



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### REPORT AND RECOMMENDATION

#### OHIO CONSTITUTION ARTICLE V, SECTION 2

#### ELECTION BY BALLOT

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

#### **Recommendation**

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

#### **Background**

Article V of the Ohio Constitution concerns the Elective Franchise.

Article V, Section 2 reads as follows:

All elections shall be by ballot.

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

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

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

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

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

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

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

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

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

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

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

### **Litigation Involving the Provision**

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

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

#### *Engstrom Presentation*

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

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

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

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

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

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

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

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

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

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

### **Presentation to the Commission**

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

### **Action by the Commission**

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

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

## Conclusion

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

## Date Adopted

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

/s/ Charleta B. Tavares  
Senator Charleta B. Tavares, Co-chair

/s/ Jonathan Dever  
Representative Jonathan Dever, Co-chair

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## Endnotes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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