been significant litigation concerning the indirect statutory initiative, although the Ohio Supreme Court has emphasized that Section 1e only relates to the statutory initiative process and not to the initiation of constitutional amendments. *See Thrailkill v. Smith*, 106 Ohio St. 1, 138 N.E. 532 (1922) (holding that Section 1e does not prevent use of the initiative in proposing an amendment to the constitution, which authorizes legislation providing for classification of property for the purpose of levying different rates of taxation).

The Ohio Court of Appeals has held that Section 1e does not prevent the initial use of the statutory initiative to propose otherwise-proscribed tax measures to the General Assembly. *See State ex rel. Durell v. Celebrezze*, 63 Ohio App.2d 125, 409 N.E.2d 1044, 1049-50 (1979).

### **Presentations and Resources Considered**

#### *Coglianesse Presentation*

On June 13, 2013, Richard N. Coglianesse, principal assistant attorney general, provided a broad overview of the role of the attorney general concerning the initiative and the referendum. Coglianesse identified possible technical changes to the Revised Code and the constitution, including dividing Article II into paragraphs, defining appropriations in Section 1d relating to the referendum, and including an expiration date for the attorney general’s “fair and truthful” certification of summaries of proposed initiatives.

#### *Schuster Presentation*

On July 7, 2013, Betsy Luper Schuster, who was, at that time, chief elections counsel for the secretary of state, provided an overview of the initiative and referendum and the ballot board based on information from the secretary of state’s website as well as an historical document listing ballot issues since 1912.

#### *Steinglass Presentations*

On August 6, 2013, Steven H. Steinglass, Senior Policy Advisor, presented an overview of the initiative and the referendum, including remarks related to the ability of the General Assembly to repeal initiated statutes, the existence of ways to prevent “non-constitutional” issues from being initiated as constitutional provisions, the signature requirements (including the geographic

distribution requirement), the use of supermajority requirements for voter approval, and the absence of a time limit on the petition circulation period.

On June 12, 2014, Mr. Steinglass presented to the committee on the use of the constitutional initiative throughout the country, including a discussion of issues concerning the statutory initiative.

#### *Thompson Presentation*

On September 12, 2013, Maurice A. Thompson, Executive Director of the 1851 Center for Constitutional Law, advanced the case for preserving and/or strengthening the initiative and referendum in Ohio. Thompson argued the initiative process gives Ohioans the capacity to act independently of the executive and legislative branches, further asserting the initiative and referendum advances public education and serves as a check on government. Commenting on proposals to reduce access to the initiative and referendum, he argued that driving up costs will foreclose participation by average grass-roots volunteers. With respect to the statutory initiative, Mr. Thompson urged reducing the number of signatures required for initiated statutes, preventing the legislature from amending or eliminating an initiated statute for a period of time or requiring a supermajority vote to do so, prohibiting the referendum of an initiated statute, and removing the requirement of a supplementary petition for the statutory initiative.

#### *McTigue Presentation*

On October 13, 2013, Donald J. McTigue, an attorney with McTigue & McGinnis LLS, opined that the current initiative and referendum should not be curtailed or made more difficult to exercise. More specifically, he identified burdens placed on the initiative and referendum by the General Assembly, including what he characterized as unintended consequences of the 2008 amendments to Article II.

#### *Subsequent Presentations by McTigue and Thompson*

On October 9, 2014, both McTigue and Thompson addressed questions posed by the committee, specifically whether the statutory initiative process could be strengthened by limiting the General Assembly's ability to repeal or amend an initiated statute during the five-year period after its adoption, and whether the process could be strengthened by undoing some of the impediments the General Assembly has placed on the initiative and referendum.

Mr. McTigue noted in some cases only a constitutional amendment will satisfy the goal of the petitioners. In addition, he expressed concern about revisions to the process that were adopted in 2008. He asserted those two requirements, working together, make it impossible to meet the 125-day requirement before an election. Thus, a proposed statute presented to the General Assembly prior to the beginning of its January session could not get on the ballot until November of the following year.

Mr. Thompson advocated a six-year, rather than a five-year, period during which the General Assembly may not repeal or amend an initiated statute, even with a two-thirds vote. He also pointed out ways the legislature could maneuver to defeat an initiative by delaying consideration or by making changes that adversely affect the proponents' effort.

### *Tillman Presentation*

On October 10, 2013, Scott Tillman, national field director from Citizens in Charge, an organization advocating the protection of the initiative and referendum process, emphasized the importance of keeping the initiative and referendum process open and available to citizens. He suggested the experience of other states could be a model for encouraging use of the statutory initiative, explaining that Michigan requires a 75 percent vote to repeal an initiated law, while Montana prevents legislative changes for three years.

### *Cain Presentation*

On December 12, 2013, Bruce Cain, professor of political science at Stanford University, presented to the committee via teleconference. Prof. Cain focused on three main topics with regard to the initiative process: 1) Assuring there is a clear idea of what the initiative is trying to fix; 2) Outlining the reasons proponents choose the initiative process as opposed to the legislative process; and 3) Distinguishing what is harmless in the constitution versus real issues that need to be changed.

Prof. Cain outlined several differences between California's and Ohio's processes. He described that there is an industry in California for the purpose of getting initiatives on the ballot. Because so many initiatives are making it to the ballot, California voters are passing fewer and fewer of them each year. He noted that the Ohio General Assembly has the ability to amend or repeal statutory sections, while the California General Assembly does not have that power, a situation that has led to using the initiative process in California as a way to check what the legislature is doing.

Prof. Cain said the California initiative process is not transparent, explaining that the people who finance the campaign arrange to have the initiative written and the general public either accepts or rejects the proposed language. Regarding how to keep subject matter that should not be in the constitution from being placed in the constitution, Prof. Cain suggested a subject matter restriction on initiatives.

### *Dinan Presentation*

On February 13, 2014, John Dinan, professor of politics and international affairs at Wake Forest University, provided the full Commission an overview of state constitutions and recent state constitutional developments. Regarding the initiative and referendum process, Prof. Dinan said, beginning in the late 20<sup>th</sup> century, the citizen's initiative process allowed the inclusion in the constitution of provisions that were blocked or otherwise unobtainable in the legislature on topics such as minimum wage and casino gambling. He said that all states have a process for

legislatively-referred constitutional amendments, but some states require that process to occur through a bare majority of the legislature in a single session before being submitted to the voters, while other states require a two-thirds supermajority approval in the legislature, sometimes even in consecutive sessions, before being submitted to the voters. He added some states also require approval of a majority of voters voting in that particular election, not just on that question, or may require approval by a certain percentage of voters, such as 60 percent or two-thirds.

He said, of the 18 states that have the constitutional initiative procedure, the requirements vary widely. He said some states require the same number of signatures on petitions for a statutory measure as the proponents would need for a constitutional measure. He said one state, Florida, requires a constitutional commission to convene every 20 years, and allows the commission to submit proposed amendments directly to the people.

Prof. Dinan noted that the debate about what belongs in a constitution and whether policy matters should be in the constitution is a debate that has occurred for as long as constitutional revision has taken place. He said the debate occurs on two levels, the first being whether it is, substantively, a good policy and the second being whether it is a policy deserving of inclusion in the constitution.

#### *Rosenfield Presentation*

On July 10, 2014, Peg Rosenfield, elections specialist for the League of Women Voters of Ohio, described the difficulties of citizen-based statutory initiative campaigns that have limited funding and rely on volunteers. Specifically, Ms. Rosenfeld noted the difficulty in meeting the 44-county geographic distribution requirement, as well as the difficulty of undertaking two signature drives, one initially, and one for the supplementary petition after the legislature fails to act. She recommended amending the indirect statutory initiative to reduce the county geographic distribution requirement to 22 or 33 counties, to introduce a direct statutory initiative with a four or five percent signature requirement, and a protection from legislative amendments only during any immediate lame duck session.

#### *Kuruc Presentation*

On December 14, 2014, Carolyn Kuruc, senior elections counsel to the secretary of state, presented on the role of the ballot board in placing issues on the statewide ballot. She reviewed the referendum, the constitutional initiative, the statutory initiative, and General Assembly-proposed amendments.

#### *Yost Presentation*

On May 14, 2015, the committee received a presentation by Dave Yost, Ohio Auditor of State, regarding the involvement of special interest groups with the Ohio initiative process. Mr. Yost said he is critical of the way the Ohio initiative process has been hijacked by business interests, suggesting a constitutional revision that would prevent the constitution from being used to confer

a benefit, either directly or indirectly. He said any interest conferred by the constitution must be available to all people who are similarly situated.

Mr. Yost emphasized a need to limit the people's path to amendment, rather than the legislature's ability to amend, because the legislature is not currently responsible for proposing problematic amendments in the constitution. He said the legislative process protects against the General Assembly proposing resolutions that have these same kinds of problems. Quoting Theodore Roosevelt, he remarked that the constitution should not be somebody's paycheck. Mr. Yost said the constitution has been hijacked by a powerful few for their own purposes.

### *McTigue Presentations*

On December 15, 2016 and January 12, 2017, Attorney Donald J. McTigue again appeared before the committee to present his comments regarding the redraft of the initiative and referendum sections of the constitution.

In December 2016, Mr. McTigue recommended that the initiated constitutional amendment petition process should stay the same in terms of when the ballot issue is submitted to voters, primarily because both general elections are well attended by voters, and sometimes proponents need to get the issue before the voters sooner rather than later. He said there is no reason to change the constitution in this regard because that issue has not been the source of problems in terms of timing or the processing of petitions. In addition, he said, the voters should have the same right as the General Assembly to determine at which election a petition should be submitted.

Mr. McTigue continued that the current constitution provides for a ten-day cure period after the Ohio Supreme Court determines the signatures are not sufficient. He said that provision is important and should be retained, explaining that petition efforts often do not get underway until after an extended process of building a coalition and getting agreement to the text of the petition. He said being able to have the additional time is important because proponents can fall short in getting the exact number of signatures needed from various counties. Mr. McTigue said having that time also reduces the impetus to challenge the petition in court. He said keeping that measure would necessitate reworking the deadlines that are in the redraft. He said the ten-day cure period is especially important with regard to referendum petitions, since referendum proponents have only 90 days to get their signatures. So, he said, at a minimum, the committee should consider restoring the ten-day cure period for referendum petitions.

Mr. McTigue also recommended that the committee address the standards for ballot language to be followed by the ballot board under Article XVI. He said ballot language has been a source of contention over the years, and that is where games are played. He suggested amending Article XVI to include a provision relating to the ballot board prescribing ballot language. He said he did not provide language for this concept because Article XVI was not part of the redraft.

Mr. McTigue said his biggest complaint is that the General Assembly passes laws that do not facilitate the process but rather restrict the right of citizens to propose initiated amendments,

laws, and referenda. He said it is important to address a specific law requiring that, in addition to filing the petition, a proponent must simultaneously file a full electronic copy and sign a verification that it is a true copy. He said the problem with this requirement is that it adds expense because proponents have to scan everything. He said there may be 20,000 part petitions, but every page must be scanned and submitted electronically, which is an expensive process.

In January 2017, Mr. McTigue clarified four different terms describing different written documents: the summary, the ballot title, the ballot language, and the explanation.

He described the ballot language as being what voters see when they go into the voting booth, and that the ballot title is the heading that appears above the ballot language. He said the ballot language and ballot title are not on the petition, and that, by statute, the secretary of state decides the title. He said, by constitutional provision, the ballot board decides the ballot language.

Mr. McTigue said the summary is a statutory creature, and is connected with the requirement of getting 1,000 signatures. He said, by statute, proponents must have a summary to submit to the attorney general, who then determines whether the summary is fair and truthful. If that requirement is met, the proponents have to print on the face of the petition that it includes certification by the attorney general. He said there is a statutory process for challenging that in the Supreme Court. If the ballot language and title is to be moved to the front of the process, he suggested that the ballot language and title can essentially take the place of the summary. He said the proponents still would have to get 1,000 signatures, but instead of a summary they would be proposing the ballot title and the ballot language, and submitting them to the ballot board, rather than to the attorney general. He said the ballot board can disregard the summary if it wishes. He said there are standards the Supreme Court has developed for what makes ballot language fair and accurate, adding if there is to be a summary up front, make it the ballot language and title, and say that is what has to be proposed by the proponents with 1,000 signatures before circulating the main petition. He said he proposes that there then be a short period where it could be challenged if someone does not like it, the court then makes a decision, and that is what gets printed on the face of the petition. He said his draft replaces the summary with the ballot language, and adds the date of certification. He said that is the primary difference between the current draft and what he did.

Commenting on the staff edits to the draft, Mr. McTigue said there is no reason to go to the attorney general. He said there is also no need for a 300 word argument or explanation. He said he would recommend getting rid of the summary requirement and require submission of proposed ballot language instead. He said he would recommend keeping the requirement that the ballot board prescribe the ballot language. He also suggested adding some tight time frames for filing a challenge with the Ohio Supreme Court. He said the one subject/separate vote requirement is purely statutory, and because that determination is made up front by statute, it should be rolled into that same process. Mr. McTigue said the draft should reinstate a ten-day cure period in the situation in which the initial petition as certified by the secretary of state has insufficient signatures.

### *Henkener Presentation*

On December 15, 2016, the committee heard from Ann Henkener, of the League of Women Voters of Ohio. Ms. Henkener said she agrees with Mr. McTigue's recommendations, noting her experience with constitutional amendments has come in the context of redistricting reform. She said there is no reason to make the constitutional amendment process more difficult. She said it is difficult right now to get something on the ballot. She said one way to improve that situation would be to lower the number of signatures required. She noted that only California and Florida exceed Ohio in the number of petition signatures needed. She said some states have a higher percentage but a smaller population, so there is no comparison. She said a 55 percent supermajority requirement is unreasonable, but if it is adopted it should also apply to the General Assembly. She also disagreed that placement of citizen's initiatives on the ballot should be limited to certain years.

Regarding initiated statutes, Ms. Henkener said increasing the number of signatures from three to five percent defeats the benefit of having a safe harbor because knowing the legislature cannot change the statute for three to five years is not enough incentive for proponents to justify having to get so many signatures. She suggested an improvement would be to have a longer safe harbor period along with the ability to go back to the voters if a change needs to be made.

Ms. Henkener said her views on the ballot board are consistent with those of Mr. McTigue, noting her experience in working on a redistricting reform proposal in which the board rejected the ballot language at the end of a long and expensive petition gathering process. She said she was alarmed to see an article in the *New York Times* that described lobbyists meeting with secretaries of state across the country to try to affect ballot language. She said she looks at ballot language as something the secretary of state and the ballot boards should perform as part of their duty to serve voters, rather than something they do in their political party capacity. She said ballot language should not be prejudicial, or used to sway the voters, but rather a way to indicate to voters what the issue is. She said a five-member board eliminates the problem of the deadlock, but that also makes it partisan, adding the partisan nature of the secretary of state influences the partisan nature of the ballot board.

Ms. Henkener said she supports Mr. McTigue's observations about timing. She said under the current system, if someone disagrees with the ballot language, there is one chance to get the Ohio Supreme Court to review the challenge and then the ballot language comes back to the same people on the ballot board and there is no further recourse. She said this must be done at least 75 days before the election, and the board traditionally meets in August. She said by the time they meet, there is time for only one appeal.

Ms. Henkener said she would like to change the composition of the ballot board, but said she is unsure what arrangement would be an improvement. She said there could be a requirement of an equal number of persons on the board, but then there is a deadlock. She said that issue has been raised with regard to the formation of a redistricting commission. She said the decision regarding the ballot language should go up front so that proponents know where they stand. She said the bar is pretty high for petitioners to prove there is a problem with the ballot language as

provided by the ballot board. She said she would recommend lowering the standard so that the board would be more sensitive toward neutral language.

