**OHIO CONSTITUTIONAL MODERNIZATION COMMISSION**

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**THURSDAY, APRIL 9, 2015**
**1:30 PM**
**SOUTH MEETING ROOMS B & C, 31ST FLOOR**
**RIFFE CENTER FOR GOVERNMENT AND THE ARTS**

**AGENDA**

I. Call to Order

II. Roll Call

III. Approval of Minutes

- Meeting of February 12, 2015

IV. Standing Committee Reports

- Coordinating Committee (Trafford)
- Public Education and Information Committee (Beckett) and Liaisons with Public Offices Committee (Asher)
- Organization and Administration Committee (Wagoner)

V. Subject Matter Committee Reports

- Education, Public Institutions, and Local Government Committee (Readler)
- Finance, Taxation, and Economic Development Committee (Cole)
- Judicial Branch and the Administration of Justice Committee (Abaray)
- Bill of Rights and Voting Committee (Saphire)
- Constitutional Revisions and Updating Committee (Mulvihill)
- Legislative Branch and Executive Branch Committee (Mills)

VI. Reports and Recommendations

- Article IV, Section 19 (Courts of Conciliation) - Obhof
  - Second Presentation
  - Public Comment
  - **Action Item: Consideration and Adoption**

- Article IV, Section 22 (Supreme Court Commission) - Obhof
  - Second Presentation
  - Public Comment
  - **Action Item: Consideration and Adoption**

- Article I, Section 2 (Right to Alter, Reform, or Abolish Government) - Saphire
  - First Presentation
  - Public Comment

- Article I, Section 3 (Right to Assemble) - Saphire
  - First Presentation
  - Public Comment

- Article I, Section 4 (Bearing Arms; Standing Armies; Military Power) - Saphire
  - First Presentation
  - Public Comment

VII. Executive Director's Report (Hollon)

VIII. Old Business

IX. New Business

X. Adjourn

# OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

## REPORT AND RECOMMENDATION OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

## OHIO CONSTITUTION ARTICLE IV, SECTION 19

## COURTS OF CONCILIATION



The Judicial Branch and Administration of Justice Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article IV, Section 19 of the Ohio Constitution concerning courts of conciliation. The committee issues this report pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

### Recommendation

*The committee finds that Article IV, Section 19 is obsolete and therefore recommends its repeal.*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.[1]

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.[2]

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.[3]

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.[4]

**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.[5] Despite this recommendation, the General Assembly did not submit the proposed repeal of Section 19 to the voters.

In 2011, the 129th General Assembly adopted Amended House Joint Resolution Number 1, intended, in part, to repeal Section 19.[6] 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.[7]

**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 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.

**Conclusion**

The Judicial Branch and Administration of Justice Committee 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 committee concludes that the provision is obsolete and recommends that Article IV, Section 19 be repealed.

**Date Adopted**

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

## Endnotes

[1] Ohio Constitution, Article IV, Section 1.

[2] Steven H. Steinglass & Gino J. Scarselli, The Ohio State Constitution (2nd prtg. 2011), p. 207.

[3] 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), p. 391.

[4] Steinglass & Scarselli, *supra*, p. 208, citing R.C. Chapter 2711, and R.C. 2701.10.

[5] Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part 10, The Judiciary, March 15, 1976, p. 65, and p. 420 of Appendix J of the Final Report.

[6] 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.

[7] 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 (last visited 10-27-2014).

# OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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**REPORT AND RECOMMENDATION OF THE**
**JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE**

**OHIO CONSTITUTION**
**ARTICLE IV, SECTION 22**

**SUPREME COURT COMMISSION**

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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 IV, Section 22 of the Ohio Constitution concerning supreme court commissions. The committee issues this report pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

## Recommendation

*The committee 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.[1]

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.[2]

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.[3]

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.[4] 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[5] by a 77.5 to 22.5 percent margin of those voting on the proposal.[6] 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.[7]

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.[8]

## 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.[9] Then, in 1976, it again recommended the repeal of this provision,[10] 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.[11] 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.[12]

## 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 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 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."

**Conclusion**

The Judicial Branch and Administration of Justice Committee 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 committee 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 committee concludes that the provision is obsolete and recommends that Article IV, Section 22 be repealed.

