OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Ohio Constitutional Modernization Commission

Co-Chair
Sen. Charleta B. Tavares
Assistant Minority Leader

Co-Chair
Rep. Ron Amstutz
Speaker Pro Tempore

January 14, 2016
Ohio Statehouse
Room 313

Ohio Constitutional Modernization Commission

Co-chair Sen. Charleta Tavares
Co-chair Rep. Ron Amstutz
Ms. Janet Abaray
Mr. Herb Asher
Mr. Roger Beckett
Ms. Karla Bell
Ms. Paula Brooks
Rep. Kathleen Clyde
Mr. Douglas Cole
Sen. Bill Coley
Rep. Bob Cupp
Rep. Michael Curtin
Ms. Jo Ann Davidson
Judge Patrick Fischer
Mr. Edward Gilbert
Mr. Jeff Jacobson
Mr. Charles Kurfess
Mr. Larry Macon
Rep. Robert McColley
Mr. Frederick Mills
Mr. Dennis Mulvihill
Sen. Larry Obhof
Sen. Bob Peterson
Mr. Chad Readler
Mr. Richard Saphire
Sen. Tom Sawyer
Sen. Michael Skindell
Rep. Emilia Sykes
Gov. Robert Taft
Ms. Pierrette Talley
Ms. Kathleen Trafford
Mr. Mark Wagoner

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

COMMISSION MEETING

THURSDAY, JANUARY 14, 2016
11:00 A.M.
OHIO STATEHOUSE ROOM 313

AGENDA

I. Call to Order

II. Roll Call

III. Approval of Minutes

- Meeting of December 10, 2015

[Draft Minutes – attached]

IV. Standing Committee Reports

- Coordinating Committee (Trafford)

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 Revision and Updating Committee (Mulvihill)
- Legislative Branch and Executive Branch Committee (Mills)

VI. Reports and Recommendations

Second Presentations

- Article I, Section 20 (Powers Reserved to the People) (Jacobson)
  - Second Presentation
  - Public Comment
  - Discussion
  - **Action: Consideration and Adoption**

    [Report and Recommendation – attached]

- Article V, Section 4 (Exclusion from Franchise for Felony Conviction) (Jacobson)
  - Second Presentation
  - Public Comment
  - Discussion
  - **Action: Consideration and Adoption**

    [Report and Recommendation – attached]

VII. Executive Director's Report (Hollon)

VIII. Old Business

IX. New Business

X. Adjourn

Co-Chair
Charleta B. Tavares
Assistant Minority Leader
15th Senate District

Co-Chair
Ron Amstutz
Speaker Pro Tempore
1st House District

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES
FOR THE MEETING HELD
THURSDAY, DECEMBER 10, 2015

Call to Order:

Co-chair Ron Amstutz called the meeting of the Ohio Constitutional Modernization Commission ("Commission") to order at 1:40 p.m.

Members Present:

A quorum was present with Commission Co-chairs Tavares and Amstutz, and Commission members Abaray, Asher, Brooks, Clyde, Cole, Coley, Curtin, Gilbert, Jacobson, Kurfess, Mills, Mulvihill, Obhof, Peterson, Readler, Saphire, Skindell, Taft, Talley, Trafford, and Wagoner in attendance.

Approval of Minutes:

The minutes of the November 12, 2015 meeting of the Commission were reviewed and approved.

Standing Committee Reports:

Coordinating Committee

Mr. Mulvihill said, at its meeting that morning, the committee approved a report and recommendation for Article I, Section 20 (Powers Reserved to the People), and Article V, Section 4 (Exclusion from Franchise for Felony Conviction), both issued by the Bill of Rights and Voting Committee. Mr. Mulvihill continued that the committee heard from the Legislative Branch and Executive Branch Committee regarding a report and recommendation on Article II, Section 2 (Election and Term of State Legislators). He said the report and recommendation provides two options for extending term limits, one option extending the limits only for newly-elected legislators, and one extending the limits for all legislators. Mr. Mulvihill said the committee did not approve the report and recommendation, but agreed to hold over its decision until next month in order to consider the process by which a recommendation with separate options could be addressed.

Mr. Mulvihill said the committee continued its review of activities in each of the subject matter committees by hearing status reports from Doug Cole, as chair of the Finance, Taxation, and Economic Development Committee, and Richard Saphire, as chair of the Bill of Rights and Voting Committee.

Mr. Mulvihill described a question that arose in the Coordinating Committee meeting about how to address gender-specific language in the Ohio Constitution. Mr. Mulvihill said the Coordinating Committee had expressed interest in looking at this question if the Commission has not already decided it.