Ms. Henkener said moving the ballot board review to the beginning of the process would not resolve all of the problems for proponents. She said she would like to be able to submit the language to the ballot board, allowing petitioners to get a first crack at drafting the language that is on the ballot. She said she would like for the proponents to submit language that has to be seriously considered, and that language should prevail unless there is something wrong with it.

### *Turcer Presentation*

On December 15, 2016, Catherine Turcer, policy analyst with Common Cause Ohio, appeared before the committee. She directed the committee to data compiled by the Ballot Initiative Strategy Center indicating how different states approach the preparation of ballot language. She commented that it is extremely difficult for proponents to collect sufficient signatures, and it is disappointing when the effort falls apart at the end, as occurred with a redistricting reform effort in which she was involved. She said she would like the ballot board review to be moved to the front to address these problems early in the process. She said this gives time for some litigation and discussion. She noted there are nine states where the proponent creates the title and the summary. She said proponents should have first crack at drafting the language.

### **Discussion and Consideration**

The recommendations expressed in this report represent the culmination of nearly five years of committee review and discussion. Members of the committee had numerous discussions among themselves and with presenters concerning the initiative and the role of the citizenry in state government. A complete review of the presentations and the comments and suggestions of committee members may be found in the meeting minutes.

From these discussions, the committee concluded that it would recommend: (a) making the statutory initiative more user-friendly; (b) calibrating the process to encourage citizens to use the initiated statute and limit the use of initiated constitutional amendments for topics that typically are contained in a constitution; (c) creating a procedure for avoiding gender-inappropriate language in initiated laws and amendments; (d) making the constitutional provisions on the initiative more transparent, more easily understood; (e) establishing a constitutional foundation under some aspects of the current initiative practice; and (f) delegating to the General Assembly the authority to adopt modern electronic methods for making the initiative processes more efficient.

### *Purpose of State Constitutions*

At the outset of its review of the initiative, members of the committee were concerned that many constitutional provisions proposed by initiative did not seem appropriate for a state constitution. The inclusion in the constitution of issues more appropriate for the Ohio Revised Code was seen as contributing to the burgeoning length of the Ohio Constitution (now at approximately 56,800

words, the tenth longest in the nation) and as making it more difficult for the General Assembly to legislate in areas that are most properly in their purview.

There was also a consensus among committee members that state constitutions, like their federal counterpart, should establish the basic framework of government, including the relationship of the three branches of government to one another, the relationship between the state and local government, and the relationship between the citizenry and the government (*i.e.*, the bill of rights and voting). Members of the committee also recognized that state constitutions in Ohio and throughout the country contain far more detail than the federal counterpart on such items as education, state debt, and taxation.

In addition, committee members expressed concern that wealthy special interests have used and have increasingly sought to use the constitutional initiative to embed their business models in the constitution. In some cases, these initiated constitutional amendments have sought to create monopolies that are virtually impervious to alteration or repeal.

Although the constitutional initiative has not been used frequently in Ohio, members of the committee recognized that the constitutional initiative has been part of the state's machinery of government for 105 years, and that its presence reflects the primacy of voters in the political and electoral process. Thus, members of the committee were reluctant to recommend any proposal that would deprive Ohio voters of their right to initiate constitutional amendments.

#### *Limitations on Amendments*

In considering how to address these concerns, the committee initially asked whether there should be a limitation on what is appropriate for a constitutional amendment as opposed to a statute, and if so, what that limitation should be. The committee discussed whether there might be ways to protect the constitution from being co-opted by special interests for personal profit as well as ways to encourage citizens wishing to change the law to use the statutory initiative process rather than try to amend the constitution. In relation to the monopoly issue, the committee's discussion contributed to the approval of Issue 2 on the November 2015 ballot, a General Assembly-proposed measure that requires a constitutional initiative creating a monopoly, determining a tax rate, or conferring special benefits to be presented to voters as two separate questions.

#### *Strengthening the Statutory Initiative*

A threshold question for the committee was why Ohio petitioners overwhelmingly chose the constitutional initiative over the statutory initiative. Relying on presentations by legal practitioners and interested parties, staff research, and committee discussions, the committee concluded that citizens generally prefer the constitutional initiative to the statutory initiative process because of the permanence provided by success at the polls. Additionally, the use of the statutory initiative, despite its lower signature requirement, was more burdensome because of the supplementary petition and the fact that the results of a successful statutory initiative could easily be reversed by the General Assembly, thus nullifying the significant effort and expense

undertaken by statutory initiative proponents. The committee also learned that the time frame applicable to the statutory initiative process created a difficult barrier for proponents.

After reviewing the experience in Ohio and comparing it with the experiences of other states, the committee adopted a proposal to strengthen the statutory initiative in the hope that a stronger statutory initiative would give those who wanted to use the initiative process an incentive to attempt to achieve their goals through the initiation of statutory, not constitutional, change. Thus, the strengthening of the statutory initiative became the principal substantive goal of the committee, though the proposal also imposes some greater difficulties on the use of the constitutional initiative and addresses other changes designed to modernize this portion of the constitution.

More specifically, the committee decided to recommend a five-year protected period, or “safe harbor,” during which the General Assembly could only amend or repeal an initiated statute with a two-thirds vote. The committee also wished to eliminate the supplementary petition requirement, feeling that increasing the signature requirement from three percent to five percent provided sufficient protection so that a supplementary petition would not be needed. The committee also relied on the apparently unintended effect of the 2008 amendment that gave statutory initiative proponents approximately two months to collect the supplementary signatures. Based on its decision to eliminate the supplementary petition, the committee understood the need to add language allowing the General Assembly to provide a procedure for proponents to withdraw a proposed initiated statute if, for whatever reason, they elect to not take the issue to the ballot.

### *Constitutional Initiative*

The committee also believed it was important to make corresponding changes to the constitutional initiative process. One goal in this area was to increase the standard for proponents to obtain passage at the polls since currently only a simple majority is required to both approve initiated statutes as well as initiated constitutional amendments. Because voter turnout is lower in odd-numbered year elections, the committee was concerned that allowing a constitutional initiative to be presented to voters during odd-numbered years, and requiring only a simple majority for passage, has had the result of constitutional amendments being adopted by a smaller percentage of voters than is desirable for an amendment to the state’s foundational document. For example, a constitutional initiative placed on the November 2015 ballot could have been approved by 1,631,024 votes, or 21.7 percent of registered voters. Conversely, a constitutional initiative placed on the November 2016 ballot could have been approved by 2,809,428, or 35.7 percent of registered voters. Thus, the committee agreed that appropriate attention to the significance of amending the constitution requires a procedure that increases both voter turnout and the percentage of voter approval. The committee agreed on a recommendation requiring constitutional initiatives to be placed on the ballot only in even-numbered years, and a passage rate of at least 55 percent.

### *Timing*

Another goal in reforming the process was to move the ballot board review to the beginning of the process rather than at the end, as is current procedure. The committee heard testimony on this issue indicating that proponents sometimes expend many thousands of dollars to mount a signature-gathering campaign only to find, at the end of the process, that the ballot board rejects their ballot language and thus effectively requires them to start over. The committee concluded that this simple change would make the process more fair without significantly altering the important role of the ballot board.

### *Constitutional Foundation*

In attempting to review all of the provisions concerning the initiative and referendum, the committee discovered that there was no explicit constitutional authorization for the requirement that an initial petition with 1,000 signatures be filed and that the attorney general determine whether the summary was “fair and truthful.” The statutory authority for this requirement was the current “facilitating” language in Article II, Section 1g, but the committee felt it more appropriate for this requirement to be addressed directly in the constitution.

### *Transparency*

Early on, it became evident that the organization of the original constitutional sections created difficulties for those wishing to use the initiative and referendum process. In addition, some of the language was confusing, especially language dealing with timelines. In the process of its own review, the committee became acutely aware of the problems the average citizen – who, after all, is the person the 1912 Constitutional Convention intended to use the process – faces in attempting to understand and use the initiative and referendum sections. Thus, the committee decided that redrafting these sections would be an important part of its mission to modernize the process. The resulting reorganization and redrafting is intended to make the process more user-friendly and easier to understand. To further modernize, the committee agreed it was important to include a requirement that initiatives and referenda include gender-neutral language, where appropriate.

### *Technology*

The committee concluded that advances in technology may be considered to have rendered obsolete newspaper publication requirements in the original language. Wishing to give the General Assembly the ability to keep up with developing trends, the committee decided to recommend language allowing the General Assembly to enact laws to modernize the publication process through the use of electronic media.

### *Signature Requirement*

During its deliberations on the statutory initiative, the committee took a hard look at the signature requirement. At one point, it considered reducing the number of required counties

from 44 to 22 (or from 50 percent to 25 percent) of Ohio counties, based on the concern that obtaining sufficient signatures from such a large number of counties is an obstacle for proponents of an initiated statute, particularly for grass-roots groups relying on volunteers to collect signatures. However, the committee rejected this approach as being inconsistent with the Ohio’s historic commitment to having broad-based support for initiatives and as sending the wrong message to residents of communities with low populations. The committee also concluded that the source of the hardship to petitioners of gathering signatures was more likely related to the supplementary petition requirement rather than to the geographic distribution requirement. Thus, the committee concluded that raising the initial percentage from three to five percent and eliminating the supplementary petition requirement of an additional three percent could alleviate some of the concerns about meeting the existing geographic distribution requirement. Therefore, the committee opted not to recommend a change to the geographic distribution requirement.

The committee also recognized one way to encourage use of the statutory initiative would be to adjust the percentage requirement for petition signatures. Committee members noted that Ohio has a low initial signature requirement of three percent, thus possibly accommodating a goal of petitioners to encourage the General Assembly to act on an issue that is of concern to voters.

Also with regard to signature requirements, the committee considered whether the supplemental petition process, with its additional signature requirement, could be eliminated or modified on the basis that the supplemental petition presents a barrier for proponents of an initiated statute. Committee members expressed a concern that if the supplemental petition requirement were eliminated without raising the percentage requirement for the initial petition, it could defeat the purpose of having an indirect, as opposed to a direct, statutory initiative process because it would be too easy for proponents to circumvent legislative participation. At the same time, all members recognized that the supplemental petition signature requirements, together with the short time frame allotted to proponents for obtaining supplemental petition signatures, presents an insurmountable obstacle for citizen groups wishing to initiate laws, and that removing this obstacle could help to encourage use of the statutory initiative.

Committee members ultimately agreed that, if the percentage requirement of the initial petition were raised from three percent to five percent, the supplemental petition could be eliminated, thus balancing the goal of encouraging use of the statutory initiative with that of allowing the General Assembly the option of addressing issues of citizen concern before an initiated statute would go on the ballot.

*Section-by-Section Review of Proposed Revisions*

Article II (Proposed Provisions)

New Provision	Title	Summary/Commentary [Source/Destination]
Section 1	Legislative Power	<ul style="list-style-type: none"> <li>Continues to provide that the legislative power of the state is vested in the General</li> </ul>

		<p>Assembly but the people reserve the power to propose laws and amendments and to reject laws.</p> <ul style="list-style-type: none"> <li>• Language on self-executing and on power of General Assembly to enact facilitating legislation taken from current 1g.</li> </ul>
Section 1a	Initiative to Amend the Constitution	<ul style="list-style-type: none"> <li>• Permits the use of the initiative to amend the constitution and describes the process to be followed.</li> <li>• Adds language from the Revised Code requiring an initial petition and giving the attorney general power to make “fair and truthful” determination.</li> <li>• Requires use of gender-neutral language</li> <li>• Requires early action by ballot board regarding title, explanation, ballot language.</li> <li>• Requires 55 percent votes for approval</li> <li>• Limits vote to general elections in even-numbered years.</li> </ul>
Section 1b	Initiative to Enact Laws	<ul style="list-style-type: none"> <li>• Permits the use of the initiative to adopt statutes and describes the process to be followed.</li> <li>• Adds language from the Revised Code requiring initial petition and giving the attorney general power to make “fair and truthful” determination.</li> <li>• Requires use of gender-neutral language.</li> <li>• Requires early action by ballot board regarding title, explanation, ballot language.</li> <li>• Clarifies dates for submission.</li> <li>• Increases signatures from 3 percent to 5 percent.</li> <li>• Eliminates the supplementary petition.</li> <li>• Creates a five-year safe harbor for initiated laws.</li> </ul>
Section 1c	Referendum to Laws	<ul style="list-style-type: none"> <li>• Permits the use of the referendum to challenge laws passed by the General Assembly.</li> <li>• Adds language from the Revised Code requiring initial petition and giving the attorney general power to make “fair and truthful” determination.</li> <li>• Requires early action by ballot board regarding title, explanation, ballot language.</li> </ul>

		<ul style="list-style-type: none"> <li>• Moves provision barring the use of the referendum to challenge laws providing for tax levies and emergency laws to Section 17.</li> </ul>
Section 1d	Petition Requirements	<ul style="list-style-type: none"> <li>• Describes the process for collecting signatures.</li> <li>• Provision taken from current 1g.</li> <li>• Provision on laws not subject referendum moved to Section 17.</li> </ul>
Section 1e	Verifying and Challenging Petitions	<ul style="list-style-type: none"> <li>• Describes the process for verifying and challenging petitions and signatures.</li> <li>• Provides periods to cure insufficient signatures.</li> <li>• Calculates time limits from time of action rather than backwards from time of election.</li> <li>• Provides the Ohio Supreme Court with original and exclusive jurisdiction.</li> <li>• Provisions generally taken from current 1g.</li> <li>• Provision in current Section 1e imposing limits on the use of the initiative moved to Section 1i.</li> </ul>
Section 1f	Explanation and Publication of Ballot Issue	<ul style="list-style-type: none"> <li>• Provisions re preparation of true copies of proposed laws and amendments and challenged laws.</li> <li>• Provisions re preparation of explanation</li> <li>• Provisions taken from current 1g.</li> <li>• Provision permitting the General Assembly to prescribe electronic publication.</li> <li>• Provision in current 1f guaranteeing initiative and referendum to people of municipalities moved 1i.</li> </ul>
Section 1g	Placing on the Ballot	<ul style="list-style-type: none"> <li>• Describes the process for prescribing ballot language and preparing ballots.</li> <li>• Requires ballot language to be prescribed in the same manner as issues submitted by the General Assembly.</li> <li>• Provisions taken from current 1g.</li> </ul>
Section 1h	Limitation of Use	<ul style="list-style-type: none"> <li>• Bars the use of the statutory initiative to adopt laws that classify property for tax purposes and authorize a single tax on land.</li> <li>• Limits the use of the constitutional initiative to create monopolies, to determine tax rates, and to confer special benefits.</li> <li>• Provision from current 1e.</li> </ul>

Section 1i	Application to Municipalities	<ul style="list-style-type: none"> <li>• Guarantees the right of the initiative and referendum to the people of each municipality.</li> <li>• Provision moved from current 1f.</li> </ul>
Section 15(G)	How Bills Shall Be Passed	<ul style="list-style-type: none"> <li>• Describes the constitutional requirements for passing bills.</li> <li>• Describes the procedures for adopting emergency law.</li> <li>• Taken from current 1d.</li> </ul>
Section 17	Effective Date of Laws	<ul style="list-style-type: none"> <li>• Bars the use of the referendum to challenge laws providing for tax levies and emergency laws.</li> <li>• Provision taken from current 1d.</li> </ul>

## Conclusion

The Constitutional Revision and Updating Committee concludes that Article II, Sections 1 to 1i, 15(G) and 17, of the Ohio Constitution should be revised to strengthen the statutory initiative, to make the constitutional initiative slightly more difficult to use, and to make the initiative process more transparent and user-friendly. These revisions would change the statutory initiative petition signature percentage requirement; eliminate the supplementary petition; limit the ability of the General Assembly to alter or repeal initiated statutes for a period of five years; increase the approval percentage for initiated constitutional amendments to 55 percent; limit constitutional initiatives to general election ballots in even-numbered years; eliminate the use of inappropriate gender-specific language; permit the use of electronic means to gather signatures and verify them; and make other technical changes in the affected provisions. No substantive recommendations are made for the referendum or for the right of the people of municipalities to use the initiative and referendum.

