



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE CONSTITUTIONAL REVISION AND UPDATING COMMITTEE

FOR THE MEETING HELD
THURSDAY, JUNE 11, 2015

Call to Order:

Chair Dennis Mulvihill called the meeting of the Constitutional Revision and Updating Committee to order at 11:10 a.m.

Members Present:

A quorum was present with Chair Mulvihill, Vice-chair Kurfess, and committee members Cupp, Macon, Obhof, Sykes, and Wagoner in attendance.

Approval of Minutes:

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

Committee Discussion:

Chair Mulvihill began the meeting by stating that the committee is tasked with considering long term constitutional issues, and is not interested in infringing citizens' ability to bring initiated statutes. He said the committee currently is addressing whether the initiative process should allow specific people to be benefited. This has been an ongoing discussion of the committee for the last two years and the committee will continue to consider it. He said the constitution should not be amended in a quick, or less-than thoughtful, or thorough manner. He stated for clarification that the committee is not looking at just the marijuana legalization effort. He then invited Senior Policy Advisor Steven H. Steinglass to outline the history of the issue and discuss a working proposal that the committee had requested for changing the initiative process to prohibit the use of the process for the creation of monopolies.

Mr. Steinglass first said he would like to underscore that the initiative is part of the DNA of Ohio and has been for 100 years. He said the fear of many is that the bad experiences that have occurred in California may come to Ohio. In California, the initiative process has moved budgetary considerations to the voters in an unorganized way, creating problems for the state.

Also in the background of the discussion about the initiative process is the history of the casino amendment, in which voters approved a provision that, by its length and detail, was more suggestive of a statute. Mr. Steinglass said the committee has looked at numerous ways to respect the history of the initiative yet to also bring it under control. At the April 9, 2015 committee meeting, he presented a memorandum on limitations on the constitutional initiative in other states, noting that most states do not have substantive limitations.

Mr. Steinglass said the committee's discussion about the use of limitations was robust, and it turned to the question of how that particular approach related to the pending special interest for marijuana growing facilities, a discussion that was picked up by the media. The next month, at the May 14, 2015 meeting, Auditor of State Dave Yost made a specific proposal.

Mr. Steinglass directed the committee's attention to the working proposal in the packet. He prepared this version, which is similar, but not identical, to Auditor Yost's proposal. Mr. Steinglass said the amendment proposed in his draft limits the constitutional initiative, but it does not prevent the General Assembly from proposing an amendment. It also does not preclude the General Assembly from adopting a statute. Mr. Steinglass explained that the goal was not to handcuff the state's normal processes. He said division A of the proposal broadly defines the use of the constitutional initiative and those who cannot benefit. It also requires that individuals, or entities, not be treated differently. He continued, saying division B tries to give some force to A by requiring a review of the substance and prohibits a monopoly amendment from going on the ballot, but it must be explicit, noting that in some ways this review is analogous to the single amendment rule review by the Secretary of State. Mr. Steinglass said he thinks the provision should explicitly state that the proposed amendment does not go on the ballot if the Secretary of State finds that it creates a monopoly. He noted that this portion of the proposal deviates from the auditor's version in that it does not require two votes before a monopoly can be permitted. Since drafting that version he has determined that it would strengthen the proposal to add a paragraph that incorporates the auditor's plan.

Mr. Steinglass additionally noted that the proposal is a work in progress and raised, as an example, the process for determining whether a proposed amendment creates a monopoly. He said it seems like bad policy to require a proponent to get thousands of signatures only to be told the proposed amendment violates the anti-monopoly provision. He added that the determination is similar to a single amendment issue but that it is a legal determination. His proposal would bring that inquiry forward in the process and give it to the attorney general, incorporating it in the fair and truthful review. He said that change is not reflected in the draft before the committee, but that it could be added in a new draft. Mr. Steinglass said division C of the proposal deals with conflict and timing. Typically, when two amendments are both approved and they conflict, the Ohio Constitution addresses that issue and provides that the measure receiving the most affirmative votes prevails. He said this has happened only once in 100 years. He observed that the complexity of this issue is whether there is a conflict and whether the severability option applies. He described what could happen in two scenarios. In the first scenario, if the ResponsibleOhio marijuana legalization proposal gets more votes, it becomes law, and there will be severability. In the second scenario, if the anti-monopoly proposal gets more votes, it becomes law with division C providing that the severability provision in the ResponsibleOhio

proposal is trumped. Mr. Steinglass emphasized that this is a draft. He then invited questions from the committee.