Subject Matter Committee Reports:

Education, Public Institutions, and Local Government Committee

Chad Readler, chair of the Education, Public Institutions, and Local Government Committee, reported on the activities of his committee. Mr. Readler said the committee would meet in January to continue its review of the education sections of the constitution. He said that later in the meeting he would be making a second presentation to the Commission of a report and recommendation on Article VI, Section 1 (Funds for Religious and Educational Purposes), and a second presentation of a report and recommendation on Article VI, Section 2 (School Funds).

Finance, Taxation, and Economic Development Committee

Doug Cole, chair of the Finance, Taxation, and Economic Development Committee, reported that the committee had met earlier in the day, and had an extended conversation around a relatively-concrete proposal regarding Article VIII, and its sections dealing with public debt. He said the committee anticipates having a report and recommendation at its next meeting in February, with a second reading shortly after that.

Judicial Branch and Administration of Justice

Janet Abaray, chair of the Judicial Branch and Administration of Justice Committee, reported that the committee would be meeting later in the afternoon, and would be continuing its discussion of issues surrounding the use of the grand jury in criminal prosecutions. She said the committee would be hearing presentations by two members of the Ohio Prosecuting Attorneys Association.

Bill of Rights and Voting Committee

Richard Saphire, chair of the Bill of Rights and Voting Committee, reported that the committee met in November and was not supposed to meet today, but met briefly in anticipation of completing its work on Article V, Section 6 (Mental Capacity to Vote). Mr. Saphire said the committee did not conclude its consideration of that section, so the committee would be taking up the question at its next meeting.

Constitutional Revision and Updating Committee

Dennis Mulvhill, reporting as chair of the Constitutional Revision and Updating Committee, said the committee met and reported to the Commission last month and had nothing new to report.

Legislative Branch and Executive Branch Committee

Fred Mills, chair of the Legislative Branch and Executive Branch Committee, said the committee intends to meet in January to consider a proposal for Congressional redistricting.

Reports and Recommendations:

Article I, Section 20 (Powers Reserved to the People)

Co-chair Amstutz recognized Mr. Saphire, who provided a first presentation of a report and recommendation issued by the Bill of Rights and Voting Committee on Article I, Section 20 (Powers Reserved to the People). Mr. Saphire said that the section was adopted as part of the 1851 constitution and expresses the view that the powers of the government are derived from the people. Article I, Section 20 states: "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."

Mr. Saphire indicated that the report and recommendation states that Article I, Section 20 has not been amended since its adoption, with the 1970s Ohio Constitutional Revision Commission not recommending any changes. He further discussed the history of the section in Ohio courts, noting that the section is generally cited in conjunction with other sections of the Bill of Rights. He said the committee heard no presentations on the section. Mr. Saphire concluded by stating that the Bill of Rights and Voting Committee recommends the provision should be retained in its current form.

Co-chair Amstutz asked for public comment. There being none, he then asked if Commission members wished to discuss the report and recommendation, which they did not. Co-chair Amstutz then said this is a first presentation, and that there is no action indicated at this time. He said a second presentation will be made at the Commission's next meeting on January 14, 2016.

Article V, Section 4 (Exclusion from Franchise for Felony Conviction)

Co-chair Amstutz then recognized Mr. Saphire for a presentation of a report and recommendation for Article V, Section 4 (Exclusion from Franchise for Felony Conviction).

Mr. Saphire explained that Article V, Section 4 relates to the power of the General Assembly to exclude from the privilege of voting or being eligible to office any person convicted of a felony. He stated that Article V, Section 4 reads: "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." Mr. Saphire said 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. Adopted as part of the 1851 Ohio Constitution, he said the provision was amended in 1976 to substitute the word "felony" for the phrase "bribery, perjury, or other infamous crime."

Mr. Saphire continued that the section empowers the General Assembly to enact laws that exclude felons from voting or holding office, rather than directly disenfranchising. He said, exercising this authority, the General Assembly enacted R.C. Chapter 2961, 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," and that when a felon is granted parole or other types of release the felon is competent to be an elector, and to sign a petition or register to vote. Mr. Saphire also described discussions and actions by the 1970s Ohio Constitutional Revision Commission, which resulted in substitution of the word "felony."

Mr. Saphire said the report and recommendation describes litigation involving the subject of felon disenfranchisement, noting that the United States Supreme Court upheld a law disenfranchising felons on the basis that the Fourteenth Amendment guarantees the right to vote "except for participation in rebellion, or other crime," thus finding an "affirmative sanction" for felony disenfranchisement laws in the Fourteenth Amendment. He indicated 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.

