The Ohio Senate
Keith Faber, President
Eric Kearney, Minority Leader

The Ohio House of Representatives
William G. Batchelder, Speaker
Armond Budish, Minority Leader

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Committees

1. Standing Committees:
   a. Organization and Administration: budgeting, staffing, ethics and procedural rules; recommendations to the Commission as a whole for new members as Commission members leave the Commission
   b. Public Education and Information: public information, education, and information to and from the citizens of Ohio and the Commission and on its proposals, if any
   c. Liaison with Public Offices: public information and relations with any and all public offices reasonably affected, if at all, by a Commission proposal
   d. Coordinating: to assign subject areas of the Ohio Constitution and proposals to various Subject Matter Committees, based upon the subject areas of the applicable committees described on attachment A; and to ensure that the Subject Matter Committees move forward on a timely basis with responses and viewpoints on proposals

2. Subject Matter Committees:

   a. Bill of Rights & Voting
      - Art. 1 Sections on Rights of All [Sections 1-4, 6, 7, 11, 13, 17, 18, 19b, 20 and 21]
      - Art. V (Elective Franchise)
      - Art. XVII (Elections)
      - Voting Rights

   b. Legislative & Executive Branches
      - Art. II (Legislative)
      - Art. XI (Reapportionment)
      - Art. XIV (Livestock Standards Care Review Board)
      - Term Limits
      - Redistricting and Reapportionment
      - Art. III (Executive)
      - Art. IX (Militia)
      - Global and Interstate/Regional Economic Development

   c. Education, Public Institutions, Local Government & Miscellaneous

APPENDIX K

Part 11

THE BILL OF RIGHTS

April 15, 1976

PART 11: THE BILL OF RIGHTS

Introduction

"It is no accident that a bill of rights constitutes the first article of most state constitutions. Man's struggle for constitutional government is centuries old and has been demanding in material and human sacrifice. Where he has been successful the symbol of his victory is civil liberty or right — the constitutional protection of the individual against arbitrary or tyrannical treatment by his government. Realizing the difficulty in securing and holding these rights we have stated them in the most prominent position among our constitutional principles." [1]

The protection of individual freedom against government power is the general purpose of a bill of rights. Those who wrote the Federal Constitution omitted a general statement of rights, arguing that it was unnecessary to write specific protections into the Constitution. The Federal Government, they stated, was one of limited powers, and it was inherent in its very nature that it could not encroach upon individual rights in the absence of a specific provision in the Constitution granting power to the government. This argument, however, did not convince the states nor the people in them, with the result that the first ten amendments, known as the Bill of Rights and providing specific individual rights against which the Federal Government could not encroach, were demanded as a condition to ratification.

The Federal Bill of Rights was intended to place limitations on the Federal Government, and each state constitution contains a bill of rights with similar — sometimes greater and sometimes fewer — restrictions on the state government in the form of similar guarantees for individuals in the state. A few provisions in the Federal Constitution itself prohibit state action of particular types — for example, Section X of Article I which prohibits states from passing any bill of attainder or ex post facto law — but the major provisions of the Bill of Rights of the Federal Constitution did not begin to be applied directly to the states until the adoption of the 14th Amendment following the Civil War. That amendment — and the 13th and the 15th adopted at about the same time — were directly applicable to the states. The key provisions of the 14th Amendment — ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" — have led to the gradual application of many, although not all, of the provisions of the Federal Bill of Rights as guarantees of individual rights against state governmental encroachment.

Since many of the rights in the Federal Bill of Rights are applied to the states today, and since most of the significant rights cases involve interpretation of the Federal, and not a state, Constitution, it may be questioned whether state bills of rights continue to have vitality. The response seems to be that they do have. They offer individual protections not found in the Federal Constitution, or greater in degree than the present federal guarantees as interpreted by the courts. They offer protection in areas found in the Federal Bill but not yet applied to the states through the 14th Amendment. They offer protection to the individual in the event federal courts alter their interpretations. Finally, and perhaps most importantly:

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1. Rankin, Robert S., "State Constitutions: The Bill of Rights", National Municipal League, 1960, p. 1.

> For those who would halt, or at least slow down, the expansion of federal power and who would revitalize state governments, the careful drafting of a state bill of rights to include all liberties which should be guaranteed against state action (even if they may also be protected by the Fourteenth Amendment) offers a major challenge. If the states cannot protect their citizens' fundamental liberties, or are careless about such protection, then obviously the basic fundamental vitality of state governments is immeasurably weakened.[2]

It is significant that none of the new or rewritten state constitutions have omitted a bill of rights. Some have shortened them by omitting expressions of political philosophy or "constitutional sermons" and some have modernized language and removed ambiguous or obsolete expressions, but all state constitutions still contain the basic, fundamental guarantees of freedoms and rights believed essential to the protection of individuals against governmental power.