Committee member Mark Wagoner asked whether federal antitrust laws come into play as states are immune from those laws if the state provides active supervision of the activity. Mr. Steinglass said there is a recent case out of North Carolina in the U.S. Supreme Court, *North Carolina Bd. of Dental Examiners v. Federal Trade Comm.*, ___ U.S. ___, 135 S.Ct. 1101 (2015). He said he believes there would be enough state supervision that there would not be an antitrust problem. Mr. Wagoner said the North Carolina case was pretty clear on this, and that his understanding is that federal antitrust law would still trump the state constitution, adding that the FTC would still have a role in deciding whether this is anti-competitive behavior. Mr. Steinglass said his understanding is that federal law in this area defers to what the state is doing, and that requires analysis of what kind of supervision the state is providing in this particular area.

Vice-chair Charles Kurfess said his present inclination is not to limit this provision to proposed amendments submitted by initiative. He said if a contemplated amendment is inconsistent with public policy it should be prevented regardless of its origin. He said the legislature has broad authority to determine classifications to which legislation would or would not apply. He prefers the monopoly to be prohibited regardless of how it comes about. Mr. Steinglass answered that, typically, provisions immunizing the constitution from amendment by the legislature are disfavored, and adding that, at the federal level, there is a strong policy argument against it. He said in this instance the proposal to tie the hands of the General Assembly would entrench something in the constitution.

Representative Kathleen Clyde, a Commission member and present as a guest of the committee, expressed her concern that the provision is drafted more broadly than just as an anti-monopoly provision. She said the current version of the proposed provision is not just about creating or giving a monopoly, but includes economic interest, privileges, and other terms. She said she is concerned that other constitutional amendments dealing with important rights issues, worker issues, and protecting certain groups, would be prohibited or be able to be struck down by this very broad language. She asked Mr. Steinglass to talk about the broad language and what the thinking was behind that. He agreed it is broad and could interfere with other activities. He does not think this will interfere with employee union rights or other types of provisions. Rep. Clyde maintained that the proposed provision is too broad, saying it would be advisable to take more time with this because it interferes with the citizen's right. Mr. Steinglass said of the 18 states that have the constitutional initiative, none has an anti-monopoly provision. He said none of his colleagues around the country could identify a state facing a similar question, so Ohio may be the only state grappling with this issue.

Representative Bob Cupp said the draft is directed to private or nonpublic entities, calling it a "closed clause" under traditional constitutional and statutory interpretation. He asked whether, if the provision is designed to affect only private enterprise, it is advisable to insert "other" to indicate that this is a classification or a type, as opposed to a closed listing. Mr. Steinglass said the word "other" was there but that he does not know why it was or whether it created problems. He said this was an interesting question that perhaps should be re-examined.

Chair Mulvihill asked whether there are any other states in which groups are coming forward to enshrine their own interest in their states' constitutions. Mr. Steinglass said there are no states that prohibit such proposals, but whether there have been attempts to establish monopolies is a harder question. He continued, saying there are 100 casino issues proposed, but to the best of his knowledge the 18 states having the initiative do not prohibit or approve the kind of use to which Ohio's constitution is being put.

Mr. Kurfess said his initial thought was that the committee should be talking only about an economic interest. Mr. Steinglass said some of those phrases have to be looked at with care because it may be ambiguous whether or not something is an economic interest.