Mr. Saphire described the report and recommendation's account of a presentation by Ohio State University, Moritz College of Law Professor Douglas Berman, who noted that Ohio is one of the few states that allow felons to vote once they have been released from incarceration. Mr. Saphire stated the report and recommendation reflects the committee's consensus 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. Thus, he said, the report and recommendation indicates the Bill of Rights and Voting Committee's conclusion that Article V, Section 4 should be retained in its current form.

Co-chair Amstutz asked for public comment and for discussion by the committee. There being none, he indicated this is a first presentation of the report and recommendation, and that there is no action indicated. He said a second presentation will be made at the Commission's next meeting on January 14, 2016.

Article VI, Section 1 (Funds for Religious and Educational Purposes)

Co-chair Amstutz then recognized Education, Public Institutions, and Local Governments Committee Chair Chad Readler for a second presentation on the report and recommendation for Article VI, Section 1 (Funds for Religious and Educational Purposes).

Mr. Readler gave a brief summary of the contents of the report and recommendation for Article VI, Section 1, indicating that the section relates to funds for religious and educational purposes. Mr. Readler said Article VI, Section 1 provides that "The principal of all funds arising from the sale or other disposition of lands or other property that is granted or entrusted to the state for educational and religious purposes shall be used or disposed of in such manner as the General Assembly shall prescribe by law." He said the committee reviewed the provision not intending to make a change but to be sure it still has significance today, as well as to consider whether the state actually holds land that is subject to these requirements. He said the committee learned that there are still some lands that are subject to this provision, and for that reason the committee unanimously agreed that the language should stay intact.

Co-chair Amstutz then asked for public comment and there was none. Chair Readler then moved for adoption of the report and recommendation, and Governor Taft seconded the motion. Offered the opportunity to discuss the motion, Commission members declined.

Co-chair Amstutz asked for a roll call vote, which was as follows:

Co-chair Tavares – yea
Co-chair Amstutz – yea
Abaray – yea
Asher – yea
Beckett – absent
Bell – absent
Brooks – yea
Clyde – yea
Cole – yea
Coley – yea
Cupp – absent
Curtin – yea
Davidson – absent
Fischer – absent
Gilbert – yea
Jacobson – yea
Kurfess – yea
Macon – absent
McColley – absent
Mills – yea
Mulvihill – yea
Obhof – yea
Peterson – yea
Readler – yea
Saphire – yea
Sawyer – absent
Skindell – yea
Sykes – absent
Taft – yea
Talley – yea
Trafford – yea
Wagoner – yea

The motion passed unanimously, by a vote of 23 in favor and none opposed, with nine absent.

Article VI, Section 2 (School Funds)

Mr. Readler then gave a second presentation of the report and recommendation for Article VI, Section 2 (School Funds).

Mr. Readler briefly summarized the contents of the report and recommendation, which indicates that Article VI, Section 2 provides that "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."

Mr. Readler said the language dates back to the Ohio Constitution of 1851 and for a long time was not a subject of court treatment and was left alone by the 1970s Commission. He said the section gained renewed interest in the 1990s when the Ohio Supreme Court, in the *DeRolph* cases,[1] considered the meaning of the "thorough and efficient" clause and its impact on the public school system in Ohio. For that reason, he said the committee felt that it was appropriate to spend a fair amount of time addressing the provision. Mr. Readler continued, saying the discussion proved helpful despite there being no consensus as to any specific change to the language as written. He described that the committee did reach a consensus that there were not enough votes to make a concrete change, and so agreed to leave the provision as written. Finally, Mr. Readler noted the report and recommendation includes scholarship by Senator Larry Obhof. Mr. Readler concluded by saying the report and recommendation indicates that Article VI, Section 2 should be retained in its current form.

Co-chair Amstutz then opened the floor for public comment, of which there was none.

Commission member Ed Gilbert, vice-chair of the Education, Public Institutions, and Local Government Committee, moved to adopt the report and recommendation, which motion was seconded by Senator Bill Coley. Co-chair Amstutz then asked the Commission for discussion.

Commission member Charles Kurfess asked whether the Ohio Supreme Court's *DeRolph* case added anything to the committee's consideration of alternative language. Mr. Readler answered that the committee reviewed all of the *DeRolph* decisions, noting that the phrase "thorough and efficient" is subject to different meanings. He said it was difficult to find another way to define those terms, and that one proposal would have spelled that out to include other adjectives and requirements, including an "outstanding," "high-performing," "excellent," or "equitable" system. There was one suggestion to remove the words "thorough and efficient" entirely on the thought that the General Assembly is required to provide an educational system open to all students, but the committee concluded that the General Assembly and the boards of education should measure the effectiveness of those systems, not the courts. He said the committee had other views as well, but, like the Ohio Supreme Court, the committee was not able to reach a significant consensus on what change would be most appropriate.