Each section of Article I, and a section in Article XIII related to eminent domain, was reviewed by the study committee and by the Commission. The studies included comparison with the Federal Constitution, history of the Ohio section, discussion of possible problems and legal interpretations of each section, and a comparison with a few other state constitutions. The committee and the Commission also heard testimony from any person interested in commenting on any section, or in proposing additions to the Ohio Bill of Rights.

The committee and the Commission determined that changes should not be recommended in the Bill of Rights unless a demonstrated need existed for the change. Changes for the sake of modernizing language or spelling, omitting obsolete provisions, rearranging, and similar matters are not recommended. A proposal to change sex-specific words — for the most part, the use of the masculine gender — to neutral words or to rewrite the sections involved so that references to a particular gender could be eliminated was rejected.

The research studies and the testimony noted provisions in the Bill of Rights that have not yet been fully explored in court decisions, or about which questions have been raised. The committee examined these problems and determined that most of them can be handled legislatively, and that others — such as balancing the rights of the property owner and the government in eminent domain proceedings — do not lend themselves to constitutional solution. Other potential problems, the committee believes, should wait for the problem to materialize, at which time changes in the constitutional language will be easier to draft and explain, and more acceptable to the voters.

Several new provisions were proposed by persons appearing before the committee and the Commission. These included an equal rights amendment and an amendment giving people the right to know and the right to participate in governmental affairs. The committee and the Commission concluded that too little was known about the meaning of some of the terms used, and about the potential effect and meaning of the proposals.

Mr. Joseph W. Bartunek of Cleveland was chairman of the Education and Bill of Rights Committee of the Commission, which was responsible for the study of the Bill of Rights and this report. Other committee members were: Mr. Robert Clerc of Cincinnati, Dr. Warren Cunningham of

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2. Hart, James P., "The Bill of Rights: Safeguard of Individual Liberty", *Texas Law Review*, October, 1957, p. 924.

Oxford, Mr. D. Bruce Mansfield of Akron, Representative Alan Norris, Representative Marcus Roberto, Mr. James W. Shocknessy of Columbus, and Mr. John A. Skipton of Findlay.

Each section of the Bill of Rights and section 5 of Article XIII is discussed in this report, with the Commission recommendation, a brief Ohio history, comparison with the Federal Constitution, and a brief interpretative comment that includes the rationale of any changes proposed by the Commission.

Summary of Recommendations

PART 11

THE BILL OF RIGHTS

The Commission submits the following recommendations to the General Assembly on Article I of the Ohio Constitution, the Bill of Rights, and on section 5 of Article XIII:

Article I

Section	Subject	Recommendation	Page
Section 1	Inalienable rights	No change	14
Section 2	Where political power vested; special privileges	No change	16
Section 3	Right to assemble	No change	18
Section 4	Bearing arms; standing armies; military power	No change	19
Section 5	Trial by jury	Assigned to a special committee	20
Section 6	Slavery and involuntary servitude	No change	21
Section 7	Rights of conscience; the necessity of religion and knowledge	No change	24
Section 8	Writ of habeas corpus	No change	25
Section 9	Bailable offenses; bail, fine and punishment	Amend	25
Section 10	Trial for crimes; witness	Amend; assigned to a special committee	29
Section 11	Freedom of speech; of the press; of libels	No change	33
Section 12	Transportation for crime; corruption of blood	No change	35
Section 13	Quartering troops	No change	36
Section 14	Search warrants	No change	37
Section 15	No imprisonment for debt	No change	38
Section 16	Redress in courts	No change	39
Section 17	Hereditary privileges	No change	42
Section 18	Suspension of laws	No change	43
Section 19	Private property inviolate, exception	No change	43
Section 19a	Damages for wrongful death	Assigned to a special committee	48
Section 20	Powers reserved to the people	No change	50

Article XIII

Section 5	Right of way	Amend	51

The Commission recommends very few changes in the Ohio Constitution's Bill of Rights, believing that its provisions have served the people of Ohio well in the past, most of them since the first days of statehood, and will continue to play an important role in the lives of Ohioans in the future. The Commission determined that further information was needed

regarding grand juries and civil trial juries, and has appointed a special committee to study those sections — sections 5, 10, and 19a of Article I. A change is recommended in section 9, relating to bail, in order to permit the denial of bail to some persons accused of serious crimes under certain circumstances, and in section 5 of Article XIII, to remove a reference to a jury "of twelve men" in a section permitting the granting of eminent domain powers to corporations. An amendment to section 10 of Article I would remove language permitting comment by counsel in a criminal trial on the failure of a defendant to testify.

Following the conclusion of the committee's work, correspondence was received from Mr. Wilmer D. Swope, chairman of the Trustees of Fairfield Township, in Columbiana County. Mr. Swope sent copies of petitions to the General Assembly and other materials proposing changes in several provisions in the Ohio Bill of Rights and in the Preamble to the Ohio Constitution. Mr. Swope's proposals are on file in the Constitutional Revision Commission office, and can be examined by any interested persons.