## Date Issued

After formal consideration by the Constitutional Revision and Updating Committee on April 13, 2017, and May 11, 2017, the committee voted to issue this report and recommendation on May 11, 2017.

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## Endnotes

<sup>1</sup> In addition to other resources cited, this report and recommendation also contains information found in Steven H. Steinglass and Gino J. Scarselli, *The Ohio State Constitution* 215 (2nd prtg. 2011), and Steven H. Steinglass, *Constitutional Revision: Ohio Style*, 77 Ohio St. L. J. 281 (2016).

<sup>2</sup> Isaac F. Patterson, *The Constitutions of Ohio*, 121 (Cleveland: Arthur H. Clark Co. 1912).

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<sup>3</sup> On September 3, 1912, Ohio voters approved the initiative and referendum (proposed Amendment No. 6) by a vote of 312,592 to 231,312. At the same election, voters approved 34 of the 42 amendments proposed by the convention.

<sup>4</sup> R.C. 3519.01(A).

<sup>5</sup> Ohio Const. art. II, § 1g

<sup>6</sup> *Id.*

<sup>7</sup> See Sec’y of State, Governor’s Race Percentage Chart: Votes for Office of Governor: November 4, 2014, <https://www.sos.state.oh.us/sos/elections/Research/electResultsMain/HistoricalElectionComparisons/percentage.aspx> (last visited Apr. 6, 2017).

<sup>8</sup> Ohio Const. art. II, § 1b.

<sup>9</sup> *Id.*

<sup>10</sup> The requirement that a petition with the requisite number of approved signatures must be filed at least 125 days prior to the general election results in a filing deadline between June 30 and July 6, depending on the date of the general election. See, e.g., Ohio Sec’y of State, *2017 Ohio Elections Calendar* (Nov. 2016), [https://www.sos.state.oh.us/sos/upload/publications/election/2017ElectionCalendar\\_Letter.pdf](https://www.sos.state.oh.us/sos/upload/publications/election/2017ElectionCalendar_Letter.pdf)

<sup>11</sup> Ohio Const. art. II, § 1b.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Article II, Section 1e was amended November 3, 2015, as a result of the passage of Issue 2. Issue 2 proposed to amend Section 1e to add prohibitions against the use of the constitution to grant a monopoly or other exclusive business interest that is not available to similarly situated persons or nonpublic entities. In addition to adding the restrictions on such activities, the amendment reorganized Section 1e to create subsections (A), (B), and (C), with the original language of the section now being identified as subsection (A).

<sup>16</sup> The three laws that were adopted as a result of a statutory initiative involved old age pensions (1933), colored oleomargarine (1959), and smoking (2006). The voters approved each of these by a substantial majority.

<sup>17</sup> Twelve statutory initiatives have gone to the voters after rejection by the General Assembly. This list of ballot measures, however, does not fully describe the use and attempted use of the statutory initiative because the state does not keep records of petitions that did not make it to the ballot for whatever reason. Nonetheless, in 1913, the General Assembly approved two statutes proposed by initiative: H.B. No. 1 (relative to regulating newspapers and publication of nothing but the truth), and H.B. No. 2 (providing for the removal of certain officers).

<sup>18</sup> See, e.g., Ohio Sec’y of State, *2017 Ohio Elections Calendar* (Nov. 2016), [https://www.sos.state.oh.us/sos/upload/publications/election/2017ElectionCalendar\\_Letter.pdf](https://www.sos.state.oh.us/sos/upload/publications/election/2017ElectionCalendar_Letter.pdf)

<sup>19</sup> Ohio Const. art. II, § 1b.

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<sup>20</sup> Ohio Const. art. II, § 1b. This has only happened once. See *State ex rel. Greenlund v. Fulton*, 99 Ohio St. 168, 124 N.E. 172, 177 (1919) (rejecting an initiated amendment on the classification of property for taxation because it received fewer affirmative votes than a conflicting legislatively-proposed amendment).

<sup>21</sup> Ohio Const. art. II, § 1e(B)(2).

<sup>22</sup> Under Ohio Const. art. XVI, § 3 (amended 1912), a provision adopted as part of the 1851 constitution, Ohio voters are asked every 20 years whether they want a state constitutional convention to be held. The voters approved constitutional convention calls in 1871 and 1910, but they have rejected the call every 20 years since 1932.

<sup>23</sup> See Hoyt Landon Warner, *Progressivism in Ohio 1897–1917*, at 295 (1964).

<sup>24</sup> See Cleveland-Marshall Coll. of Law Library, *Ohio Constitution – Law and History: Calls for Conventions*, <http://guides.law.csuohio.edu/ohioconstitution/callsconventions> (last updated Mar. 10, 2017).

<sup>25</sup> See Warner, *supra*, note 23 at 318–19.

<sup>26</sup> See Lloyd L. Sponholtz, *The 1912 Constitutional Convention in Ohio: The Call-Up and Nonpartisan Selection of Delegates*, 79 Ohio Hist. 209, 212 (1970).

<sup>27</sup> See Warner, *supra*, note 23 at 319; see also Lloyd L. Sponholtz, *Progressivism in Microcosm: An Analysis of the Political Forces at Work in the Ohio Constitutional Convention of 1912*, at 148 (1969) (unpublished Ph.D. dissertation, University of Pittsburgh) (reviewing roll call votes).

<sup>28</sup> See Hoyt Landon Warner, *Ohio’s Constitutional Convention of 1912*, 61 Ohio St. Archeological & Hist. Q. 11, 17 (1952).

<sup>29</sup> See Herbert S. Bigelow, *New Constitution for Ohio: An Explanation of the Work of Ohio’s Fourth Constitutional Convention* 14–15, H.R. Doc. No. 62-863 (1912) (discussing the “resourcefulness of the enemy” and an “attack that had failed” in explaining why the proponents of the initiative and referendum did not vote against the constitutional provision barring the use of the indirect statutory initiative to adopt the single tax).

<sup>30</sup> See *2 Proceedings and Debates of the Constitutional Convention of the State of Ohio* 1368 (1912).

<sup>31</sup> See Cleveland-Marshall Coll. of Law Library, *Ohio Constitution – Law and History: Table of Proposed Amendments*, <http://guides.law.csuohio.edu/ohioconstitution/ohioconstitutionamendmentstable> (last updated Mar. 10, 2017).

<sup>32</sup> This portion of the report and recommendation focuses only on the constitutional initiative because there has been so little use made of the statutory initiative.

<sup>33</sup> Of the four initiated amendments that the voters approved during this period, two never went into effect. A proposal on the classification of property for taxation received fewer affirmative votes than a General Assembly-proposed amendment. See *Greenlund v. Fulton*, *supra*, note 20 at 177 (rejecting an initiated amendment because it received fewer affirmative votes than a conflicting legislatively-proposed amendment). And an amendment to subject the legislative ratification of federal constitutional amendments to the referendum was struck down by the Supreme Court in *Hawke v. Smith*, 253 U.S. 221 (1920). The two initiated amendments that became part of the constitution involved home rule/liquor in 1914 and the manufacture of liquor in 1918.

<sup>34</sup> Prior to the 1912 Convention, amendments proposed by the General Assembly had to receive more than 50 percent of the vote at the election (not on the issue), thus making constitutional revision difficult. Indeed, prior to 1912, Ohio voters approved only 11 of the 37 amendments proposed by the General Assembly, but 19 of the rejected amendments received more affirmative than negative votes. See Steinglass, *Constitutional Revision: Ohio*

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*Style, supra*, note 1, at 309-10. The 1912 Convention proposed and the voters approved the elimination of this supermajority requirement, thus permitting legislatively-proposed amendments to be approved when they receive 50 percent or more votes on the issue. *Id.*

<sup>35</sup> See Steven H. Steinglass, *Approved Initiated Amendments – Ohio Voting Percentages* (Nov. 3, 2016) (on file with the Ohio Constitutional Modernization Commission).

<sup>36</sup> *See id.*

<sup>37</sup> Because no substantive changes are proposed in either the operation of the referendum or the use of the initiative by the people of municipalities, these devices are not discussed.

<sup>38</sup> Two states – Massachusetts and Mississippi – have the indirect constitutional initiative, under which the state legislature may place competing constitutional amendments on the ballot.

<sup>39</sup> Two states – Utah and Washington – have both the direct and indirect statutory initiative. California had both the direct and indirect statutory initiative from 1912 to 1966, when the voters repealed the seldom-used indirect statutory initiative.

<sup>40</sup> *See Mich. Const. art. II, §9; Nev. Const. art. 19, § 2(3).*

<sup>41</sup> Adapted from M. Dane Water, *Initiative and Referendum Almanac* 28-29 (2003).

<sup>42</sup> The information in this section is taken from Steven H. Steinglass, *Supermajority Requirements Nationally* (Nov. 3, 2016) (on file with the Ohio Constitutional Modernization Commission).

<sup>43</sup> Prior to 1964, New Hampshire only permitted amendments to be proposed by constitutional conventions, and the state had 13 conventions between 1850 and 1984. *See id.*

<sup>44</sup> *See Steven H. Steinglass, Double Assent and the Nevada Experience* (Nov. 3, 2016) (on file with the Ohio Constitutional Modernization Commission).

<sup>45</sup> *See Jennie Drage Bowser, Use of the Statutory Initiative vs. the Constitutional Initiative* (Feb. 6, 2014) (on file with the Ohio Constitutional Modernization Commission).

<sup>46</sup> *Id.*

<sup>47</sup> *See Ohio Const. art. II, § 1g* (amended 1971).

<sup>48</sup> *See id.* art. XVI, § 1 (amended 1974).

<sup>49</sup> *See id.* art. II, § 1g (amended 1978).

<sup>50</sup> *See Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution: Final Report 343–70* (June 30, 1977) [hereinafter OCRC Final Report], <http://www.lsc.ohio.gov/ocrc/final%20report%20index%20to%20proceedings%20and%20research.pdf> .

<sup>51</sup> *See Ohio Const. art. II, § 1g* (amended 2008).

<sup>52</sup> *See Ohio Initiated Monopolies Amendment, Issue 2 (2015)*, Ballotpedia, [https://ballotpedia.org/Ohio\\_Initiated\\_Monopolies\\_Amendment\\_Issue\\_2\\_\(2015\)](https://ballotpedia.org/Ohio_Initiated_Monopolies_Amendment_Issue_2_(2015)) (last visited Apr. 11, 2017); *see also Steinglass, Constitutional Revision: Ohio Style, supra*, note 1, at 326-29.

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<sup>53</sup> See Steinglass, *Constitutional Revision: Ohio Style*, *supra*, note 1, at 315.

<sup>54</sup> See *Ohio Publication of Proposed Amendments and Statutes, Amendment 3 (1923)*, Ballotpedia, [https://ballotpedia.org/Ohio Publication of Proposed Amendments and Statutes, Amendment 3 \(1923\)](https://ballotpedia.org/Ohio_Publication_of_Proposed_Amendments_and_Statutes,_Amendment_3_(1923)) (last visited Apr. 11, 2017).

<sup>55</sup> See *Ohio Initiative and Referendum System, Amendment 3 (1939)*, Ballotpedia, [https://ballotpedia.org/Ohio Initiative and Referendum System, Amendment 3 \(1939\)](https://ballotpedia.org/Ohio_Initiative_and_Referendum_System,_Amendment_3_(1939)) (last visited Apr. 11, 2017).

<sup>56</sup> See *id.*

<sup>57</sup> See *Ohio Initiative & Referendum Procedures, Amendment 7 (1976)*, Ballotpedia, [https://ballotpedia.org/Ohio Initiative %26 Referendum Procedures, Amendment 7 \(1976\)](https://ballotpedia.org/Ohio_Initiative_%26_Referendum_Procedures,_Amendment_7_(1976)) (last visited Apr. 11, 2017).

<sup>58</sup> See Ohio Const. art. XVI, § 1 (amended 1974); see also OCRC Final Report, *supra*, note 50, at 188–91.

<sup>59</sup> See OCRC Final Report, *supra*, note 50, at 25, 343–70. The 1970s Commission recommendation to eliminate the geographic distribution requirement was based, at least in part, on concerns about whether it was consistent with the “one man one vote requirement.” See *id.* at 368 – 69.

<sup>60</sup> See *id.* at 188-191.

<sup>61</sup> Ohio Const. art. II, § 1g (“The foregoing provisions of this section shall be self-executing, except as herein otherwise provided.”).

<sup>62</sup> *Id.* (“Laws may be passed to facilitate their operation but in no way limiting or restricting either such provisions or the powers herein reserved.”).

<sup>63</sup> Ohio Rev. Code Ann. § 3519.01(A) (West Supp. 2015).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* see also Schaller v. Rogers, 2008-Ohio-4464, at ¶¶ 13–16 (10<sup>th</sup> Dist. Sept. 4, 2008) (describing the development of these facilitating provisions, beginning in 1929, and reviewing the evolution of the statutory provisions requiring those proposing a constitutional amendment to submit a petition to the attorney general for a fair and truthful determination).

<sup>66</sup> Ohio Rev. Code Ann. § 3519.01(A)(West Supp. 2015).

<sup>67</sup> Ohio Const. art. XVI, § 1 (1851) (“When more than one amendment shall be submitted at the same time, they shall be so submitted, as to enable the electors to vote on each amendment, separately.”).

<sup>68</sup> Ohio Const. art. II, § 1g (amended 1978) (“The ballot language shall be prescribed by the ballot board in the same manner, and subject to the same terms and conditions, as apply to issues submitted by the general assembly pursuant to Section 1 of Article XVI of this constitution.”).

<sup>69</sup> State ex rel. Ohio Liberty Council v. Brunner, 125 Ohio St.3d 315, 2010-Ohio-1845, 928 N.E.2d 410, at 415-16 (quoting R.C. 3519.01(A)).

<sup>70</sup> *Id.* at 416.

<sup>71</sup> *Id.* at 416-17.

**ARTICLE II, SECTIONS 1 THROUGH 1g****Section 1 – In Whom Power Vested**

The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly, except as hereinafter provided; and independent of the general assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the general assembly to enact laws, shall be deemed limitations on the power of the people to enact laws.

**Section 1a – Initiative and Referendum to Amend Constitution**

The first aforesaid power reserved by the people is designated the initiative, and the signatures of ten per centum of the electors shall be required upon a petition to propose an amendment to the constitution. When a petition signed by the aforesaid required number of electors, shall have been filed with the secretary of state, and verified as herein provided, proposing an amendment to the constitution, the full text of which shall have been set forth in such petition, the secretary of state shall submit for the approval or rejection of the electors, the proposed amendment, in the manner hereinafter provided, at the next succeeding regular or general election in any year occurring subsequent to one hundred twenty-five days after the filing of such petition. The initiative petitions, above described, shall have printed across the top thereof: “Amendment to the Constitution Proposed by Initiative Petition to be Submitted Directly to the Electors.”