**Date Adopted**

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

## Endnotes

[1] 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.,* Isaac F. Patterson, The Constitution of Ohio: Amendments and Proposed Amendments (Cleveland: Arthur H. Clark Co. 1912), p. 238 (referring to section "21[22]).

[2] Ohio Constitution, Article IV, Section 1.

[3] Official Report of the Proceedings and Debates of the Third Constitutional Convention of Ohio (Cleveland: W.S. Robison & Co., 1873-74), pp. 751-74.

[4] *See* Patterson, *supra*, Proposed 1874 Constitution, Article IV, Sections 4-6, pp. 198-99.

[5] *See* Laws of Ohio, vol. 72, p. 269-70 (1874).

[6] 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. *Id.*, p. 238.

[7] 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 Steven H. Steinglass & Gino J. Scarselli, The Ohio State Constitution (2nd prtg. 2011), pp. 373-74.

[8] *See id.* at p. 209.

[9] Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report, Part 1, Administration, Organization, and Procedures of the General Assembly, December 31, 1971, pp. 65-67.

[10] Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report, Part 10, The Judiciary, March 15, 1976, pp. 67-68, and pp. 422-23 of Appendix J of the Final Report.

[11] 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.

[12] 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/

**OHIO CONSTITUTIONAL MODERNIZATION COMMISSION**

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**REPORT AND RECOMMENDATION OF THE**
**BILL OF RIGHTS AND VOTING COMMITTEE**

**OHIO CONSTITUTION**
**ARTICLE I, SECTION 2**

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

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The Bill of Rights and Voting Committee of 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 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

## Recommendation

*The committee 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."[1]

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.[2]

*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 *** ."[3]

*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.[4] 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.[5]

**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[6] and "is to be construed and analyzed identically" to its federal counterpart.[7]

**Presentations and Resources Considered**

There were no presentations to the 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.

**Conclusion**

The Bill of Rights and Voting Committee concludes that Article I, Section 2 should be retained in its current form.

**Date Adopted**

After formal consideration by the Bill of Rights and Voting Committee on December 11, 2014, and February 12, 2015, the committee voted to adopt this report and recommendation on February 12, 2015.

## Endnotes

[1] Steven H. Steinglass & Gino J. Scarselli, The Ohio State Constitution (2nd prtg. 2011), p. 85.

[2] 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.

[3] Steinglass & Scarselli, p. 85.

[4] *Id.*, p. 88.

[5] Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part 11, The Bill of Rights, April 15, 1976, pp. 16-18, and pp. 444-46 of Appendix K of the Final Report.

[6] *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.

[7] *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 OF THE**
**BILL OF RIGHTS AND VOTING COMMITTEE**

**OHIO CONSTITUTION**
**ARTICLE I, SECTION 3**

**RIGHT TO ASSEMBLE**

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The Bill of Rights and Voting Committee of 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 committee issues this report pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

## Recommendation

*The committee 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.[1] 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.[2] 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.[3]

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."[4]

**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.[5] Thus, the 1970s Commission recommended that no change be made to the provision.[6]

**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 committee on this provision.

## Conclusion

The Bill of Rights and Voting Committee concludes that Article I, Section 3 should be retained in its current form.

## Date Adopted

After formal consideration by the Bill of Rights and Voting Committee on December 11, 2014, and February 12, 2015, the committee voted to adopt this report and recommendation on February 12, 2015.

## Endnotes

[1] 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."

[2] Steven H. Steinglass & Gino J. Scarselli, The Ohio State Constitution (2nd prtg. 2011), p. 89.

[3] 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), p. 27.

[4] Steinglass & Scarselli, *supra.*

[5] Recommendations of the Education and Bill of Rights Committee, November 19, 1975, p. 4726.

[6] Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part 11, The Bill of Rights, April 15, 1976, p. 18, and p. 446 of Appendix K of the Final Report.

# OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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**REPORT AND RECOMMENDATION OF THE**
**BILL OF RIGHTS AND VOTING COMMITTEE**

**OHIO CONSTITUTION**
**ARTICLE I, SECTION 4**

**BEARING ARMS; STANDING ARMIES; MILITARY POWER**

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The Bill of Rights and Voting Committee of 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 committee issues this report pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

## Recommendation

*The committee 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."[1]

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.[2] 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.[3]

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.[4]

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 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.

**Conclusion**

The Bill of Rights and Voting committee concludes that Article I, Section 4 should be retained in its current form.

**Date Adopted**

After formal consideration by the Bill of Rights and Voting Committee on December 11, 2014, and February 12, 2015, the committee voted to adopt this report and recommendation on February 12, 2015.

## Endnotes

[1] Steven H. Steinglass & Gino J. Scarselli, The Ohio State Constitution (2nd prtg. 2011), p. 90.

[2] *Id.*

[3] Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part 11, The Bill of Rights, April 15, 1976, p. 19, and p. 447 of Appendix K of the Final Report.

[4] *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**

## STATUTORY CHARGES

### 103.61 Ohio constitutional modernization commission.

The members of the Ohio constitutional modernization commission shall meet for the purpose of:

(A) Studying the Constitution of Ohio;

(B) Promoting an exchange of experiences and suggestions respecting desired changes in the Constitution;

(C) Considering the problems pertaining to the amendment of the Constitution;

(D) Making recommendations from time to time to the general assembly for the amendment of the Constitution.

A commission recommendation is void unless it receives a two-thirds vote of the membership of the commission.

### 103.62 Report to general assembly.

In the event of a call for a constitutional convention, the Ohio constitutional modernization commission shall report to the general assembly its recommendations with respect to the organization of a convention, and report to the convention its recommendations with respect to amendment of the Constitution.

### 103.63 Establishment; members; compensation.

There is established an Ohio constitutional modernization commission consisting of thirty-two members. Twelve members shall be appointed from the general assembly as follows: three by the president of the senate, three by the minority leader of the senate, three by the speaker of the house of representatives, and three by the minority leader of the house of representatives. On or before the tenth day of January every even-numbered year, the twelve general assembly members shall meet, organize, and elect two co-chairpersons, who shall be from different political parties. Beginning in 2014, the twelve general assembly members shall elect one co-chairperson from each house of the general assembly. The members shall then, by majority vote, appoint twenty commission members, not from the general assembly. All appointments shall end on the first day of January of every even-numbered year, or as soon thereafter as successors are appointed, and the commission shall then be re-created in the manner provided above. Members may be reappointed. Vacancies on the commission shall be filled in the manner provided for original appointments.

The members of the commission shall serve without compensation, but each member shall be reimbursed for actual and necessary expenses incurred while engaging in the performance of the member's official duties. Membership on the commission does not constitute holding another public office. The joint legislative ethics committee is the appropriate ethics commission as described in division (F) of section 102.01 of the Revised Code for matters relating to the public members appointed to the Ohio constitutional modernization commission.

**103.64 Receipt of and disbursement of funds; annual report.**

The Ohio constitutional modernization commission may receive appropriations and grants, gifts, bequests, and devises and may expend any funds received in such a manner for the purpose of reimbursing members for actual and necessary expenses incurred while engaged in official duties, or for the purpose of meeting expenses incurred in any special research or study relating to the Constitution of Ohio. The commission shall file annually with the auditor of state, on or before the fifteenth day of March, a full report of all grants, gifts, bequests, and devises received during the preceding calendar year, stating the date when each was received and the purpose for which the funds received therefrom were expended.

**103.65 Staff.**

The Ohio constitutional modernization commission may employ professional, technical, and clerical employees as may be required successfully and efficiently to carry out the purposes of the commission. Funds for the compensation and reimbursement of employees shall be paid from the state treasury out of funds appropriated for the purpose. All disbursements of the commission shall be by voucher approved by one of the co-chairpersons of the commission.

**103.66 Timing of reports.**

The Ohio constitutional modernization commission shall make its first report to the general assembly not later than January 1, 2013. Thereafter, it shall report at least every two years until its work is completed.

**103.67 Expiration of commission.**

The Ohio constitutional modernization commission shall complete its work on or before July 1, 2021, and shall cease to exist at that time. The terms of all members shall expire July 1, 2021.