ARTICLE I

Section 1

Present Constitution

Section 1. All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

Section 1 is derived from Article VIII, section 1 of the 1802 Constitution and was adopted in 1851 with minor modifications of the language. It has not been amended since 1851. In both Constitutions, it is the first section; indicating, perhaps, that it is a statement of principle as well as a guarantee of rights. It resembles the beginning of the second paragraph of the Declaration of Independence which states:

> We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

The section has no direct parallel in the United States Constitution.

Comment

Section 1 falls within the category some scholars of state constitutional law classify as "political theory" and unenforceable. Indeed, no Ohio case was found in which this section alone was cited by a court as setting forth an enforceable right or guarantee. However, the section is cited together with other sections in Article I as providing for due process in a manner somewhat similar to the 14th Amendment and thus has an indirect parallel with the Federal Constitution. To provide the full protection of the due process clause of the 14th Amendment, it is also necessary to consider sections 16 and 19 of Article I of the Ohio Constitution. In *D. P. Supply Co. v. Dayton*, 138 Ohio St. 540 (1941), the Ohio Supreme Court identified the limits of due process as guaranteed by these sections by saying that all freedoms of the Bill of Rights are subject to the properly exercised police power, which limitation is expressly recognized

in Article I, section 19. The rights granted in section 1 are absolute and "inalienable" but, although absolutely given, they are not absolute in their scope; they are limited in a manner that is in accord with due process and the police power.

The police power includes that which is reasonable and necessary to secure the health, safety and welfare of the community, as long as it does not otherwise violate the United States Constitution or the Ohio Constitution, and is not exercised in an arbitrary or oppressive manner. The Supreme Court of Ohio has established guidelines to evaluate the exercise of the police power; in *City of Cincinnati v. Cornell*, 141 Ohio St. 535 (1943) it said,

> Laws or ordinances passed by virtue of the police power which limit or abrogate constitutionally guaranteed rights must not be arbitrary, discriminatory, capricious or unreasonable and must bear a real and substantial relation to the object sought to be obtained, namely, the health, safety, morals or general welfare of the public.

Personal freedom may be curtailed as punishment for crime. Guardians may be appointed, thus giving, under certain circumstances, exclusive control over an individual's personal freedom or power to handle property to another.

The individual has the right to enjoy and defend his liberty. In *Palmer & Crawford v. Tingle*, 55 Ohio St. 423 (1896), the Court said that "liberty did not mean a mere freedom from physical restraint or state of slavery, but is deemed to embrace the right of man to enjoy his naturally endowed faculties restrained only as much as is necessary for the common welfare."

Section 1 also provides for the freedom to acquire, possess, and protect property. The freedoms attached to property, though, are also circumscribed, but the same standards must be met in order for a legislative body to effectively limit the right to enjoy and use property as one wishes. The concept of property is broad, and it is difficult to define one specific type of regulation limiting absolute freedom in the use of property; regardless of the myriad forms of property, however, the requirement that certain standards be maintained in its regulation in order to satisfy the requirements of due process does not change.

In *Frecker v. Dayton*, 88 Ohio App. 52, *affd.* 153 Ohio St. 14 (1949), the Court found that street vending was a legitimate business and the owner had a property right in the business, affording him the protection of Article I, section 1. Any attempt to interfere with that property interest must be supportable on the basis of a reasonable exercise of the police powers. A set of Columbus ordinances that prohibited the use of pinball or similar machines, enforced by the threat of a misdemeanor penalty and confiscation of the machines, was upheld in *Benjamin v. Columbus*, 167 Ohio St. 103 (1957). The appellant sought to overturn the ordinances, arguing that they were arbitrary and unreasonable and deprived him of his property without due process — not only because they would authorize the police to seize his machines, but also because the ordinances would drive him out of business in Columbus. The Court held that this injury was unavoidable. Justice Taft, writing for the Court, said that almost every exercise of the police power will either interfere with the enjoyment of liberty or the acquisition, possession, or production of property within the meaning of section 1, or would involve an injury within the meaning of the 14th Amendment. Nevertheless, if the act is not unreasonable or arbitrary and bears a substantial relation to the protection of the health, safety or welfare of the public, it will not be overturned because of its

harmful effects on certain people. The courts would only interfere if the legislature had made a clearly erroneous decision about the act's reasonableness or relationship to the public welfare.