**Section 1b – Initiative and Referendum to Enact Laws**

When at any time, not less than ten days prior to the commencement of any session of the general assembly, there shall have been filed with the secretary of state a petition signed by three per centum of the electors and verified as herein provided, proposing a law, the full text of which shall have been set forth in such petition, the secretary of state shall transmit the same to the general assembly as soon as it convenes. If said proposed law shall be passed by the general assembly, either as petitioned for or in an amended form, it shall be subject to the referendum. If it shall not be passed, or if it shall be passed in an amended form, or if no action shall be taken thereon within four months from the time it is received by the general assembly, it shall be submitted by the secretary of state to the electors for their approval or rejection, if such submission shall be demanded by supplementary petition verified as herein provided and signed by not less than three per centum of the electors in addition to those signing the original petition, which supplementary petition must be signed and filed with the secretary of state within ninety days after the proposed law shall have been rejected by the general assembly or after the expiration of such term of four months, if no action has been taken thereon, or after the law as passed by the general assembly shall have been filed by the governor in the office of the secretary of state. The proposed law shall be submitted at the next regular or general election

occurring subsequent to one hundred twenty-five days after the supplementary petition is filed in the form demanded by such supplementary petition, which form shall be either as first petitioned for or with any amendment or amendments which may have been incorporated therein by either branch or by both branches, of the general assembly. If a proposed law so submitted is approved by a majority of the electors voting thereon, it shall be the law and shall go into effect as herein provided in lieu of any amended form of said law which may have been passed by the general assembly, and such amended law passed by the general assembly shall not go into effect until and unless the law proposed by supplementary petition shall have been rejected by the electors. All such initiative petitions, last above described, shall have printed across the top thereof, in case of proposed laws: "Law Proposed by Initiative Petition First to be Submitted to the General Assembly." Ballots shall be so printed as to permit an affirmative or negative vote upon each measure submitted to the electors. Any proposed law or amendment to the constitution submitted to the electors as provided in 1a and 1b, if approved by a majority of the electors voting thereon, shall take effect thirty days after the election at which it was approved and shall be published by the secretary of state. If conflicting proposed laws or conflicting proposed amendments to the constitution shall be approved at the same election by a majority of the total number of votes cast for and against the same, the one receiving the highest number of affirmative votes shall be the law, or in the case of amendments to the constitution shall be the amendment to the constitution. No law proposed by initiative petition and approved by the electors shall be subject to the veto of the governor.

### **Section 1c – Referendum to Challenge Laws Enacted by General Assembly**

The second aforesaid power reserved by the people is designated the referendum, and the signatures of six per centum of the electors shall be required upon a petition to order the submission to the electors of the state for their approval or rejection, of any law, section of any law or any item in any law appropriating money passed by the general assembly. No law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state, except as herein provided. When a petition, signed by six per centum of the electors of the state and verified as herein provided, shall have been filed with the secretary of state within ninety days after any law shall have been filed by the governor in the office of the secretary of state, ordering that such law, section of such law or any item in such law appropriating money be submitted to the electors of the state for their approval or rejection, the secretary of state shall submit to the electors of the state for their approval or rejection such law, section or item, in the manner herein provided, at the next succeeding regular or general election in any year occurring subsequent to one hundred twenty-five days after the filing of such petition, and no such law, section or item shall go into effect until and unless approved by a majority of those voting upon the same. If, however, a referendum petition is filed against any such section or item, the remainder of the law shall not thereby be prevented or delayed from going into effect.

### **Section 1d – Emergency Laws; Not Subject to Referendum**

Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions, and emergency laws necessary for the immediate preservation of the public

peace, health or safety, shall go into immediate effect. Such emergency laws upon a yea and nay vote must receive the vote of two-thirds of all the members elected to each branch of the general assembly, and the reasons for such necessity shall be set forth in one section of the law, which section shall be passed only upon a yea and nay vote, upon a separate roll call thereon. The laws mentioned in this section shall not be subject to the referendum.

### **Section 1e – Powers; Limitation of Use**

(A) The powers defined herein as the “initiative” and “referendum” shall not be used to pass a law authorizing any classification of property for the purpose of levying different rates of taxation thereon or of authorizing the levy of any single tax on land or land values or land sites at a higher rate or by a different rule than is or may be applied to improvements thereon or to personal property.

(B)(1) Restraint of trade or commerce being injurious to this state and its citizens, the power of the initiative shall not be used to pass an amendment to this constitution that would grant or create a monopoly, oligopoly, or cartel, specify or determine a tax rate, or confer a commercial interest, commercial right, or commercial license to any person, nonpublic entity, or group of persons or nonpublic entities, or any combination thereof, however organized, that is not then available to other similarly situated persons or nonpublic entities.

(2) If a constitutional amendment proposed by initiative petition is certified to appear on the ballot and, in the opinion of the Ohio ballot board, the amendment would conflict with division (B)(1) of this section, the board shall prescribe two separate questions to appear on the ballot, as follows:

(a) The first question shall be as follows:

“Shall the petitioner, in violation of division (B)(1) of Section 1e of Article II of the Ohio Constitution, be authorized to initiate a constitutional amendment that grants or creates a monopoly, oligopoly, or cartel, specifies or determines a tax rate, or confers a commercial interest, commercial right, or commercial license that is not available to other similarly situated persons?”

(b) The second question shall describe the proposed constitutional amendment.

(c) If both questions are approved or affirmed by a majority of the electors voting on them, then the constitutional amendment shall take effect. If only one question is approved or affirmed by a majority of the electors voting on it, then the constitutional amendment shall not take effect.

(3) If, at the general election held on November 3, 2015, the electors approve a proposed constitutional amendment that conflicts with division (B)(1) of this section with regard to the creation of a monopoly, oligopoly, or cartel for the sale, distribution, or other use of any federal Schedule I controlled substance, then notwithstanding any severability provision to the contrary, that entire proposed constitutional amendment shall not take effect. If, at any subsequent election, the electors approve a proposed constitutional amendment that was proposed by an

initiative petition, that conflicts with division (B)(1) of this section, and that was not subject to the procedure described in division (B)(2) of this section, then notwithstanding any severability provision to the contrary, that entire proposed constitutional amendment shall not take effect.

(C) The supreme court of Ohio shall have original, exclusive jurisdiction in any action that relates to this section.

### **Section 1f – Power of Municipalities**

The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.

### **Section 1g – Petition Requirements and Preparation; Submission; Ballot Language; By Ohio Ballot Board**

Any initiative, supplementary, or referendum petition may be presented in separate parts but each part shall contain a full and correct copy of the title, and text of the law, section or item thereof sought to be referred, or the proposed law or proposed amendment to the constitution. Each signer of any initiative, supplementary, or referendum petition must be an elector of the state and shall place on such petition after his name the date of signing and his place of residence. A signer residing outside of a municipality shall state the county and the rural route number, post office address, or township of his residence. A resident of a municipality shall state the street and number, if any, of his residence and the name of the municipality or post office address. The names of all signers to such petitions shall be written in ink, each signer for himself. To each part of such petition shall be attached the statement of the circulator, as may be required by law, that he witnessed the affixing of every signature. The secretary of state shall determine the sufficiency of the signatures not later than one hundred five days before the election.

The Ohio supreme court shall have original, exclusive jurisdiction over all challenges made to petitions and signatures upon such petitions under this section. Any challenge to a petition or signature on a petition shall be filed not later than ninety-five days before the day of the election. The court shall hear and rule on any challenges made to petitions and signatures not later than eighty-five days before the election. If no ruling determining the petition or signatures to be insufficient is issued at least eighty-five days before the election, the petition and signatures upon such petitions shall be presumed to be in all respects sufficient.

If the petitions or signatures are determined to be insufficient, ten additional days shall be allowed for the filing of additional signatures to such petition. If additional signatures are filed, the secretary of state shall determine the sufficiency of those additional signatures not later than sixty-five days before the election. Any challenge to the additional signatures shall be filed not later than fifty-five days before the day of the election. The court shall hear and rule on any challenges made to the additional signatures not later than forty-five days before the election. If no ruling determining the additional signatures to be insufficient is issued at least forty-five days

before the election, the petition and signatures shall be presumed to be in all respects sufficient.

No law or amendment to the constitution submitted to the electors by initiative and supplementary petition and receiving an affirmative majority of the votes cast thereon, shall be held unconstitutional or void on account of the insufficiency of the petitions by which such submission of the same was procured; nor shall the rejection of any law submitted by referendum petition be held invalid for such insufficiency. Upon all initiative, supplementary, and referendum petitions provided for in any of the sections of this article, it shall be necessary to file from each of one-half of the counties of the state, petitions bearing the signatures of not less than one-half of the designated percentage of the electors of such county. A true copy of all laws or proposed laws or proposed amendments to the constitution, together with an argument or explanation, or both, for, and also an argument or explanation, or both, against the same, shall be prepared. The person or persons who prepare the argument or explanation, or both, against any law, section, or item, submitted to the electors by referendum petition, may be named in such petition and the persons who prepare the argument or explanation, or both, for any proposed law or proposed amendment to the constitution may be named in the petition proposing the same. The person or persons who prepare the argument or explanation, or both, for the law, section, or item, submitted to the electors by referendum petition, or against any proposed law submitted by supplementary petition, shall be named by the general assembly, if in session, and if not in session then by the governor. The law, or proposed law, or proposed amendment to the constitution, together with the arguments and explanations, not exceeding a total of three hundred words for each, and also the arguments and explanations, not exceeding a total of three hundred words against each, shall be published once a week for three consecutive weeks preceding the election, in at least one newspaper of general circulation in each county of the state, where a newspaper is published. The secretary of state shall cause to be placed upon the ballots, the ballot language for any such law, or proposed law, or proposed amendment to the constitution, to be submitted. The ballot language shall be prescribed by the Ohio ballot board in the same manner, and subject to the same terms and conditions, as apply to issues submitted by the general assembly pursuant to Section 1 of Article XVI of this constitution. The ballot language shall be so prescribed and the secretary of state shall cause the ballots so to be printed as to permit an affirmative or negative vote upon each law, section of law, or item in a law appropriating money, or proposed law, or proposed amendment to the constitution. The style of all laws submitted by initiative and supplementary petition shall be: "Be it Enacted by the People of the State of Ohio," and of all constitutional amendments: "Be it Resolved by the People of the State of Ohio." The basis upon which the required number of petitioners in any case shall be determined shall be the total number of votes cast for the office of governor at the last preceding election therefor. The foregoing provisions of this section shall be self-executing, except as herein otherwise provided. Laws may be passed to facilitate their operation, but in no way limiting or restricting either such provisions or the powers herein reserved.

**ARTICLE II**

**Section 1.    *[Legislative Power]***

(A) The legislative power of the state shall be vested in a General Assembly, consisting of a Senate and House of Representatives, but the people reserve to themselves the power of the initiative and referendum, as set forth in this article. The limitations expressed in the constitution on the power of the General Assembly to enact laws shall be deemed limitations on the power of the people to enact laws.

(B) The provisions of this article concerning the initiative and referendum shall be self-executing, except as herein otherwise provided. Laws may be passed to facilitate their operation, but in no way limiting or restricting either such provisions or the powers herein preserved.

**Section 1a.   *[Initiative to Amend the Constitution]***

(A) The people reserve the power to propose an amendment to the constitution, independent of the General Assembly, and may do so by filing with the attorney general an initial initiative petition proposing an amendment to the constitution. The initial petition shall be signed by one thousand or more electors.

(B) The initial initiative petition submitted to the attorney general shall contain the full text of only one proposed constitutional amendment and a summary that contains a fair and truthful statement of it. The proponents may also submit, at their discretion, a suggested title, a suggested explanation of the constitutional amendment, and suggested ballot language. Where appropriate, the proposed constitutional amendment and the summary shall contain gender-neutral language. The petition shall have printed across the top: “Amendment to the Constitution Proposed by Initiative Petition to be Submitted Directly to the Electors” and shall set forth the full text of the proposed amendment.

(1) The attorney general shall examine the summary to determine whether it is a fair and truthful statement of the proposed constitutional amendment, and shall examine the proposed constitutional amendment and summary to determine whether they contain appropriate gender-neutral language.

(2) If the attorney general determines that the summary is a fair and truthful statement of the proposed constitutional amendment and that the proposed amendment and summary contain appropriate gender-neutral language, the attorney general shall so notify the proponents, and shall certify the petition and forward the petition and the summary, along with the suggested title, suggested explanation, and suggested ballot language, if applicable, to the ballot board.

(3) If the attorney general determines that the summary is not a fair and truthful statement of the proposed constitutional amendment or that the proposed constitutional amendment or summary does not contain appropriate gender-neutral language, the attorney general shall advise the proponents of the basis for this determination and return the petition and the summary to the proponents for revision and resubmission, if they elect to do so.

(C) Upon receiving the certified petition and summary, and, if applicable, the suggested title, the suggested explanation, and the suggested ballot language from the attorney general, the Ohio ballot board shall, within fourteen days:

(1) Determine whether the petition contains only one proposed constitutional amendment. If the ballot board determines that the petition contains only one proposed constitutional amendment, the board shall certify its approval to the attorney general, who then files the petition with the secretary of state. If the ballot board determines that the petition contains more than one proposed constitutional amendment, the board shall divide the

initiative petition into individual petitions each containing only one proposed constitutional amendment and certify its approval to the attorney general. If the board so divides an initiative petition and so certifies its approval to the attorney general, the proponents shall resubmit to the attorney general appropriate summaries for each of the individual petitions arising from the ballot board's division of the petition. The proponents may, at their discretion, also resubmit a suggested title, explanation, and ballot language for each individual petition. The attorney general then shall review the resubmission or resubmissions as provided in this article.

(2) Prescribe the title and ballot language. The prescribed title and ballot language shall be printed on the face of the initiative petition proposing the constitutional amendment, along with the date they were prescribed by the board, prior to circulation of the initiative petition. No other summary of the proposed amendment shall be required to be printed on the initiative petition.

(3) Prepare the explanation of the proposed amendment.

(D) Upon completion of review and certification as described in divisions B and C of this section, proponents may circulate the petition.

(E) The petition shall be required to bear the signatures of ten percent or more of the electors of the state, including five percent or more of the electors from each of one-half or more of the counties as determined by the total number of votes cast for the office of governor at the last preceding election for that office.

(F) Upon obtaining the required signatures, proponents shall submit the petition and signatures to the secretary of state for verification. Proponents of an initiative petition to propose an amendment may submit the petition to the secretary of state at any time, but the petition must be

submitted to the secretary of state before the first day of June in an even-numbered year for the proposed amendment to appear on the ballot that year.

(G) Upon verifying the requirements of the petition and signatures on the petition as provided in this article, the secretary of state shall submit the proposed amendment for the approval or rejection of the electors at the next general election held in an even-numbered year.

(H) If the proposed amendment to the constitution is approved by at least 55 percent of the electors voting on the issue, it shall take effect thirty days after it is approved.

(I) If conflicting proposed amendments to the constitution are approved at the same election by at least 55 percent of the electors voting for the proposed amendments, the one receiving the highest number of affirmative votes shall be the amendment to the constitution.

(J) An amendment that the electors approve shall be published by the secretary of state.

(K) Proponents who are aggrieved by the determinations of the attorney general, the ballot board, or the secretary of state under this section may challenge the determination in the Supreme Court of Ohio. The Supreme Court shall have exclusive, original jurisdiction in all such challenges.

**Section 1b.    *[Initiative to Enact Laws]***

(A) The people reserve the power to propose a law, independent of the General Assembly, and may do so by filing with the attorney general an initial initiative petition proposing a law to the General Assembly. The petition shall be signed by one thousand or more electors.

