



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 Sapphire appeared before the Commission to present the committee's report and recommendation, by which it recommended retention of Article I, Section 20. Chair Sapphire explained the history and purpose of the provision, indicating that the committee had determined that it would be appropriate to retain Article I, Section 20 in its current form.

Action by the Commission

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

Conclusion

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

Date Adopted

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

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

/s/ Ron Amstutz
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).