Benjamin also illustrates the principle that private property may be subject to confiscation or destruction if the property is in some way violative of certain acts passed pursuant to the police power. Statutes providing drastic measures for the elimination of disease whether in humans, crops, or stock, are in general authorized under the police power as preservation of public health. (e.g., *Kroplin v. Truax*, 119 Ohio St. 610, 1929)

The enjoyment, possession and protection of real property is also subject to regulation. Building codes and zoning ordinances which are not purely fanciful or aesthetic but which are measurable and have a rational relationship to the preservation of the health, safety and welfare of the public are not unconstitutional. (*State ex rel. Jack v. Russell*, 162 Ohio St. 281, 1954)

The police power can also be used to regulate the use of property in another way, through licensing and regulation of licensed businesses, not only to prevent crime but to protect the public. In *Auto Realty Service, Inc. v. Brown*, 27 Ohio App. 2d 77 (Franklin County Ct. A., 1971) the appellant was found to be engaging in the sale of automobiles without the necessary license and without following the required regulations for such sales. Finding against his claim that the requirements violated his freedom under Article I, section 1, to engage in business, the Court held that while the individual has the constitutional right and freedom to engage in business, the State has the right to regulate this freedom, subject to certain restraints, for the safety of the public. Regulations may not be arbitrary and must have a real relationship to the public health, safety, or welfare. They must not destroy lawful competition or create trade restraints tending to establish a monopoly.

Finally, the individual has the right to seek and obtain happiness and safety. The pursuit of happiness has been interpreted as the right to follow or pursue any occupation or profession without restriction and without having a burden imposed on one not imposed on others. This provision, though, has been rarely litigated and the possible ramifications of its guarantee are not known.

ARTICLE I

Section 2

Present Constitution

Section 2. All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

Article I, section 2 has remained unchanged since its adoption in 1851. It is derived from Article VIII, section 1 of the 1802 Constitution and the Declaration of Independence. Much of the 1851 section is basically the same as its 1802 counterpart, with slight language alterations. The last clause, though, was added in 1851 after considerable debate. It was seen as a move to return the power of the government in all its manifestations

to the people and to curb the power of individuals and corporations who had achieved wealth, influence and position in part through privileges granted them by the state. The supporters of this clause argued successfully that all power is inherent in the people and cannot be bartered away. Grants of privileges, they contended, diminished or partitioned that power; therefore, the grants violated the people's right to control their government and the government failed to provide equal protection and benefits.

This section contains the "equal protection" clause of the Ohio Constitution, although its language is not identical to the parallel clause of the United States Constitution, Amendment 14, section 1. The major portion of Article I, section 2, however, is derived from the Declaration of Independence and has no federal constitutional parallel.

Comment

The first sentence of section 2 is, like section 1, more of a statement of principles than an enforceable right or guarantee. In *Ohio ex rel Atty. Gen. v. Covington, et al.*, 29 Ohio St. 102 (1876), the Ohio Supreme Court stated that this declaration enunciates the foundation principle of government — that the people are the source of all political power — but the Court said that this was not intended as a denial of the power or right of delegation and representation.

The "equal protection" clause of section 2 — "Government is instituted for their equal protection and benefit" — differs from the federal parallel in the 14th Amendment which is as follows: ". . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

The ramifications of the federal "equal protection" clause are extensive, and will not be discussed here. Since the 14th Amendment applies directly to the states (many other provisions of the Federal Bill of Rights having been made applicable to the states through the 14th Amendment), the state cannot diminish those rights or guarantees found in the 14th Amendment. The only relevant inquiry would seem to be whether Ohio courts have interpreted the Ohio provision significantly differently from the federal provision, or found in the Ohio provision any rights not found in the federal provision. No cases have been found that would seem to give the Ohio provision any special significance.

The "privileges or immunities" clause was an issue in *Railway Company v. Telegraph Association*, 48 Ohio St. 390 (1891). The question raised was whether a franchise granted to the Telegraph Company to operate a telephone service could subsequently be altered or revoked when it was later found that the operation of the Railway Company interfered. Did the Telegraph Company have a vested interest in the telephone system as operated that not even the legislature could limit, reduce, or revoke? The Court held that special privileges and immunities were under the control of the legislature and that according to Article I, section 2, if granted, they could be altered, revoked, or repealed by the General Assembly. If the exercise of rights conflicted, it would be construed as the intention of the legislature to deny an exclusive franchise, if not repeal the antecedent grant. Having received their corporate franchises from the state, the companies hold them in implied trust for the benefit of the community at large, and to the constitutional grant of legislative power to control the exercise of those franchises, which are privileges, in the future as the public good might require.

The people's rights to alter, reform, or abolish the government is another statement generally classified as "political theory". Article XVI

of the Ohio Constitution sets forth the methods of amending the Constitution, including the calling of a Convention to revise, alter, or amend it, and this statement in section 2 does not appear to add anything of substance.

ARTICLE I

Section 3

Present Constitution

Section 3. The people have the right to assemble together, in a peaceable manner, to consult for their common good; to instruct their Representatives; and to petition the General Assembly for the redress of grievances.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

Originally adopted as Article VIII, section 19 of the Constitution of 1802, this section was included in the Constitution of 1851 almost word for word, and has remained unchanged since 1851.