(B) The initial initiative petition submitted to the attorney general shall contain the full text of the proposed law and a summary of it that contains a fair and truthful statement of the proposed law. The proponents may also submit, at their discretion, a suggested title, a suggested explanation of the proposed law, and suggested ballot language. The proposed law shall contain only one subject. Where appropriate, the proposed law shall contain gender-neutral language. The

petition shall have printed across the top: “Law Proposed by Initiative Petition First to be Submitted to the General Assembly” and shall set forth the full text of the proposed law.

(1) The attorney general shall examine the summary to determine whether the summary is a fair and truthful statement of the proposed law and whether the summary contains appropriate gender-neutral language.

(2) If the attorney general determines the summary is a fair and truthful statement of the proposed law and that appropriate gender-neutral language has been used, the attorney general shall so notify the proponents, and shall certify the petition and forward it and the summary, along with the suggested title, suggested explanation, and suggested ballot language, if applicable, to the ballot board.

(3) If the attorney general determines the summary is not a fair and truthful statement of the proposed law or determines the proposed law does not contain appropriate gender-neutral language, the attorney general shall advise the proponents of the basis for this determination and return the proposed law or the summary to the proponents for revision and resubmission, if they elect to do so.

(C) Upon receiving the certified petition and summary, and, if applicable, the suggested title, suggested explanation, and suggested ballot language from the attorney general, the Ohio ballot board shall, within fourteen days:

(1) Determine whether the petition contains only one proposed law. If the ballot board determines that the petition contains only one proposed law, the board shall certify its approval to the attorney general, who then files the petition with the secretary of state. If the ballot board determines that the petition contains more than one proposed law, the board shall divide the initiative petition into individual petitions each containing only one

proposed law and certify their approval to the attorney general. If the board so divides an initiative petition and so certifies its approval to the attorney general, the proponents shall resubmit to the attorney general appropriate summaries for each of the individual petitions arising from the ballot board's division of the petition. The proponents may, at their discretion, also resubmit a suggested title, explanation, and ballot language for each individual petition. The attorney general then shall review the resubmissions as provided in this article.

(2) Prescribe the title and ballot language. The prescribed title and ballot language shall be printed on the face of the initiative petition proposing the law, along with the date they were prescribed by the board, prior to circulation of the initiative petition. No other summary of the proposed law shall be required to be printed on the initiative petition.

(3) Prepare the explanation of the proposed law.

(D) Upon completion of review and certification as described in divisions B and C of this section, proponents may circulate the petition.

(E) The petition shall be required to bear the signatures of five percent or more of the electors of the state, including two and one-half percent or more of the electors from each of one-half or more of the counties, as determined by the total number of votes cast for the office of governor at the last preceding election for that office.

(F) Upon obtaining the required signatures, proponents shall submit the petition and signatures to the secretary of state for verification. Proponents of an initiative to propose a law to the General Assembly may do so by filing the initiative petition with the secretary of state at any time, but the petition must be filed with the secretary of state before the first day of February for the proposed law to be submitted to the voters at the general election that year. A proposed law filed

with the secretary of state after the first day of February shall be submitted to the voters the general election in the following year.

(G) Upon receipt of the petition, the secretary of state shall transmit a copy of the petition and full text of the proposed law to the General Assembly. If the proposed law is passed by the General Assembly, either as petitioned for or in an amended form, it shall be subject to the referendum under Section 1c of this article.

(H) If before the first day of June immediately following the filing of the petition the General Assembly does not pass the proposed law in the form as filed with the secretary of state, and the petition is not withdrawn as provided by law, and, upon verifying the requirements of the petition and signatures on the petition as provided in this article, the secretary of state shall submit the proposed law for the approval or rejection of the electors at the next general election.

(I) If the proposed law is approved by a majority of the electors voting on the issue, it shall take effect thirty days after the election at which it was approved in lieu of any amended form of the law that may have been passed by the General Assembly.

(J) If conflicting proposed laws are approved at the same election by a majority of the total number of votes cast for each of the proposed laws, the one receiving the highest number of affirmative votes shall be the law.

(K) A law proposed by initiative petition and approved by the electors shall not be subject to veto by the governor.

(L) A law proposed by initiative petition and approved by the electors shall be published by the secretary of state.

(M) A law proposed by initiative petition and approved by the electors shall not be subject to repeal, amendment, or revision by act of the General Assembly for five years after its effective

date, unless upon the affirmative vote of two-thirds of all members elected to each branch of the general assembly, and further approved by the governor or the General Assembly as specified in Article II, Section 16.

(N) Proponents who are aggrieved by the determinations of the attorney general, the ballot board, or the secretary of state under this section may challenge the determination in the Supreme Court of Ohio. The Supreme Court shall have exclusive, original jurisdiction in all such challenges.

**Section 1c. [Referendum to Challenge Laws]**

(A) The people reserve the power through the referendum to challenge a law, section of law, or item in a law appropriating money, and may do so at any time within ninety days after the law has been filed by the governor in the office of the secretary of state, by filing with the secretary of state an initial referendum petition signed by one thousand or more electors.

(B) The initial referendum petition shall contain the full text of the law, section of law, or item in a law appropriating money being challenged and a summary that contains a fair and truthful statement of the law being challenged. The challengers may also submit, at their discretion, a suggested title, a suggested explanation of the law being challenged, and suggested ballot language. The petition shall have printed across the top: "Referendum Petition to Challenge a Law Enacted by the General Assembly to be Submitted to the Electors" and shall set forth the full text of the law being challenged. (C) The secretary of state shall verify the number of signatures and compare the law being challenged with the law on file with the office of the secretary of state. If the petition is correct, the secretary of state shall so certify and shall file the petition with the attorney general.

(D) Within ten days of receiving the petition challenging a law, section of law, or item in a law appropriating money,

(1) The attorney general shall examine the summary to determine whether the summary is a fair and truthful statement of the law being challenged

(2) If the attorney general determines the summary is a fair and truthful statement of the law being challenged, the attorney general shall so notify the challengers, and shall certify the referendum petition and forward the petition and the summary, along with the suggested title, suggested explanation, and suggested ballot language, if applicable, to the ballot board.

(3) If the attorney general determines the summary is not a fair and truthful statement of the law being challenged, the attorney general shall advise the challengers of the basis for this determination and return the petition or the summary to the challengers for revision and resubmission, if they elect to do so

(E) Upon receiving the certified petition and summary, and, if applicable, the suggested title, the suggested explanation, and the suggested ballot language from the attorney general, the Ohio ballot board shall, within fourteen days:

(1) Prescribe the title and ballot language. The prescribed ballot title and language shall be printed on the face of the referendum petition challenging the law, section of law, or item in a law appropriating money being challenged along with the date they were prescribed by the board. No other summary of the proposed amendment shall be required to be printed on the initiative petition.

(2) Prepare the explanation of the proposed referendum.

(F) Upon completion of review and certification as described in divisions C, D and E of this section, proponents may circulate the petition.

(G) The petition shall be required to bear the signatures of six percent or more of the electors of the state, including three percent or more of the electors from each of one-half or more of the counties, as determined by the total number of votes cast for the office of governor at the last preceding election for that office.

(H) Upon verifying the requirements of the petition as provided in this article, the secretary of state shall submit the challenge for the approval or rejection of the electors, by referendum vote, at the next primary or general election occurring sixty days or more after the process for verifying and challenging the requirements of the petition and signatures on the petition is complete.

(I) If a law, section of law, or item in a law appropriating money subjected to a challenge by referendum is approved by a majority of the electors voting on the issue, it shall go into effect thirty days after the election at which it is approved.

(J) If a referendum petition is filed challenging any section of law or item in a law appropriating money, the remainder of the law that is not being challenged shall not be prevented or delayed from going into effect.

(K) A law providing for a tax levy, a law providing appropriation for current expenses of the state government and state institutions, or an emergency law necessary for the immediate preservation of the public peace, health, or safety, as determined under Section 15(G) of this article, shall not be subject to challenge by referendum.

(L) Challengers who are aggrieved by the determinations of the attorney general, the ballot board, or the secretary of state under this section may challenge the determination in the Supreme Court of Ohio. The Supreme Court shall have exclusive, original jurisdiction in all such challenges.

**Section 1d. *[Petition Requirements]***

(A) An initiative or referendum petition filed under this article may be presented in separate parts, but each part shall contain a full and correct copy of the title and text of the proposed constitutional amendment, proposed law, or the challenged law, section of law, or item in a law appropriating money, to be submitted to the electors, as well as a full and correct copy of the summary approved by the attorney general.

(B) Each person who signs an initiative or referendum petition shall sign in ink and only for the person individually, and shall provide the person's residential address and the date the person signed the petition. The General Assembly may prescribe by law for the collection of electronic signatures in addition to or in lieu of petitions signed in ink.

(C) Each separate part of an initiative or referendum petition shall contain a statement of the person who circulated the part, as may be required by law, indicating that the circulator witnessed the affixing of every signature to the part. The General Assembly may prescribe by law for the witnessing of electronic signatures presented in addition to or in lieu of petitions signed in ink.

(D) In determining the sufficiency of the signatures required for an initiative or referendum petition, the secretary of state shall consider only the signatures of persons who are electors.

**Section 1e. *[Verifying and Challenging Petitions]***

(A) Within thirty days following the filing of an initiative or referendum petition, the secretary of state shall verify the validity or invalidity and sufficiency or insufficiency of the petition and the signatures on the petition pursuant to the requirements of this article. If the secretary of state determines that the petition contains insufficient valid signatures overall or with respect to the minimum number of counties as required by this article, the proponents shall be provided ten

additional days to file a supplemental petition with valid signatures to cure the deficiency. If additional signatures are filed, the secretary of state shall determine their validity and sufficiency within ten days following the filing of the additional signatures.

(B) The Supreme Court of Ohio shall have original and exclusive jurisdiction over all challenges made to the secretary of state's determination as to the validity, invalidity, sufficiency or insufficiency of an initiative or referendum petition and the signatures on such petition.

(C) A challenge to the secretary of state's determination of validity, invalidity, sufficiency or insufficiency of the initiative or referendum petition and the signatures on such petition shall be filed with the Supreme Court within seven days after the secretary of state's determination. The Supreme Court shall hear and rule on a challenge within fourteen days after the filing of the challenge with the court. If the Supreme Court does not rule on the challenge within fourteen days after the filing of the challenge to the petition or the signatures, the petition and signatures shall be deemed to be valid and sufficient in all respects.

(D) If the Supreme Court determines the signatures are insufficient, additional signatures to the petition may be filed with the secretary of state within ten days following the Supreme Court's ruling. If additional signatures are filed, the secretary of state shall determine their validity and sufficiency within ten days following the filing of the additional signatures.

(E) A challenge to the secretary of state's determination as to the validity, invalidity, sufficiency or insufficiency of the additional signatures shall be filed with the Supreme Court within seven days of the secretary of state's determination. The Supreme Court shall hear and rule on any challenges to the additional signatures within fourteen days of the filing of the challenge with the court. If the Supreme Court does not rule on the challenge within fourteen days of the filing of

the challenge, the petition and signatures shall be deemed to be valid and sufficient in all respects.

(F) The filing of further signatures and challenges to petitions and signatures shall be not be permitted following the Supreme Court's determination as to the sufficiency of the additional signatures.

(G) The approval of a proposed amendment to the constitution or a proposed law, submitted by initiative petition and approved by a majority of the electors voting on the issue, shall not be held unconstitutional on account of the insufficiency of the petitions proposing the issue. The rejection of a law, section of law, or item in a law appropriating money, challenged in a referendum petition and rejected by a majority of the electors voting on the issue, shall not be held invalid on account of the insufficiency of the petitions initiating the challenge.

**Section 1f. [Explanation and Publication of Ballot Issue]**

(A) A true copy of all laws or amendments to the constitution proposed by initiative, or any law, section of law, or item in a law appropriating money being challenged by referendum petition, shall be prepared by the \*\*\*secretary of state. The proponents or challengers may prepare and file with the secretary of state an argument for the proposed laws or proposed constitutional amendments or against any challenged law, section of law, or item in a law appropriating money. The person or persons who prepare the argument for any proposed law or proposed amendment to the constitution shall be named in the petition. The person or persons who prepare the argument against any law, section, or item submitted to the electors by referendum shall be named in the petition.

(B) The person or persons who prepare the argument for the law, section, or item, submitted to the electors by referendum petition, or against any proposed law or amendment submitted by

petition, shall be named by the General Assembly, if in session, and, if not in session, then by the governor.

(C) An argument or explanation prepared under this article shall each be three hundred words or less, but such word count shall not include the identification of the person or persons preparing the arguments or explanations.

(D) The full text of the proposed amendment to the constitution, the proposed law, or the law, section of law, or item in a law appropriating money, together with the title, the ballot language, the explanation, and the arguments for and against each shall be published once a week for three consecutive weeks preceding the election in at least one newspaper of general circulation in each county of the state, where a newspaper is published. The General Assembly may prescribe by law for the electronic publication of the items required by this section in addition to or in lieu of newspaper publication.

**Section 1g. *[Placing on the Ballot]***

(A) The secretary of state shall place on the ballot language for submission to the electors for a vote on an amendment to the constitution proposed by initiative petition, on a law proposed by initiative petition, and on a law, section of law, or item in a law appropriating money challenged by referendum petition.

(B) The ballot language shall be prescribed by the Ohio ballot board in the same manner and under the same terms and conditions as apply to proposed amendments submitted by the General Assembly under Article XVI, Section 1 of this constitution.

(C) The secretary of state shall cause the ballots to be prepared to permit an affirmative or negative vote on each proposed amendment to the constitution, proposed law, or law, section of law, or item in a law appropriating money.

(D) The style of all constitutional amendments submitted by an initiative petition shall be: “Be it Resolved by the People of the State of Ohio.” The style of all laws submitted by initiative petition shall be: “Be it Enacted by the People of the State of Ohio.”

**Section 1h. [Limitation of Use]**

(A) The power of the initiative shall not be used to pass a law authorizing any classification of property for the purpose of levying different rates of taxation on the property or of authorizing the levy of any single tax on land, land values, or land sites at a higher rate or by a different rule than is or may be applied to improvements on the land or to personal property.

(B)(1) Restraint of trade or commerce being injurious to this state and its citizens, the power of the initiative shall not be used to pass an amendment to this constitution that would grant or create a monopoly, oligopoly, or cartel, specify or determine a tax rate, or confer a commercial interest, commercial right, or commercial license to any person, nonpublic entity, or group of persons or nonpublic entities, or any combination thereof, however organized, that is not then available to other similarly situated persons or nonpublic entities.

(2) Prior to circulation, a constitutional amendment to be proposed by initiative petition shall be presented to the ballot board and if, in the opinion of the ballot board, the amendment would conflict with division (B)(1) of this section, the board shall prescribe two separate questions to appear on the ballot, as follows:

(a) The first question shall be as follows: "Shall the petitioner, in violation of division (B)(1) of Section 1h of Article II of the Ohio Constitution, be authorized to initiate a constitutional amendment that grants or creates a monopoly, oligopoly, or cartel, specifies or determines a tax rate, or confers a commercial interest, commercial right, or commercial license that is not available to other similarly situated persons?"

(b) The second question shall describe the proposed constitutional amendment.

(c) If both questions are approved or affirmed by at least 55 percent of the electors voting on them, then the constitutional amendment shall take effect. If only one question is approved or affirmed by at least 55 percent of the electors voting on it, then the constitutional amendment shall not take effect.

(C) The Supreme Court shall have original and exclusive jurisdiction in any action that relates to this section.

**Section 1i. [Application to Municipalities]**

The powers of the initiative and referendum are reserved to the people of each municipality, as provided by law, on questions which a municipality may be authorized by law to control by legislative action.