Bethany Sanders, deputy legal counsel and policy advisor for the Ohio Senate Democratic Caucus, appeared on behalf of Senator Joe Schiavoni. She read a letter from Sen. Schiavoni addressed to Chair Mulvihill, Mr. Kurfess, and the committee, in which he indicated that the amendment language as proposed by Mr. Steinglass is too broad, using phrases such as "may" and "directly or indirectly," and that the phrase "similarly situated" has a history that may affect how it is interpreted. Sen. Schiavoni wrote that he advocated avoiding the use of the "notwithstanding" trump card in a proposed amendment, and noted the importance of respecting citizens who undertake the initiative process. Sen. Schiavoni added that statutory language in the Revised Code could be utilized as a guide to evaluating an amendment, and that statutory provisions requiring review by the attorney general and the ballot board, could be adapted to allow review of whether a proposal would operate to create a monopoly. Finally, Sen. Schiavoni addressed his concerns about the timing of the discussion, and that hasty action to amend the constitution could have unknown consequences. He said he agrees with Chair Mulvihill that the role of the Commission is to consider what is best for the constitution over many years, rather than to respond to issues of the moment.

Chair Mulvihill then recognized Ian James, executive director of ResponsibleOhio, to speak about the organization's marijuana legalization initiative proposal. Mr. James said the initiative process was adopted due to abuse of rights by the legislature. He said until now we have avoided taking away this right, but that is what is now being proposed, and that taking such an action is ill-conceived. Mr. James said for eighteen years the statehouse has refused to address the issue of medical marijuana, and noted that criminalization has not eliminated the availability of marijuana, but made it easier for drug dealers to market to children because they do not care about the age of the buyer. He said the consequences of drug prosecution are extreme and complex. Comparing the ResponsibleOhio proposal to the repeal of alcohol prohibition, he said the proposed measure would create local control, just like alcohol laws, and would make it illegal to sell marijuana to persons under 21. He said the group's plan protects business, protects young people, creates jobs, and injects money into the state economy. He said the majority of Ohioans should decide an issue that the statehouse has refused to address.

Mr. James said it is immoral to prevent legalization because, in doing so, you defend drug dealers and support an underground economy. He said the cartel running the marijuana industry now is about cash, not conscience. He said it is immoral to prevent patients from obtaining access to medical marijuana.

Mr. James said politicians trust voters enough to elect them, but do not trust voters to deal with this issue. He said it is not a new idea to limit the initiative process, noting that voters have rejected 74 percent of all citizen initiatives. He said it is insulting to suggest that changes to the initiative process are needed because voters are gullible; they are not. Mr. James said only 25 percent of Ohio voters want to make it harder to amend the constitution. As evidenced by casinos and bond sales, leaving in place the ability of the statehouse politicians to create monopolies takes rights from voters and puts control in the hands of the rich and powerful. Mr. James said after casinos were approved, a local special interest demanded that the casino be moved from the Arena District to the West Side of Columbus. He elaborated that those special interests had statehouse access and were able to move it along without giving voters the reasons. He said voters should have full transparency about who is getting the money.

Mr. James said this action is being taken because the statehouse has refused to address the need for marijuana legalization. In 1997, HB 33 attempted to provide medical marijuana to children with epilepsy. He said that bill languished in committee, but the General Assembly easily enacted a bill that created a state rock song. He continued saying there is more compassion in the General Assembly for a rock song than for children with epilepsy. He said the system of amending the constitution has worked well; it is counterproductive to suggest voters need to be protected.

Mr. James then addressed questions from the committee. Representative Emilia Sykes asked whether there is any situation in which Mr. James could support some type of limitation on the initiative. He replied saying the slippery slope is opening this door, and asked where that would end. He reiterated that he believes in the voters, and that, right or wrong, they should make the decision.

Rep. Cupp said the proposed amendment does not do anything to change the statutory initiative law, and that ResponsibleOhio could still put this issue before the voters seeking their approval of the law as a statute. Mr. James countered that, if only a statute is involved, the General Assembly could change it.