Section 3 has had little effect in recent years because of the impact of its federal counterpart in the Bill of Rights, the First Amendment, clause 3, which has been incorporated through the 14th Amendment to apply to the states, providing the full extent of the federal guarantee to all (*Elfbrandt v. Russell*, 384 U.S. 11 (1966)). The federal guarantee provides that:

> Congress shall make no law . . . . abridging . . . . the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Comment

Freedom to associate for the advancement of beliefs and ideas or to petition for redress of grievances is so fundamental to the concept of ordered liberty that its protection is assumed by the due process clause of the 14th Amendment, even though actions taken under the protection of this clause may be controversial, political, social, or economic actions, *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963).

Like other rights, though, this freedom is not absolute and is circumscribed by the legitimate exercise of police powers by state and municipal authorities to protect the health and safety of the citizens. The police power, however, cannot be used merely to prevent or disperse annoying gatherings, but only to enforce statutes reasonably designed to protect life and order.

The people also have the right to petition for the redress of grievances. Interference with this right to petition, to express ideas, or to act in a concerted way by either a government, through its agents or officers, or an individual, with the purpose of preventing such legal action, is forbidden by the First and 14th Amendments, *McQueen v. Druker*, 317 F. Supp. 1122, *aff.* 438 F. 2d 781 (D.C., Mass., 1970). Further, unless there is some overriding state concern, an association or an individual's right to belong to the association cannot be interfered with by laws prohibiting people belonging to the association from holding certain jobs, or by rules against joining an organization for those holding certain jobs.

The presence of a threat of violence or a clear danger to persons or property is normally a sufficient basis for the restriction of the rights to free speech or assembly, but governmental officials may not selectively

or discriminatorily enforce statutes that deal with disturbances, by using these laws to either allow or prohibit constitutionally protected activities at their discretion. (*United States v. Crowthers*, 456 F. 2d 1074 (4 Cir. 1972)) The interests of government in regulations that infringe upon constitutional rights must be balanced against those of the individual, and the state must show a compelling interest in overriding individual interests to do so.

Ohio's section allows similar freedom and restriction, subject to the same valid exercise of police power. In *Toledo v. Sims*, 14 Ohio Ops. 2d 66 (1960), a municipal court held that the people of Ohio had affirmed, through Article I, section 3, the right of the inhabitants of the state to assemble or congregate. Ohio courts have repeatedly interpreted the section in a manner consistent with the First Amendment of the U.S. Constitution. Where they have failed to provide the level of protection required by the 14th Amendment, they have been reversed, *Coates v. Cincinnati*, 402 U.S. 611 revg. 21 Ohio St. 2d 66 (1971).

ARTICLE I

Section 4

Present Constitution

Section 4. The people have the right to bear arms for their defence and security; but standing armies, in time of peace, are dangerous to liberty and shall not be kept up; and the military shall be in strict subordination to the civil power.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

Section 4 has not been altered since its 1851 adoption. The second and third clauses are identical in content to section 20 of Article VIII of the 1802 Constitution; the 1851 Constitution merely modernized the language. The first clause, however, in the 1802 Constitution, stated that the people had the right to bear arms for the protection of themselves and the State. The 1851 Constitution says that the people have the right to bear arms for their defense and security. The earlier Constitution ties the possession of arms by individuals more closely to the concept of the protection of the State in keeping with the concepts, then prevalent, of the vigilant citizenry or the citizen-soldier. This was followed in a natural transition, by the statement that standing armies were dangerous and that the military should be subordinated to the civilian powers. The 1851 section altered the language, stating that individuals could bear arms for their defense and security. Whether any significant change in meaning was intended is not clear, because of the lack of debate.

The first clause guarantees the right to bear arms, as does the Second Amendment of the Federal Bill of Rights. The second clause provides for civilian control over the military. While this has no specific parallel in the United States Constitution, the concept is implied in Article II, section 2 which names the President as Commander-in-Chief of the armed forces. The Ohio Constitution contains a similar implied subordination of the military to the civil authorities, Article III, section 10 and in Article IX, which provide that the Governor is the Commander-in-Chief and shall appoint the adjutant general and other such officers of the militia as provided by law.