**Section 15. [How Bills Shall Be Passed]**

\* \* \*

(G) An emergency law, necessary for the immediate preservation of the public peace, health, or safety, must receive upon a yea and nay vote the affirmative vote of two-thirds of all members elected to each branch of the General Assembly. The reason for the emergency shall be set forth in a separate section of the law, which shall be passed only upon an affirmative yea and vote, upon a separate roll call thereon, of two-thirds of all members elected to each branch of the General Assembly. When votes are required to be taken by a yea and nay vote under this section, the names of the members voting for and against the bill and the reason for the emergency shall be entered upon the journal.

**Section 17. [Effective Date of Laws]**(A) Except as otherwise provided in this section, a law passed by the General Assembly and signed by the governor, shall go into effect ninety days

after the governor files it with the secretary of state, or in a case in which a veto of the governor is overridden ninety days after the presiding officer of the second house to exercise the veto files it with the secretary of state. In cases in which a bill becomes law because the governor has not signed it within the time limitation and requirements specified in Article II, Section 16, the law shall go effect as if the governor had signed it within the specified time limitation.

(B) A law passed by the General Assembly and signed by the governor providing for tax levies, appropriations for the current expenses of state government and state institutions, and emergency laws necessary for the immediate preservation of the public peace, health, or safety, shall go into effect when filed by the governor with the secretary of state, or in a case in which a veto of the governor is overridden ninety days after the presiding officer of the second house to exercise the veto files it with the secretary of state. In cases in which a bill becomes law because the governor has not signed it within the time limitation and requirements specified in Article II, Section 16, the law shall go effect as if the governor had signed it within the specified time limitation.

(C) When a petition, signed by six per centum of the electors of the state and verified as herein provided, shall have been filed with the secretary of state within ninety days after any law shall have been filed by the governor in the office of the secretary of state, ordering that such law, section of such law or any item in such law appropriating money be submitted to the electors of the state for their approval or rejection, the secretary of state shall submit to the electors of the state for their approval or rejection such law, section or item, in the manner herein provided, at the next succeeding regular or general election in any year occurring subsequent to one hundred twenty-five days after the filing of such petition, and no such law, section or item shall go into effect until and unless approved by a majority of those voting upon the same. If, however, a

referendum petition is filed against any such section or item, the remainder of the law shall not thereby be prevented or delayed from going into effect.

(V10b) (5-3-2017)



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION OF THE LEGISLATIVE BRANCH AND EXECUTIVE BRANCH COMMITTEE

#### OHIO CONSTITUTION ARTICLE II, SECTION 2

#### ELECTION AND TERM OF STATE LEGISLATORS [OPTION ONE]

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The Legislative Branch and Executive Branch Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article II, Section 2 of the Ohio Constitution concerning the election and term of state legislators. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*The committee recommends that Article II, Section 2 be amended to add one term to the current limit imposed on state senators, and two terms to the current limit imposed on state representatives. The committee further recommends that Article II, Section 2 be amended to allow legislators holding office at the time of the effective date of the amendment to continue to serve up to a total of 12 consecutive years.*

#### **Background**

Article II, Section 2, reads as follows:

Representatives shall be elected biennially by the electors of the respective house of representatives districts; their term of office shall commence on the first day of January next thereafter and continue two years.

Senators shall be elected by the electors of the respective senate districts; their terms of office shall commence on the first day of January next after their election. All terms of senators which commence on the first day of January, 1969 shall be four years, and all terms which commence on the first day of January, 1971 shall be four years. Thereafter, except for the filling of vacancies for

unexpired terms, senators shall be elected to and hold office for terms of four years.

No person shall hold the office of State Senator for a period of longer than two successive terms of four years. No person shall hold the office of State Representative for a period longer than four successive terms of two years. Terms shall be considered successive unless separated by a period of four or more years. Only terms beginning on or after January 1, 1993 shall be considered in determining an individual's eligibility to hold office.

In determining the eligibility of an individual to hold office in accordance [with] to this article, (A) time spent in an office in fulfillment of a term to which another person was first elected shall not be considered provided that a period of at least four years passed between the time, if any, [in] which the individual previously held that office, and the time the individual is elected or appointed to fulfill the unexpired term; and (B) a person who is elected to an office in a regularly scheduled general election and resigns prior to the completion of the term for which he or she was elected, shall be considered to have served the full term in that office.

Article II concerns the Legislative Branch, providing the organizational structure and membership requirements of the General Assembly, the governor's veto power, and the procedures for initiative and referendum.

### **Amendments, Proposed Amendments, and Other Review**

The 1802 Constitution provided for terms of only one year for representatives and two years for senators.<sup>1</sup> The 1851 Constitution increased the terms to two years for each. Term lengths of two years for senators remained in place until 1956, when voters approved, by a vote of 57.4 percent to 42.6 percent, an amendment that increased the term of office to four years.<sup>2</sup> Another amendment in 1967 staggered senate terms, requiring only half of the senate to stand for election at a time.<sup>3</sup>

In the early 1990s, some 21 states enacted state legislative term limits, responding to public opinion that "career politicians" were to blame for perceived governmental deficiencies.<sup>4</sup> In line with that trend, Ohio voters adopted an amendment limiting all state legislators to eight consecutive years of service, with the result that senators may only serve two successive terms of four years, and representatives may only serve four successive terms of two years.<sup>5</sup> Placed on the ballot by initiative petition as Issue 3, the measure was approved on November 3, 1992 by a margin of 2,982,285 to 1,378,009, or 68.4 percent to 31.6 percent.<sup>6</sup>

In the 1970s, the Ohio Constitutional Revision Commission did not review this provision.

## **Litigation Involving the Provision**

Article II, Section 2 has not been the subject of litigation; however, similar state constitutional provisions by which Ohio and other states imposed term limits upon federal congressional offices were rejected in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (“Allowing individual States to adopt their own qualifications for congressional service would be inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States.”).

## **Presentations and Resources Considered**

The committee received two presentations from John C. Green, Ph.D., Director of the Bliss Institute of Applied Politics at the University of Akron, and one presentation from Ann Henkener, First Vice President of the League of Women Voters of Ohio on this issue.

### *First Green Presentation*

John C. Green first presented to the committee on April 10, 2014. According to Dr. Green, Ohio’s model, called the “common model,” imposes eight-year consecutive limits in each chamber, while other models include six- or eight-year consecutive limits for the house and senate respectively, twelve-year lifetime limitations in both chambers combined, and twelve-year consecutive limits in each chamber. Dr. Green indicated that, between 1997 and 2012, six states repealed or struck down term limits, while one state enacted term limits. Thus, in 2014, 15 states had legislative term limits.

Describing the impact of legislative term limits, Dr. Green stated that term limits have impeded the development of legislative leaders, reducing leaders’ agenda-setting and coalition-building capabilities. He further indicated that the limits reduce the influence of the legislative branch in state government, instead empowering the executive branch, administrative agencies, nonpartisan staff, and lobbyists. Dr. Green also indicated that term limits increase partisanship and reduce the time legislators have to accomplish legislative goals. He noted that term limits have failed to achieve the goal of increasing the number of “citizen legislators,” as opposed to career legislators. Dr. Green observed that term limits have not increased gender, racial, or ethnic diversity in state legislatures.

Dr. Green stated that term limits have had only a modest impact on the electoral process, with no increase in the overall competitiveness of elections, no decrease in campaign spending, and an increase in the role of party caucuses in legislative campaigns. Dr. Green opined that, despite these drawbacks, term limits will continue to have strong public support. However, he stated that increasing the limits from 8 years to 12 years may alleviate the problem of a diminished role for legislative leadership. He also indicated that allowing former legislators to return to office mitigates some of the impact of term limits.

### *Second Green Presentation*

In his second presentation to the committee, on June 12, 2014, Dr. Green presented polling data related to term limits. Conducted by the Center for Marketing and Opinion Research for the Bliss Institute in April 2014, the “2014 Akron Buckeye Poll” surveyed a random sample of 1,078 registered Ohio voters, including both landline and cell phone users. Participants were asked whether they thought term limits produced poor government or good government and whether the limits have helped or hurt the state. The resulting data, with a margin of error of plus or minus three percentage points, indicates that 57 percent of those polled indicated they thought that term limits have helped the state, with 30 percent stating that the limits hurt the state and 13 percent having no opinion. These figures may be compared with 2005 polling data indicating that 59 percent of voters believed that term limits help the state, with 30 percent saying the limits hurt the state and 11 percent indicating they had no opinion.

Asked whether term limits should be kept at eight years, extended to 12 years, or repealed altogether, 70 percent of those polled favored keeping term limits at eight years, with 13 percent willing to extend the limits to 12 years, 12 percent agreeing that they should be repealed altogether, and five percent having no opinion. Queried as to whether they could accept an increase in the limit to 12 years, 38 percent of participants answered that they were firm on keeping the total number of years served at eight, with 32 percent willing to accept a 12-year limit, 13 percent being firm on a 12-year limit, 12 percent supporting a complete repeal of term limits, and five percent having no opinion.

Asked whether they would support increasing state legislative terms by two years, meaning that representatives would serve a four-year term and senators a six-year term, 61 percent of participants indicated they would support such a measure, with 36 percent indicating they would not and three percent having no opinion.

Sixty-two percent of participants stated that it should take a legislator less than five years to learn the job, while 28 percent said five-to-ten years was appropriate, seven percent identifying more than 10 years as the correct time span, and three percent having no opinion.

### *Henkener Presentation*

Ann Henkener, First Vice President of the League of Women Voters of Ohio (“League”), presented to the committee on July 10, 2014. According to Ms. Henkener, the League’s long opposition to term limits is based upon the rationale that terms are inherently limited to two years for representatives and four years for senators, requiring legislators to seek re-election at the end of those terms. Ms. Henkener asserted that the arguments against term limits as presented by the League to voters in 1992, when the current version of Article II, Section 2 appeared on the ballot, have proved mostly true. As she described them, those arguments are that term limits create more “lame duck” legislators, reduce competition for legislative seats, result in less-experienced legislators, reduce institutional memory, impede long-term thinking about societal problems, and increase the power of staff, bureaucrats, and lobbyists. Ms. Henkener opined that voters continue to support the concept of term limits because they are perceived as a counterbalance to problems attributed to the redistricting process. She stated that if redistricting reform occurs,

allowing for more competitive districts, then voters might look more favorably on extending term limits.

## Conclusion

The Legislative Branch and Executive Branch Committee concludes that Article II, Section 2 should be amended to expand term limits for state senators by one term, and for state representatives by two terms. The committee also concludes that these extensions should apply to legislators who are in office at the time of the effective date of an amendment, with the result that senators serving their first term would be eligible to hold office for two more four-year terms, while senators in their second term would be eligible for one additional four-year term. Likewise, representatives in their first term may hold office for five more two-year terms, those in their second term would be permitted four more two-year terms, and so on. The modified provision additionally would allow newly-elected legislators to be eligible to serve twelve consecutive years in their respective houses.

The committee also recommends that Article II, Section 2 be reorganized to first describe the length of term and term limits for state senators, followed by a description of the length of term and term limits for state representatives. This reorganization does not substantially change the meaning of the provision but is intended to assist the reader's comprehension of the meaning of the section. These proposed changes bring the format of the section in line with the structure of other sections in Article II.

Thus, the committee recommends Section 2 be amended as shown in Attachment A, which provides a marked-up version of the provision. Attachment B provides a clean version of Section 2, if the proposed amendment is adopted.

## Date Issued

After formal consideration by the Legislative Branch and Executive Branch Committee on March 12, 2015, and April 9, 2015, the committee voted to issue this report and recommendation on April 9, 2015.

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## Endnotes

<sup>1</sup> Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution*, 140 (2nd prtg. 2011).

<sup>2</sup> Michael F. Curtin, *Ohio Politics Almanac*, 83 (3<sup>rd</sup> ed. 2015).

<sup>3</sup> Steinglass & Scarselli, *supra*.

<sup>4</sup> Steven F. Huefner, *Term Limits in State Legislative Elections: Less Value for More Money?*, 79 Ind. L.J. 427, 428 (2004).

<sup>5</sup> Steinglass & Scarselli, *supra*, at 141.

<sup>6</sup> *Id.*, Appendix B.



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION OF THE LEGISLATIVE BRANCH AND EXECUTIVE BRANCH COMMITTEE

#### OHIO CONSTITUTION ARTICLE II, SECTION 2

#### ELECTION AND TERM OF STATE LEGISLATORS [OPTION TWO]

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The Legislative Branch and Executive Branch Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article II, Section 2 of the Ohio Constitution concerning the election and term of state legislators. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*The committee recommends that Article II, Section 2 be amended to allow all newly-elected state legislators to serve a total of twelve consecutive years, consisting of three four-year terms for senators and six two-year terms for representatives. The committee also recommends that this expansion of the current eight-year limit on consecutive terms of legislative service not apply to current members of the General Assembly, with the result that all members already in office at the time of the effective date of the amendment would be limited to eight years consecutive service.*

#### **Background**

Article II, Section 2, reads as follows:

Representatives shall be elected biennially by the electors of the respective house of representatives districts; their term of office shall commence on the first day of January next thereafter and continue two years.

Senators shall be elected by the electors of the respective senate districts; their terms of office shall commence on the first day of January next after their election. All terms of senators which commence on the first day of January, 1969 shall be four years, and all terms which commence on the first day of January,

1971 shall be four years. Thereafter, except for the filling of vacancies for unexpired terms, senators shall be elected to and hold office for terms of four years.

No person shall hold the office of State Senator for a period of longer than two successive terms of four years. No person shall hold the office of State Representative for a period longer than four successive terms of two years. Terms shall be considered successive unless separated by a period of four or more years. Only terms beginning on or after January 1, 1993 shall be considered in determining an individual's eligibility to hold office.

In determining the eligibility of an individual to hold office in accordance [with] to this article, (A) time spent in an office in fulfillment of a term to which another person was first elected shall not be considered provided that a period of at least four years passed between the time, if any, [in] which the individual previously held that office, and the time the individual is elected or appointed to fulfill the unexpired term; and (B) a person who is elected to an office in a regularly scheduled general election and resigns prior to the completion of the term for which he or she was elected, shall be considered to have served the full term in that office.

Article II concerns the Legislative Branch, providing the organizational structure and membership requirements of the General Assembly, the governor's veto power, and the procedures for initiative and referendum.

### **Amendments, Proposed Amendments, and Other Review**

The 1802 Constitution provided for terms of only one year for representatives and two years for senators.<sup>1</sup> The 1851 Constitution increased the terms to two years for each. Term lengths of two years for senators remained in place until 1956, when voters approved, by a vote of 57.4 percent to 42.6 percent, an amendment that increased the term of office to four years.<sup>2</sup> Another amendment in 1967 staggered senate terms, requiring only half of the senate to stand for election at a time.<sup>3</sup>

In the early 1990s, some 21 states enacted state legislative term limits, responding to public opinion that "career politicians" were to blame for perceived governmental deficiencies.<sup>4</sup> In line with that trend, Ohio voters adopted an amendment limiting all state legislators to eight consecutive years of service, with the result that senators may only serve two successive terms of four years, and representatives may only serve four successive terms of two years.<sup>5</sup> Placed on the ballot by initiative petition as Issue 3, the measure was approved on November 3, 1992 by a margin of 2,982,285 to 1,378,009, or 68.4 percent to 31.6 percent.<sup>6</sup>

In the 1970s, the Ohio Constitutional Revision Commission did not review this provision.

## **Litigation Involving the Provision**

Article II, Section 2 has not been the subject of litigation; however, similar state constitutional provisions by which Ohio and other states imposed term limits upon federal congressional offices were rejected in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (“Allowing individual States to adopt their own qualifications for congressional service would be inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States.”).