Mr. Gilbert agreed with Mr. Readler, saying the committee had at least eight to 10 speakers on every angle of this section. He said the topic was very well researched and discussed, and the committee spent a great deal of time going through this on all angles. He said the committee could not agree on new language and so left it the same.

Mr. Saphire commented that the United States Constitution does not use the word "education," and there are other states that do not explicitly guarantee education in their constitutions. He wondered if the committee considered deleting the language entirely, and whether inclusion of this language made any difference at all. He said, as he reads *DeRolph,* the Supreme Court ultimately left it to the General Assembly, so that he is not sure at the end of the day that the guarantee in the constitution made much of a difference.

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

Mr. Readler answered that one proposal would have removed the "thorough and efficient" language, the thought being that the question posed is who should decide what the state's public education system looks like, should it be the legislature, the governor, and the boards of education on the one hand, or should there be a role for the courts to decide. He said *DeRolph* injected the courts into this public policy question. He added, there is a lot of debate about whether that was a good or bad thing but that was a focus of the committee's discussion. He said he is not equipped to answer questions about the analytical aspects of the provision.

Co-chair Charleta Tavares said she would revert to the constitutional convention of 1850-51, where the delegates were expressing their intent that Ohio should have an educational system for all. So she would object to taking the language having to do with education out of the constitution.

Sen. Obhof commented that he was not on the committee, but he thinks *DeRolph* resulted in significant changes to the school funding system in Ohio and played a major role in how things were done as a policy matter. To the extent that the constitutional provision has been looked at historically, it has actually resulted in significant policy changes over a number of decades. So, he said, answering the question of whether the case mattered, the answer is yes.

Commission member Herb Asher said the original *DeRolph* case became an issue of school facilities, which became another impact of *DeRolph*. He said there have been changes that came about, not necessarily in the area of school performance, but about support for facilities.

Mr. Gilbert said there is no question *DeRolph* made a difference, and education is a right and should be, adding the case made a big difference in funding and how schools are operating today. He said "we should consider education as a right."

Commission member Jeff Jacobson said the inclusion of provisions about education in state constitutions came about in the mid-1800s because of a desire to not let education be in the hands of religious bodies. Citizens were worried that those who had access to religious educational institutions might not support public schools, so the desire came about in many states to put education in the constitution. He said, judging the *DeRolph* litigation, what was clear in the General Assembly at that time was not that the "thorough and efficient" provision got Ohio into trouble, but that the state did not have a rational basis for what it was doing, and that government actions must at least meet a rational basis test. He added, in Ohio, the system was based on schools getting whatever was left over when everything else was funded. That approach could not be a rational basis, so the legislature developed a rational basis. He said that was the General Assembly's responsibility under any reading of the constitution. He said the "thorough and efficient" language had no effect other than to invite confusion and/or mischief.

Mr. Cole asked, putting aside whether thorough and efficient played a role, whether the committee considered crafting language clarifying that the determination of what constitutes "thorough and efficient" education should go to the legislative body, rather than to a judicial body.

Mr. Readler answered there were certainly discussions to that end, but he does not know if there was a specific proposal that would have added that. Generally speaking, he said there were members who thought it was appropriate for the courts to be the final arbiter of the provision and

that it was not something to be reserved exclusively to the legislature, governors, and the boards of education.

Mr. Gilbert said the committee had at least three proposals for other language, so that was all considered and debated.

Co-chair Amstutz said he, too, has a history with the provision over the years. He said that 1851 was the time when public education was being promoted across the country and Ohio was at the vanguard of the movement. As it relates to the court decision, he said in the case of facilities the state basically had provided almost no funding, and that has changed to many billions of dollars as a result of the influence of that litigation. He added that, in the case of operating expenditures, not only did the methodology for distribution change, but the volume of expenditure increased about 85 percent over a time when inflation increased 32 percent. He continued that, because that was a main part of the state's budget, it was to the detriment of higher education during that time period. He said the *DeRolph* decision had a tremendous impact even though the outcome is reflected in this report, which is that there continues to be a difference of opinion as to whether the Court decision should continue to press for additional funding. He commented that this is why no one on that side of the discussion is willing to say the courts should no longer have as much influence in interpreting what clearly is a mandate on the legislature. He concluded that there are differences of opinion, so that is why it was hard to find consensus for change.