Comment

The "right to bear arms" of the Ohio Constitution is worded differently from the Second Amendment and could be construed to have a different effect on an individual's rights, especially since the Second Amendment has not been held applicable to the states. The Second Amendment begins: "A well-regulated militia being necessary to the security of a free state . . ." and thus the right to bear arms is intimately connected with the concept of a citizen soldier and individual states' rights. Ohio's section appears to be an absolute affirmation of the right to bear arms without any governmental interference or limitation of that right. The Supreme Court of Ohio, though, has held that to fully understand Article I, section 4, it must be read in conjunction with the Second Amendment; a form of reverse incorporation. When both are read together, it is seen that the primary purpose in permitting people to bear arms is to dispense with the need for a standing army and to enable the people to prepare for their own defense by retaining their arms, *State v. Nieto,* 101 Ohio St. 409 (1920). Further, the existence of this right does not restrict the legislature's power and responsibility under its police powers to pass laws and establish regulations that may be necessary to protect the safety and welfare of the citizens of Ohio. Consequently, the protection of the general public by the regulation of the use and transportation of dangerous weapons, through the exercise of the legislative power, is a legitimate use of that authority; *Akron v. White,* 28 Ohio Op. 2d 41 (Mun. Ct., 1963). Under these same powers, the legislature can enact laws that totally regulate the sale of arms and that govern the possession of concealed weapons, *Nieto.* Although an ordinance prohibiting the bare possession of arms by the people will generally be unconstitutional, the extent of the police powers of the State allow restrictions to be placed on this right.

It is beyond the scope of this report to analyse the federal provision. The reader is referred to other materials, such as Levin, *The Right to Bear Arms: The Development of the American Experience,* 48 Chi.-Kent L. Rev. 148 (1971).

ARTICLE I

Section 5

Present Constitution

Section 5. The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

Commission Recommendation

The Commission has appointed a special committee to study civil trial juries.

History; Comparison with Federal Constitution

"The right of trial by jury shall be inviolate" was section 8 of Article VIII of the 1802 Constitution and section 5 of Article I of the 1851 Constitution. The exception—that, in civil cases, verdicts could be rendered by ¾ of the jury—was proposed by the 1912 Constitutional Convention and subsequently adopted by the people. No changes have been made in the section since 1912.

The Federal Constitution guarantees the right to a trial by jury in criminal cases in Article III, section 2: "The trial of all crimes, except in cases of impeachment, shall be by jury . . ." and in the Sixth Amendment: "In all criminal prosecutions the accused shall enjoy the right to a

speedy and public trial, by an impartial jury . . .". The Seventh Amendment provides for jury trials in civil cases as follows:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Comment

Section 10 of Article I of the Ohio Constitution contains a guarantee of a jury trial in criminal cases similar to that found in the Sixth Amendment to the Federal Constitution (and in the Constitution itself). Discussion of the various aspects of jury trials as found in those provisions will be found following section 10. The committee concluded that no changes in the Constitution were desirable with respect to the requirements for juries in criminal cases.

A number of issues have been raised in recent years by lawyers, judges, and others expert in the administration of justice concerning civil trial juries. The questions include: under what circumstances is there a right to a jury trial? what are permissible jury sizes? is a unanimous verdict a constitutional requirement? can jury verdicts be reduced in size without violating the Constitution?

After discussion of these issues and the research papers presented to it on these topics, the committee concluded that it did not have sufficient information on which to base any recommendations for change in the Ohio Constitution, but that the questions were important and should be studied further by a special committee, with particular emphasis on the problem of sizes of verdicts.

The Commission has appointed a special committee, and a further report on juries will be issued in the future.

ARTICLE I

Section 6

Present Constitution

Section 6. There shall be no slavery in this state; nor involuntary servitude, unless for the punishment of crime.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

This section had its basis in Article VI of the Ordinance of 1787, the first clause of which said, "There shall be neither slavery nor involuntary servitude in the said territory (Northwest Territory), otherwise than in punishment of crimes . . .". Article VI contained a further provision, though, that allowed for the recapture of slaves and indentured servants notwithstanding the previous guarantee. Article VIII, section 2 of the Constitution of 1802 retained the opening clause and limited indenture to children until the age of 21 years for males and 18 years for females unless an individual entered into indenture in perfect freedom for good consideration received or to be received. Indenture of negroes or mulattoes residing in the state, regardless of the origin of the contract, was limited to one year except in cases of apprenticeships. The Constitutional Convention of 1850-1851 retained only the opening clause after modernizing the language, and the section has not been altered since 1851.

The Thirteenth Amendment to the Federal Constitution provides in section 1:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

The 13th Amendment is one of the post-Civil War amendments to the Federal Constitution and, therefore, postdates the Ohio provision.

Comment

There are no Ohio cases construing section 6, and the history and origins of Ohio might help account for this. Ohio was admitted to the United States as a free state, just as previously it had been part of a free territory, and it became a hotbed of abolitionist sentiment. Harriet Beecher Stowe lived in Cincinnati, Joshua R. Giddings taunted Southern adversaries with stinging invective in Washington, and Oberlin College became an important center for the abolitionist movement. So, slavery was never an issue except in cases of slaves who were escaping through Ohio. Other forms of servitude, as indenture, were dying out by the end of the 18th Century and never became widespread in Ohio. The substitute for indentured whites was enslaved blacks but this, of course, was prohibited throughout the Northwest Territory.