## **Presentations and Resources Considered**

The committee received two presentations from John C. Green, Ph.D., Director of the Bliss Institute of Applied Politics at the University of Akron, and one presentation from Ann Henkener, First Vice President of the League of Women Voters of Ohio on this issue.

### *First Green Presentation*

John C. Green first presented to the committee on April 10, 2014. According to Dr. Green, Ohio’s model, called the “common model,” imposes eight-year consecutive limits in each chamber, while other models include six- or eight-year consecutive limits for the house and senate respectively, twelve-year lifetime limitations in both chambers combined, and twelve-year consecutive limits in each chamber. Dr. Green indicated that, between 1997 and 2012, six states repealed or struck down term limits, while one state enacted term limits. Thus, in 2014, 15 states had legislative term limits.

Describing the impact of legislative term limits, Dr. Green stated that term limits have impeded the development of legislative leaders, reducing leaders’ agenda-setting and coalition-building capabilities. He further indicated that the limits reduce the influence of the legislative branch in state government, instead empowering the executive branch, administrative agencies, nonpartisan staff, and lobbyists. Dr. Green also indicated that term limits increase partisanship and reduce the time legislators have to accomplish legislative goals. He noted that term limits have failed to achieve the goal of increasing the number of “citizen legislators,” as opposed to career legislators. Dr. Green observed that term limits have not increased gender, racial, or ethnic diversity in state legislatures.

Dr. Green stated that term limits have had only a modest impact on the electoral process, with no increase in the overall competitiveness of elections, no decrease in campaign spending, and an increase in the role of party caucuses in legislative campaigns. Dr. Green opined that, despite these drawbacks, term limits will continue to have strong public support. However, he stated that increasing the limits from 8 years to 12 years may alleviate the problem of a diminished role for legislative leadership. He also indicated that allowing former legislators to return to office mitigates some of the impact of term limits.

### *Second Green Presentation*

In his second presentation to the committee, on June 12, 2014, Dr. Green presented polling data related to term limits. Conducted by the Center for Marketing and Opinion Research for the Bliss Institute in April 2014, the “2014 Akron Buckeye Poll” surveyed a random sample of 1,078 registered Ohio voters, including both landline and cell phone users. Participants were asked whether they thought term limits produced poor government or good government and whether the limits have helped or hurt the state. The resulting data, with a margin of error of plus or minus three percentage points, indicates that 57 percent of those polled indicated they thought that term limits have helped the state, with 30 percent stating that the limits hurt the state and 13 percent having no opinion. These figures may be compared with 2005 polling data indicating that 59 percent of voters believed that term limits help the state, with 30 percent saying the limits hurt the state and 11 percent indicating they had no opinion.

Asked whether term limits should be kept at eight years, extended to 12 years, or repealed altogether, 70 percent of those polled favored keeping term limits at eight years, with 13 percent willing to extend the limits to 12 years, 12 percent agreeing that they should be repealed altogether, and five percent having no opinion. Queried as to whether they could accept an increase in the limit to 12 years, 38 percent of participants answered that they were firm on keeping the total number of years served at eight, with 32 percent willing to accept a 12-year limit, 13 percent being firm on a 12-year limit, 12 percent supporting a complete repeal of term limits, and five percent having no opinion.

Asked whether they would support increasing state legislative terms by two years, meaning that representatives would serve a four-year term and senators a six-year term, 61 percent of participants indicated they would support such a measure, with 36 percent indicating they would not and three percent having no opinion.

Sixty-two percent of participants stated that it should take a legislator less than five years to learn the job, while 28 percent said five-to-ten years was appropriate, seven percent identifying more than 10 years as the correct time span, and three percent having no opinion.

### *Henkener Presentation*

Ann Henkener, First Vice President of the League of Women Voters of Ohio (“League”), presented to the committee on July 10, 2014. According to Ms. Henkener, the League’s long opposition to term limits is based upon the rationale that terms are inherently limited to two years for representatives and four years for senators, requiring legislators to seek re-election at the end of those terms. Ms. Henkener asserted that the arguments against term limits as presented by the League to voters in 1992, when the current version of Article II, Section 2 appeared on the ballot, have proved mostly true. As she described them, those arguments are that term limits create more “lame duck” legislators, reduce competition for legislative seats, result in less-experienced legislators, reduce institutional memory, impede long-term thinking about societal problems, and increase the power of staff, bureaucrats, and lobbyists. Ms. Henkener opined that voters continue to support the concept of term limits because they are perceived as a counterbalance to problems attributed to the redistricting process. She stated that if redistricting reform occurs,

allowing for more competitive districts, then voters might look more favorably on extending term limits.

## Conclusion

The Legislative Branch and Executive Branch Committee concludes that Article II, Section 2 should be amended to expand term limits for newly-elected state senators by one term, and for state representatives by two terms. The committee does not recommend extending term limits for current members of the General Assembly, who would be limited to eight consecutive years of service in their respective houses.

The committee also recommends that Article II, Section 2 be reorganized to first describe the length of term and term limits for state senators, followed by a description of the length of term and term limits for state representatives. This reorganization is intended to assist the reader's comprehension of the meaning of the section. The committee further recommends that the provision be reorganized to include a supplemental paragraph entitled "Effective Date and Repeal," consisting of a description of when the provision, if adopted, would take effect. The committee also recommends the inclusion of "Schedule 1," consisting of an explanation that the extended term limits contained in the revised provision will only apply to newly appointed or elected legislators. These proposed changes bring the format of the section in line with the structure of other sections in Article II.

Therefore, the committee recommends Section 2 be amended as shown in Attachment A, which provides a marked-up version of the provision. Attachment B provides a clean version of Section 2, if the proposed amendment is adopted.

## Date Issued

After formal consideration by the Legislative Branch and Executive Branch Committee on March 12, 2015, and April 9, 2015, the committee voted to issue this report and recommendation on April 9, 2015.

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## Endnotes

<sup>1</sup> Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution*, 140 (2nd prtg. 2011).

<sup>2</sup> Michael F. Curtin, *Ohio Politics Almanac*, 83 (3<sup>rd</sup> ed. 2015).

<sup>3</sup> Steinglass & Scarselli, *supra*.

<sup>4</sup> Steven F. Huefner, *Term Limits in State Legislative Elections: Less Value for More Money?*, 79 Ind. L.J. 427, 428 (2004).

<sup>5</sup> Steinglass & Scarselli, *supra*, at 141.

<sup>6</sup> *Id.*, Appendix B.

## Option Two

### *Article II, Section 2*

~~Representatives shall be elected biennially by the electors of the respective House of Representatives districts; their term of office shall commence on the first day of January next thereafter and continue two years.~~

Senators shall be elected by the electors of the respective Senate districts; ~~their~~ Their ~~terms~~ term of office of a senator shall commence on the first day of January ~~next after their~~ following the election. All terms of senators which commence on the first day of January, 1969 shall be four years, and all terms which commence on the first day of January, 1971 shall be four years. Thereafter, except for the filling of vacancies for unexpired terms, senators shall be elected to and hold office for terms of four years. No person shall hold the office of senator for a period longer than three successive terms of four years. Terms shall be considered successive unless separated by a period of four or more years.

Representatives shall be elected biennially by the electors of the respective House of Representative districts. The term of office of a representative shall commence on the first day of January following the election and continue two years. No person shall hold the office of representative for a period longer than six successive terms of two years. Terms shall be considered successive unless separated by a period of four or more years.

~~No person shall hold the office of State Senator for a period of longer than two successive terms of four years. No person shall hold the office of State Representative for a period longer than four successive terms of two years. Terms shall be considered successive unless separated by a period of four or more years. Only terms beginning on or after January 1, 1993 shall be considered in determining an individual's eligibility to hold office.~~

In determining the eligibility of an individual to hold office in accordance ~~to~~ with this article, (A) time spent in an office in fulfillment of a term to which another person was first elected shall not be considered provided that a period of at least four years passed between the time, if any, in which the individual previously held that office, and the time the individual is elected or appointed to fulfill the unexpired term; and (B) a person who is elected to an office in a regularly scheduled general election and resigns prior to the completion of the term for which he or she was elected, shall be considered to have served the full term in that office.

### EFFECTIVE DATE AND REPEAL

If adopted by a majority of the electors voting on this proposal, Section 2 of Article II as amended by this proposal shall take effect on January 1, 2017, and existing Section 2 of Article II shall be repealed effective January 1, 2017.

## SCHEDULE 1

The version of Section 2 of Article II in effect on December 31, 2016, shall apply to senators and representatives who are in office on that date.

The version of Section 2 of Article II as amended by this proposal shall first apply to senators and representatives who are appointed or elected on or after the effective date of this amendment and who are not in office on December 31, 2016.

## **Option Two**

### *Article II, Section 2*

Senators shall be elected by the electors of the respective Senate districts. The term of office of a senator shall commence on the first day of January following the election. All terms of senators which commence on the first day of January 1969 shall be four years, and all terms which commence on the first day of January 1971 shall be four years. Thereafter, except for the filling of vacancies for unexpired terms, senators shall be elected to and hold office for terms of four years. No person shall hold the office of senator for a period longer than three successive terms of four years. Terms shall be considered successive unless separated by a period of four or more years.

Representatives shall be elected biennially by the electors of the respective House of Representatives districts. The term of office of a representative shall commence on the first day of January following the election and continue two years. No person shall hold the office of representative for a period longer than six successive terms of two years. Terms shall be considered successive unless separated by a period of four or more years.

In determining the eligibility of an individual to hold office in accordance with this article, (A) time spent in an office in fulfillment of a term to which another person was first elected shall not be considered provided that a period of at least four years passed between the time, if any, in which the individual previously held that office, and the time the individual is elected or appointed to fulfill the unexpired term; and (B) a person who is elected to an office in a regularly scheduled general election and resigns prior to the completion of the term for which he or she was elected, shall be considered to have served the full term in that office.

### EFFECTIVE DATE AND REPEAL

If adopted by a majority of the electors voting on this proposal, Section 2 of Article II as amended by this proposal shall take effect on January 1, 2017, and existing Section 2 of Article II shall be repealed effective January 1, 2017.

### SCHEDULE 1

The version of Section 2 of Article II in effect on December 31, 2016 shall apply to senators and representatives who are in office on that date.

The version of Section 2 of Article II as amended by this proposal shall first apply to senators and representatives who are appointed or elected after the effective date of this amendment and who are not in office on December 31, 2016.



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION OF THE BILL OF RIGHTS AND VOTING COMMITTEE

#### OHIO CONSTITUTION ARTICLE V, SECTION 6

#### MENTAL CAPACITY TO VOTE

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The Bill of Rights and Voting Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article V, Section 6 of the Ohio Constitution concerning the disenfranchisement of mentally incapacitated persons. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

#### **Recommendation**

*Based on the following and for the reasons stated herein, the committee recommends that Article V, Section 6 in its current form be repealed, and that a new section be adopted as follows:*

*The General Assembly shall provide that no person who has been determined under law to lack the mental capacity to vote shall have the rights and privileges of an elector during the time of incapacity.*

#### **Background**

Article V of the Ohio Constitution concerns the Elective Franchise.

Article V, Section 6 reads as follows:

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

The clear purpose of the provision is to disqualify from voting persons who are mentally incapacitated. The provision modifies the broad enfranchisement of United States citizens over the age of 18 who otherwise meet the qualifications of an elector, as contained in Article V, Section 1.<sup>1</sup>

When this provision was adopted as part of the 1851 Ohio Constitution, words such as “idiot,” “lunatic,” and “feeble-minded,” were commonly used to describe persons of diminished mental capacity. In modern times, however, the descriptors “idiot” and “insane person” have taken on a pejorative meaning and are not favored. Throughout the 1800s, an “idiot” was simply a person with diminished mental capacity, what later was termed “mental retardation,” and what is now referred to as being “developmentally disabled.” Further, the word “idiot” conveyed that it was a permanent state of mental incapacity, possibly congenital, as opposed to “mania” “dementia,” or “insanity,” which signified potentially transient or temporary conditions.<sup>2</sup> Today, the word “idiot” has become an insult, suggesting someone who is willfully foolish or uninformed.<sup>3</sup>

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

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

From my review of legal literature going back to 1800 it seems apparent that the common definition of the word “idiot,” as understood in 1851 when our present Constitution was in the main adopted, meant that it refers to a person who has been without understanding from his nativity, and whom the law, therefore, presumes never likely to attain any. I am unable to find anything indicating any real change in this definition to this date. \* \* \*

The words “insane person,” however, most commonly then as well as now, refer to a person who has suffered such a deprivation of reason that he is no longer capable of understanding and acting with discretion and judgment in the ordinary affairs of life. It seems quite apparent that some persons who once had normal reason and sense faculties become permanently insane. Others lose their normal perception and reason for relatively short periods of time such as day, a week, or a month or two, and then regain their normal condition for either their entire life or for some lesser indeterminate period. During these lucid intervals such persons commonly exercise every characteristic of normality associated with all those persons who have never, even for a short period, been deprived of their normal reasoning faculties.

*Baker v. Keller*, 15 Ohio Misc. 215, 229, 237 N.E.2d 629, 638 (Marion CP Ct. 1968).

### **Amendments, Proposed Amendments, and Other Review**

Article V, Section 6 has not been amended since its adoption as part of the 1851 Ohio Constitution.

In the 1970s, the Elections and Suffrage Committee (“E&S Committee”) of the Ohio Constitutional Revision Commission (“1970s Commission”) discussed whether to amend the

provision in order to remove the “idiot” and “insane person” references. The E&S Committee’s discussion centered both on the words themselves, which were recognized as outdated and potentially offensive, as well as the provision’s vagueness:

The present provision concerning mental illness and voting is unsatisfactory for several reasons. First, the constitutional language is simply a direct prohibition. The General Assembly is not expressly given the power to determine which mental conditions are such that a person should not vote, nor to establish procedures for determining who does or who does not fall into the categories. Statutory authority for the courts to deny the vote to involuntarily committed patients is nevertheless provided in [Ohio Revised Code] section 5122.15, dealing with legal incompetency. But this provision carries out neither the letter nor the spirit of the constitutional prohibition. The law now tolerates the voting of some persons who may in fact be mentally incompetent. A voluntary patient who does not request a hearing before the probate court retains his civil rights, among them the right to vote. The loss of the right to vote is based upon the idea that a person in need of indeterminate hospitalization is also legally incompetent. But there are other persons whose right to vote may be challenged on the basis of insanity, either at the polls or in the case of contested election results. In these instances, there are no provisions resolving how hearings must be conducted, by whom, or even the crucial question of whether medical evidence shall be required. The lack of procedure for determining who is “insane” or an “idiot” could allow persons whose opinions are unpopular or whose lifestyles are disapproved to be challenged at the polls, and they may lose their right to vote without the presentation of any medical evidence whatsoever.<sup>4</sup>

The E&S Committee acknowledged that “large scale and possibly arbitrary exclusion from voting are a greater danger to the democratic process than including some who may be mentally incompetent to vote.” The E&S Committee concluded that “a person should not be denied the right to vote because he is ‘incompetent,’ but only if he is incompetent for the purpose of voting,” ultimately recommending a revision that would exclude from the franchise persons who are “mentally incompetent for the purpose of voting.”<sup>5</sup> The 1970s Commission voted to submit this recommendation to the General Assembly, specifically proposing repeal of the section and replacing it with a new Section 5 that would read:

The General Assembly shall have power to deny the privileges of an elector to any person adjudicated mentally incompetent for the purpose of voting only during the period of such incompetency.<sup>6</sup>

For reasons that are not clear, the General Assembly did not present this issue to the voters.