Co-chair Amstutz asked for a roll call vote, which was as follows:

Co-chair Tavares – yea
Co-chair Amstutz – yea
Abaray – yea
Asher – yea
Beckett – absent
Bell – absent
Brooks – yea
Clyde – yea
Cole – yea
Coley – yea
Cupp – absent
Curtin – yea
Davidson – absent
Fischer – absent
Gilbert – yea
Jacobson – yea
Kurfess – nay
Macon – absent
McColley – absent
Mills – yea
Mulvihill – yea
Obhof – yea
Peterson – yea
Readler – yea
Saphire – yea
Sawyer – absent

Skindell – yea
Sykes – absent
Taft – yea
Talley – yea
Trafford – yea
Wagoner – yea

The motion passed by a vote of 22 in favor and one opposed, with nine absent.

Executive Director's Report:

Co-chair Amstutz then recognized Executive Director Steven C. Hollon for his report. Mr. Hollon directed Commission members to the draft of the Annual Report. He noted that the Commission is only required to issue a biennial report, but it was determined it would be in the Commission's interest to issue an annual report. Mr. Hollon pointed out, on page 50 of the booklet regarding the Coordinating Committee, there is incomplete material that will be corrected after today's meeting. He indicated the report should say there are 11 reports and recommendations for presentation to the full Commission. One item not listed is Article I, Section 13 (Quartering of Troop); that item will be added to the final draft. He further indicated that, on the last page, only two items were considered and approved by the Coordinating Committee; it did not approve the report and recommendation for Article II, Section 2 (Election and Term of State Legislators). The recommendations to the General Assembly on the last page also were not subject to adoption today and so they will not be included in the Annual Report. He said, other than these noted changes, this is the report that he would like to provide to the General Assembly leadership, and would need the full approval of the Commission today to do so.

Motion to approve the report by Pierrette Talley, seconded by Mr. Mills. There was no discussion by members of the Commission.

Co-chair Amstutz took a voice vote, on which the motion passed unanimously, and the report was adopted.

Adjournment:

There being no further business to come before the Commission, the meeting adjourned at 2:30 p.m.

Approval:

The minutes of the December 10, 2015 meeting of the Commission were approved at the January 14, 2016 meeting of the Commission.

Co-chair Senator Charleta B. Tavares Assistant Minority Leader	Co-chair Representative Ron Amstutz Speaker Pro Tempore

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION

OHIO CONSTITUTION
ARTICLE I, SECTION 20

POWERS RESERVED TO THE PEOPLE

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.[1] 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.[2] 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.[3] Instead, the Court has preferred to rely on the liberty provision of the Fourteenth Amendment when dealing with unenumerated rights.[4] 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,[5] 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.[6] The 1970s Ohio Constitutional Revision Commission did not recommend any changes to this section.[7]

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*, 8th

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 _____, _____ moved to adopt the report and recommendation for Article I, Section 20, a motion that was seconded by _____. A roll call vote was taken, and the motion passed by a_____ vote of _____.

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 _____, and _____, the Commission voted to adopt this report and recommendation on _____.

_____ _____

Senator Charleta B. Tavares, Co-Chair Representative Ron Amstutz, Co-Chair

Endnotes

[1] Steven H. Steinglass and Gino J. Scarselli, *The Ohio State Constitution* 125 (2nd prtg. 2011).

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

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

[4] *Id.* at 714.

[5] *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.").

[6] Steinglass & Scarselli, *supra.*

[7] 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).

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION

OHIO CONSTITUTION
ARTICLE V, SECTION 4

EXCLUSION FROM FRANCHISE FOR FELONY CONVICTION

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.[1]

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).[2] 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."[3] 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.[4] 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.[5]

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.[6] 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."[7]

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."[8] 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."[9]

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 111th 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.[10]

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.[11] 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 _____, _____ moved to adopt the report and recommendation for Article V, Section 4, a motion that was seconded by _____. A roll call vote was taken, and the motion passed by a _____ vote of _____.

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 _____, the Commission voted to adopt this report and recommendation on_____.

Senator Charleta B. Tavares, Co-Chair

Representative Ron Amstutz, Co-Chair

Endnotes

[1] 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.

[2] 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 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.

[3] 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%202195-2601%20elections-suffrage%202602-2743%20local%20govt.pdf (last visited Aug. 13, 2015).

[4] 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).

[5] Ohio Constitutional Revision Commission (1970-77), Volume 5, Elective Franchise Recommendations, *supra*, at 2513-16.

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

[7] *Id.*

[8] 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).

[9] *Id.*

[10] *Id.*

[11] *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

2016 Meeting Dates

February 11

March 10

April 14

May 12

June 9

July 14

August 11

September 8

October 13

November 10

December 8