The 13th Amendment forbids all shades and conditions of slavery, including apprenticeships for long periods or any forms of serfdom. The general purpose of the Amendment, when read with the 14th and 15th, was found to be the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made citizens from the oppressions of those who formerly exercised dominion over them (*Slaughter-House Cases*, 83 U.S. 36, 1872). The Court asserted, though, that this protection was not limited to the Negro, saying that while Congress only had Negro slavery in mind when it passed the Amendment, it prohibited other forms of slavery as well, including any type of peonage or coolie system. This opinion was supported by the "Civil Rights" Cases, 109 U.S. 3 (1883). There, the Court said that the 13th Amendment has respect, not to distinctions of race, or class or color, but to slavery; not merely prohibiting state laws establishing or upholding slavery, but absolutely declaring that slavery or involuntary servitude should not exist in any part of the United States. Further, the Enabling Clause gave Congress the power to pass all laws necessary and proper for abolishing all badges and incidents or burden and disabilities of slavery in the United States which includes all restraints on fundamental liberties which are the essence of civil freedom.

The 13th Amendment prohibits any type of forced labor contracts when the employer may use debt or criminal fraud statutes to enforce the contract or punish the employee. This was the issue dealt with in *Pollock v. Williams*, 322 U.S. 4 (1944). Commenting on the Thirteenth Amendment, the Court said that the Thirteenth, as implemented by the Antipeonage Act, was not merely to end slavery, but to maintain a system of completely free and voluntary labor in the United States. While certain forced labor, as a sentence of hard labor for the punishment of crime, may be consistent with the Thirteenth Amendment in special circumstances, generally, it violates the Amendment. The defense against oppressive hours, pay, and working conditions or treatment is to change employers, but when the employer can compel and the employee cannot escape his obligation to work, there is no power below to redress, and no incentive above to relieve harsh or oppressive labor conditions. Whatever

social value there is in enforcing contracts and obligations of debt, Congress has established that no indebtedness warrants a suspension of the right to be free from compulsory service. This meant, the Court held, that no state could make the quitting of work a component of a crime or make criminal sanctions available for holding unwilling persons to labor. In *United States v. Shackney*, 333 F. 2d 475 (2 Cir., 1964), the Court said the 13th Amendment applied to direct subjection, by a state using its power to return the servant to the master, and to indirect subjection, by the state using criminal penalties to punish those who left the employer's service. The Court contended, though, that the term went further. Various combinations of physical violence, of indications that more would be used against an attempt to leave, and of threats of immediate physical confinement, it said, were sufficient to violate the 13th Amendment, although where the employee has a clear choice about leaving even when the alternative is unappealing there is no violation.

ARTICLE I

Section 7

Present Constitution

Section 7. All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

Article I, section 7 has remained unchanged since it was included in the Constitution of 1851. Largely copied from its predecessor, Article VIII, section 3 of the Constitution of 1802, it was re-written and enlarged in 1851 by the addition of three new clauses. Of those clauses added in 1850-51, the first provides that no person shall be incompetent as a witness because of his religious beliefs. The second states that nothing within the section shall be construed to dispense with oaths or affirmations, and the final one extends the duty of the legislature to pass suitable laws to protect every religious denomination in the peaceful mode of public worship.

The First Amendment to the Federal Constitution provides several guarantees of fundamental liberties: freedom of religion, freedom of speech and press, and freedom of assembly. Section 7 of Article I of the Ohio Constitution deals with freedom of religion. The relevant portion of the First Amendment is "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . .". Obviously, much of section 7 of Article I of the Ohio Constitution is not found in the Federal Constitution nor any of its Amendments.

Comment

The First Amendment's religious freedom provision has been applied to the states through the due process clause of the 14th Amendment (*Cantwell et al. v. Connecticut,* 310 U.S. 296, 1940). Federal cases expounding on various aspects of religious freedom cover such matters as military conscientious objectors, tax status of property associated with a religious institution, solicitation of funds for religious purposes, public support for schools associated with a religious group, prayer in public schools, and other topics, and are too numerous to discuss. Since Supreme Court decisions interpreting the First Amendment apply to the states, it is possible to affect the constitutional wall separating church and state in Ohio only if the Ohio Constitution, and its interpretation by the legislature or the courts, goes beyond the federal by making the wall higher, not by lowering it.

Early Ohio cases contained no surprises in interpreting the Ohio provisions. The Ohio Constitution adopts a hands-off policy towards religion and requires that each religious denomination maintain that same policy towards the others. It also recognizes the constitutional privilege to worship God according to the dictates of conscience, and the right to teach these beliefs to children; the commitment to this right has been formalized by Article I, section 7 of the Constitution of 1851. There can be no interference with the exercise of this right, and Ohio courts have permitted no prior restraint on its use, whether by legislative, judicial or executive action (*Bloom v. Richards,* 2 Ohio St. 387, 1853). This right to freedom of religious belief is not limited to Christian belief, but extends to any type of belief and neither Christianity nor any other religious belief can be part of the laws of Ohio. The legislature cannot promote Christianity or any other belief beyond passing laws to protect them from outside interference, *Board of Education of Cincinnati v. Minor,* 23 Ohio St. 211 (1872).