## Litigation Involving the Provision

Only two Ohio Supreme Court cases refer to this provision. An early case, *Sinks v. Reese*, 19 Ohio St. 306 (1869), cited it to support a holding that some votes by mentally-impaired residents of an asylum could be disqualified; however, the court counted a vote by a resident who was “greatly enfeebled by age,” because “the reverence which is due to ‘the hoary head’ ought to have left his vote uncontested.” The court also mentioned the provision in *State ex rel. Melvin v. Sweeney, Secy. of State*, 154 Ohio St. 223, 94 N.E.2d 785 (1950), in which the court held constitutional a statutory provision that required county boards of elections to provide ballot assistance to physically disabled voters, but prohibited them from providing similar assistance to illiterate voters.

The provision also was cited in the context of an election in which a person of diminished mental capacity was alleged to have been improperly allowed to vote. *In re South Charleston Election Contest*, 1905 Ohio Misc. LEXIS 191, 3 Ohio N.P. (n.s.) 373 (Clark County Probate Court, 1905), involved a contested election relating to the sale of liquor in which one voter was deemed by the court to be mentally incompetent for the purpose of voting, with the result that the election was so close as to be declared null and void.

*Baker v. Keller, supra*, a common pleas case, cited Article V, Section 6 in relation to its conclusion that a litigant could not base a motion for new trial on the allegation that a mentally ill juror should have been disqualified where there had been no adjudication of incompetence.

More recently, a Maine federal court decision has been relied on in other jurisdictions for its holding that imposition of a guardianship for mental health reasons does not equate with mental incapacity for purposes of voting. *Doe v. Rowe*, 156 F. Supp. 2d 35, 59 (D. Me. 2001), concluded that federal equal protection and due process guarantees require a specific finding that an individual is mentally incompetent for the purpose of voting before disqualification can occur. *Doe v. Rowe* was cited in *Bell v. Marinko*, 235 F. Supp.2d 772 (N.D. Ohio 2002), for the proposition that, because voting is a fundamental right, disenfranchisement based on residency requirements must be predicated on notice and an opportunity to be heard.

## Presentations and Resources Considered

*Michael Kirkman, Disability Rights Ohio*

On December 11, 2014, Michael Kirkman, executive director of Disability Rights Ohio, a legal advocacy and rights protection organization, presented to the committee on the topic of voting rights for the disabled. Mr. Kirkman attended the committee meeting again on February 12, 2015, to provide additional assistance as the committee discussed potential changes to Article V, Section 6.

According to Mr. Kirkman, society’s perception of mental disability has changed since 1851, when neglect, isolation, and segregation were typical responses. Social reform after the Civil War helped create institutions for housing and treating the mentally ill, but there was little

improvement in societal views of mental illness. Mr. Kirkman noted that, even as medical and psychiatric knowledge expanded, the mentally ill were still living in deplorable conditions and were sometimes sterilized against their will. By the 1950s, there was a growing awareness that the disabled should be afforded greater rights, with the recognition that due process requirements must be met before their personal liberties and fundamental rights could be constrained. Mr. Kirkman observed that Article V, Section 1 gives broad basic eligibility requirements for being an Ohio voter, but Article V, Section 6 constitutes the only categorical exception in that it automatically disenfranchises people with mental disabilities. Mr. Kirkman further noted the difficulty in defining “mental incapacity for the purpose of voting,” commenting that mental capacity is not fixed in time or static in relation to every situation, and that even mental health experts have difficulty defining the concept. According to Mr. Kirkman, the better practice is to make an individualized determination of decisional capacity in the specific context in which it is challenged.

Mr. Kirkman emphasized the view of the disability community that full participation in the political process is essential, and for this reason he advocated removal of Article V, Section 6, without replacement. Alternately, if Article V, Section 6 cannot be entirely eliminated, Mr. Kirkman recommended the provision should be phrased as an affirmative statement of non-discrimination, such as “No person otherwise qualified to be an elector shall be denied any of the rights or privileges of an elector because of a disability.” He also stated that the self-enabling aspect of the current provision should be changed to reflect that the General Assembly has the authority to enact laws providing due process protection for persons whose capacity to vote is subject to challenge.

In his second appearance before the committee on February 12, 2015, Mr. Kirkman commented that the phrase “mentally incompetent to vote” is not currently favored when drafting legislative enactments. Instead, he said the mental health community favors expressing the concept as a lack of mental “capacity,” or as being “mentally incapacitated.” Mr. Kirkman noted that the word “incompetent” is a purely legal term used in guardianship and criminal codes, while “mental incapacity” more specifically describes the mental state that would affect whether a person could vote.

Mr. Kirkman again appeared before the committee on November 12, 2015 to answer questions from committee members about proposed changes to the provision. Reiterating that experts dispute what is meant by “capacity to vote,” Mr. Kirkman said one way to address that question would be to include language giving the General Assembly an express role in deciding what circumstances should affect voting rights.

### *Huhn Presentation*

On November 12, 2015, the committee heard a presentation by Wilson R. Huhn, professor emeritus at the University of Akron School of Law, who spoke on behalf of the American Civil Liberties Union of Ohio (“ACLU”). After describing the constitutional due process requirements relating to the right to vote, Professor Huhn advocated for removing Article V, Section 6, saying the General Assembly would still retain the ability to establish procedures for

denying the right to vote to persons who are incapable of voting. Prof. Huhn said mental health experts use methods to evaluate performance that are far more than a simple IQ test, and that people have abilities based on living skills, communication skills, and common sense.

### *Research Materials*

The committee benefited from several memoranda that described relevant research, as well as posed questions for consideration and suggested possible changes to the section.

Staff research presented to the committee indicates that voting is a fundamental right that the United States Supreme Court calls the “essence of a democratic society.” *Reynolds v. Sims*, 377 U.S. 553, 555 (1964). “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). In addition, disenfranchisement is considered to be a denial of a fundamental liberty, subject to basic due process protections that ensure fundamental fairness. *Lassiter v. Dept. of Social Servs.*, 452 U.S. 18, 24 (1981). In reviewing provisions affecting the exercise of the elective franchise, courts apply the balancing test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), by which the individual’s interest in participating in the democratic process is weighed against the state’s interest in ensuring that those who vote understand the act of voting. *Dunn v. Blumstein*, 405 U.S. 330 (1972). Because voting is a fundamental right, the high court has held a state’s interest in limiting its exercise must be compelling, and the limitations themselves must be narrowly tailored to meet that compelling interest. *See, e.g., Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008).<sup>7</sup>

The committee also reviewed other state constitutions that address disenfranchisement of the mentally impaired. Although nine states have no constitutional provision relating to a voter’s mental status, the remainder contain a limitation on voting rights for persons experiencing mental impairment, with three of those states having a provision that grants discretion to the state legislature to determine whether to disenfranchise. Significantly, only four states, Ohio, Kentucky, Mississippi, and New Mexico, retain the descriptors “idiots” and “insane persons,” with other states referring to such persons as being mentally incompetent, mentally incapacitated, or as having a mental disability.

### *Additional Resources*

Research that assisted the Committee’s consideration of this issue included Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 McGeorge L.Rev. 931 (2007); James T. McHugh, *Idiots and Insane Persons: Electoral Exclusion and Democratic Values Within the Ohio Constitution*, 76 Albany L.Rev. 2189 (2013); Kay Schriener, *The Competence Line in American Suffrage Law: A Political Analysis*, Disability Studies Quarterly, Vol. 22, No. 2, page 61; Kay Schriener & Lisa A. Ochs, *Creating the Disabled Citizen: How Massachusetts Disenfranchised People Under Guardianship*, 62 Ohio St. L.J. 481 (2001).

## Discussion and Consideration

In reviewing possible changes to Article V, Section 6, the committee first considered whether to simply replace the offensive references with more appropriate language, leaving the rest of the section intact. However, some members emphasized the importance of additionally stating that any disenfranchisement due to lack of mental capacity must last only during the period of incapacity.

The committee also discussed whether to retain the section's "self-executing" status, or whether to include language that would specifically authorize or require the General Assembly to create laws governing the disenfranchisement of mentally incapacitated persons. On this question, some members asserted that expressly requiring or empowering the General Assembly to act was unnecessary because this legislative authority is inherent. Ultimately, it was the consensus of the committee that expressly requiring or enabling action by the General Assembly is necessary in order to acknowledge an evolving understanding of the concept of "mental capacity for the purpose of voting," and so the committee concluded that the section should include such language.

The committee also addressed what would be the appropriate descriptor for persons whose mental disability would disqualify them from voting. On this question, the committee found persuasive Michael Kirkman's assertion that the preferred modern reference is to an individual's "incapacity," rather than to his or her "incompetence." Members of the committee agreed that "mental incapacity" would be an acceptable phrase to substitute for "idiots" and "insane persons." Combined with the committee's consensus that disenfranchisement should occur only during the time of the individual's incapacity, allowing voting to be restored to persons who recover their mental capacity, the committee concluded that the appropriate phrase should be "mental incapacity to vote."

The committee also considered the significance of the use of the phrase "privileges of an elector" in the section, as opposed to using the phrase "privileges of a voter" or "rights of a voter." One committee member noted that "privileges of an elector" would not indicate merely voting, but would include activities such as running for public office or signing a petition. Further discussion centered on the symbolic or other differences between using the word "privilege" and using the word "right," as well as the inclusion of the word "entitled" in the section. Some committee members expressed a strong preference for having the new section refer to voting as a "right," a word choice they believed would signify the importance of the act of voting, and emphasize the constitution's protection of the individual's voting prerogative. Other committee members were reluctant to change the reference to "privileges of an elector," because of the possibility that the original meaning and application of that phrase would be lost. Several members acknowledged that the "privilege versus right" controversy was larger than could be thoroughly addressed or satisfactorily resolved by the committee, and that, in any case, its resolution was not necessary to revising the section.

As a compromise, the committee agreed to recommend that the phrase read “rights and privileges of an elector,” so as to embrace both the concept of voting as a right and the concept, articulated in the original language of the section, of an “elector” having privileges beyond those of simply voting.

Debate arose over whether to include an explicit reference to judicial review, due process, or adjudication, as a prerequisite to disenfranchisement. Some committee members said they were inclined to exclude the reference based on their view that due process must be satisfied regardless of whether the provision expressly mentions the need for it. These committee members indicated that a constitutional provision that expressly requires adjudication could complicate or interfere with current procedures for ascertaining whether an individual is capable of voting. Other committee members said requiring adjudication would emphasize that the burden is on the state to prove that an individual’s mental state disqualifies him or her from voting, rather than the burden being on the individual to prove sufficient mental capacity to vote. Some members sought to include language that would emphasize that voting is a right that should not be removed absent adjudication. Those members expressed the view that a constitutional provision that doesn’t express this concept is not fair to the citizen.

The committee was divided between those who wanted to include a reference to adjudication, and those who did not. As a way of addressing the issue of adjudication, the committee decided the amendment should require the General Assembly to enact laws governing the legal determination of whether a person lacks the mental capacity to vote. The committee also agreed its recommendation should focus on substituting the references to “idiots” and “insane persons” with the adjective phrase “lacks the mental capacity to vote.” The committee further concluded that the provision could recognize both the “rights” and “privileges” of an elector, and that the disenfranchisement would only be during the period of incapacity.

The Bill of Rights and Voting Committee concluded that the considerations and interests supporting the change proposed by the 1970s Commission remain relevant today. Specifically, current knowledge regarding mental illness and cognitive impairment, as well as modern distaste for adjectives like “idiot,” continue to provide justification for amending this provision.<sup>8</sup>

Additionally, the current provision does not require that the subject individual be mentally incapacitated for the purposes of voting. The committee concluded that, without this specific element, the current provision lacks proper protection for persons asserted to be incapable of voting due to mental disability.

In addition to these considerations, the committee acknowledged the view that voting is a right, and that an individual possesses the “privileges of an elector,” which may include the ability to sign petitions or run for public office. Thus, the committee desired the new provision to signify that it is both of these potentially separate rights or interests that are infringed when a person is determined to lack mental capacity for the purpose of voting.

## Conclusion

Based on these considerations, the Bill of Rights and Voting Committee recommends that Article V, Section 6 be repealed and replaced with the following new provision:

*The General Assembly shall provide that no person who has been determined under law to lack the mental capacity to vote shall have the rights and privileges of an elector during the time of incapacity.*

The recommended amendment serves the goal of:

- Requiring the General Assembly to enact laws relating to the disenfranchisement of persons lacking the mental capacity to vote;
- Removing all outdated or pejorative references to mentally incapacitated persons;
- Specifying that the disenfranchisement only applies to the period of incapacity; and
- Requiring that only mental incapacity *for the purposes of voting* would result in disenfranchisement.

## Date Issued

After considering this report and recommendation on September 10, 2015, November 12, 2015, and March 10, 2016, the Bill of Rights and Voting Committee, by a vote of six to one, voted to issue this report and recommendation on March 10, 2016.

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## Endnotes

<sup>1</sup> Article V, Section 1 provides:

Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, has the qualifications of an elector, and is entitled to vote at all elections. Any elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless he again registers to vote.

<sup>2</sup> Although the discipline of psychology was in its infancy in the 1800s, the Ohio Supreme Court's description of insanity in 1843 reflects a surprisingly modern view:

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

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A full citation to “Shelford on Lunacy” is Leonard Shelford, *A Practical Treatise on The Law Concerning Lunatics, Idiots, and Persons of Unsound Mind, with an Appendix of The Statutes of England, Ireland, and Scotland, Relating to Such Persons and Precedents and Bills of Costs* (London, Wm. McDowall. 1833).

<sup>3</sup> See Merriam Webster Dictionary, <http://www.merriam-webster.com/dictionary/idiot> (1. *usually offensive*: a person affected with extreme mental retardation; 2. a foolish or stupid person). For further discussion of 19<sup>th</sup> century scientific and political views on the subject of disenfranchisement of the mentally incompetent, see Kay Schriener, *The Competence Line in American Suffrage Law: A Political Analysis*, 22 *Disability Stud. Q.*, no. 2, 2002, at 61; and Kay Schriener and Lisa A. Ochs, *Creating the Disabled Citizen: How Massachusetts Disenfranchised People Under Guardianship*, 62 *Ohio St. L.J.* 481 (2001).

<sup>4</sup> Ohio Constitutional Revision Commission (1970-77), Proceedings Research, Volume 5, Elections and Suffrage Committee Report, 2502, 2515 (Apr. 22, 1974), <http://www.lsc.ohio.gov/ocrc/v5%20pgs%20195-2601%20elections-suffrage%202602-2743%20local%20govt.pdf> (last visited Oct. 28, 2015).

<sup>5</sup>*Id.* at 2516.

<sup>6</sup> Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Constitution, Part 7, Elections and Suffrage, 23-25 (Mar. 15, 1975) <http://www.lsc.ohio.gov/ocrc/recommendations%20pt7%20elections%20and%20suffrage.pdf> (last visited Oct. 28, 2015).

<sup>7</sup> A discussion of Due Process and Equal Protection jurisprudence related to state constitutional provisions that disenfranchise the mentally impaired may be found in Jennifer A. Bindel, *Equal Protection Jurisprudence and the Voting Rights of Persons with Diminished Mental Capacities*, 65 *N.Y.U. Ann. Surv. Am. L.* 87 (2009).

<sup>8</sup> Since the 1970s, the General Assembly has undertaken efforts to purge the Ohio Revised Code of outdated or pejorative references to persons having diminished mental capacity, and to protect the civil rights of persons subject to guardianships. Thus, Am. Sub. H.B. 53, introduced and passed by the 127<sup>th</sup> General Assembly, removed all statutory references to “lunatic,” “idiot,” “imbecile,” “drunkard,” “deaf and dumb,” and “insane,” in 29 sections of the Revised Code, replacing them, where necessary, with more modern references.