Rep. Cupp said one right conveyed would be an economic monopoly. He noted that Mr. James has proposed specific growing zones which are tied to real estate, and there is a lot of money in marijuana. He asked if it is moral to enshrine something in the state constitution to make a few individuals fabulously wealthy. Mr. James replied he believes the group Rep. Cupp is referring to is "Better for Ohio." Mr. James said ResponsibleOhio has proposed 10 facilities. Should the General Assembly legalize marijuana, then licenses will be auctioned off, and the people will have no say about it as those decisions are made behind closed doors. Mr. James said the question is who pays for that campaign to be sure voters get a chance to vote on it. He said under the ResponsibleOhio plan, the proposed grow facilities have to abide by the law, and the group's proposal requires the state to regulate, test, and tax marijuana. Rep. Cupp asked whether, under the proposal, the state can regulate the price. Mr. James replied affirmatively.

Mr. Kurfess said he does not have full understanding about the various proposals but asked whether the ResponsibleOhio proposal would be precluded if Ohio had the anti-monopoly

provision that is being discussed. Mr. James said yes, it would. Mr. Kurfess then asked whether the proposal grants an economic interest, and Mr. James agreed that it does, but that the measure proposes licenses, taxes, and regulation, just as the state does with commercial egg farms. Mr. Kurfess followed by asking whether the language of the proposal presumes to grant an interest by name, to which James said yes. Mr. Kurfess asked how the interests are identified, and Mr. James said they are identified by land.

Chair Mulvihill asked if the group could still legalize marijuana without creating an economic benefit for specific growers. Mr. James said that in order to get legalization passed, going back to 1997, there has been little to no interest in moving it forward. He said the reason is now escalated because other states have legalized it. Chair Mulvihill clarified his question by asking whether the group could still amend the constitution of the state of Ohio to legalize it without giving an economic interest to a few people. Mr. James answered that the reality is who pays for that campaign. He said his group has seen other efforts, and they are very expensive, time consuming, detailed, and difficult. He said there is economic interest here, and legalization will generate billions for the state. Chair Mulvihill asked if Mr. James was saying that the people who promote the measure have to be incentivized. Mr. James said limiting voters' right to make the decision is not the approach. He said without creating an economic incentive, it would still be possible to place the issue before the voters, but in reality you would not have that happen nor would it pass.

Chair Mulvihill posed a hypothetical question about a constitutional provision that would create a pharmaceutical network, making one distributor of prescription drugs the only retailer in the state, and asking whether Mr. James would agree that such a plan would be a good idea. Mr. James said presumably yes, if the voters want that and that he believes in the voters.

Representative Michael Curtin, a Commission member and present as a guest of the committee, said before the ResponsibleOhio plan, some members of the General Assembly were aware two years ago of an initiative by green energy entrepreneurs. He said many people are in favor of green energy, but this group began circulating petitions proposing a constitutional initiative that would require the state to issue \$1.3 billion in green energy bonds, with the proceeds to be distributed by this group whose names were unknown. He said the group wanted a constitutional right to get their hands on \$1.3 billion dollars of state-issued bond proceeds that they would distribute themselves. He said that idea followed the casino initiative and now ResponsibleOhio is trying to obtain a similar benefit. He said the discussion began 15 months ago in light of proposals seeking to establish special monopolies. His question to Mr. James was whether it is a legitimate exercise of state authority to have a provision that would prevent the green energy scenario.

Mr. James answered that citizens have a right to petition the government. He said Rep. Curtin is correct about "if approved by the voters" but, the petition about green energy never saw the ballot box.

Mr. Wagoner commented that the committee is grappling with whether to extend antitrust immunity to private entities. He said in the private sector this would not be permitted, and said

there may be a way to limit this in a much more focused way. He said there could potentially be a middle ground, and that maybe the committee could work on some of the language.

Mr. Steinglass said, in response to Rep. Curtin's question, that limitations on the initiative have been seen by some as a first amendment issue, but courts have consistently rejected such claims.

The discussion having come to a conclusion, Chair Mulvihill noted that the committee will reconvene in September.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 12:40 p.m.

Approval:

The minutes of the June 11, 2015 meeting of the Constitutional Revision and Updating Committee were approved at the September 10, 2015 meeting of the committee.

/s/ Dennis P. Mulvihill

Dennis P. Mulvihill, Chair

/s/ Charles F. Kurfess

Charles F. Kurfess, Vice-chair