Section 7 also sets out the fundamental guarantee, recognized as a fundamental principle in both state and federal constitutional law, that no religious test can be required by law for qualification for holding office, *Clinton v. State,* 33 Ohio St. 27 (1877). Ohio, further, specifically states that an individual's religious beliefs will not disqualify him as a witness; Article I, section 7 goes on to state that this will not dispense with any oath or affirmation. In *Clinton,* this was held to mean that, although a religious belief would not affect a witness's competency, to be held competent to take an oath as a witness, the individual's beliefs would have to be such that he believed a Supreme Being would inflict punishment for false swearing. Generally, though, any form of oath or affirmation, which appeals to the conscience of the person to whom it is administered and binds him to speak the truth, is sufficient.

Ohio courts had held that the Constitution does not enjoin or require religious instruction or the reading of religious books in the schools because the legislature placed control of these matters in the hands of those who managed schools. Recent decisions, however, starting with *Engel v. Vitale,* 370 U.S. 421 (1962) in the federal courts, have removed this freedom of choice from the hands of Ohio public school administrations.

Since the application of the First Amendment's religious freedom guarantee to the states, no Ohio cases have been decided that would alter the federal rules by interpreting the Ohio constitutional provision more strictly than the federal.

ARTICLE I

Section 8

Present Constitution

Section 8. The privilege of the writ of habeas corpus shall not be suspended, unless, in cases of rebellion or invasion, the public safety require it.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

Section 12 of Article VIII of the 1802 Constitution combined the provisions relating to the writ of habeas corpus with those relating to bail; in 1851 the bail provisions were separated and made part of section 9. The habeas corpus language was not changed in 1851. In 1874, the Constitutional Convention proposed adding at the end of the section: ". . . and then only in such manner as may be provided by law." The proposals of that Convention, however, were not adopted by the people. Section 8 has, therefore, not been changed since 1851.

The second paragraph of section IX of Article I of the Federal Constitution provides: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety require it." Thus, only minor language and punctuation differences distinguish the federal from the Ohio version.

Comment

Both the Ohio and the Federal Constitutions deal only with the instances in which the writ of habeas corpus can be suspended, and neither Constitution attempts to set forth those instances when the writ is, or must be made, available, nor what can, or should, be accomplished by its issuance. The writ is an ancient common law one, and its development, through cases and statutes, is a lengthy one. Examination of both federal and state cases dealing with the writ did not disclose any significant differences between federal and state interpretations nor any reasons to recommend changes in the language.

ARTICLE I

Section 9

Present Constitution

Section 9. All persons shall be bailable by sufficient sureties, except for capital offences where the proof is evident, or the presumption great. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

Commission Recommendation

The Commission recommends the amendment of section 9 as follows:

Section 9. All persons shall be bailable by sufficient sureties, except AS PROVIDED IN THIS SECTION AND EXCEPT for capital ~~offences~~ OFFENSES where the proof is evident or the presumption great. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

PERSONS MAY BE DENIED BAIL PRIOR TO TRIAL IF THE OFFENSE CHARGED IS A FELONY THAT WAS COMMITTED WHILE THE PERSON WAS RELEASED ON BAIL.

NOTWITHSTANDING ANY OTHER PROVISION OF THIS CONSTITUTION OR SUPREME COURT RULE ADOPTED PURSUANT THERETO, THE GENERAL ASSEMBLY MAY PASS LAWS IMPLEMENTING THIS SECTION.

History; Comparison with Federal Constitution

Article I, section 9 was adopted in 1851 and has remained unchanged. It was a combination of two sections from the Constitution of 1802: Article VIII, section 12 which guaranteed the right of bail in all but capital offenses and Article VIII, section 13, which prohibited excessive bail and fines, and cruel and unusual punishments. Aside from this reorganization, the sections were preserved intact with only minor changes in the language. In 1912, there was an attempt to add to this section to abolish capital punishment, until such time as the legislature decided to reinstate it, and replace it with life imprisonment. The proposal, though, failed to attract voter support and was not ratified.

The Eighth Amendment to the Federal Constitution reads as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Comment — Bail

A significant difference exists between the Ohio and the federal constitutional bail provisions, and it is this difference that led to the Commission's recommendation to amend the section. The Eighth Amendment prohibits "excessive" bail but does not grant a right to bail. Ohio is one of about 23 states whose constitution guarantees a right to bail, except, in Ohio, in capital cases "where the proof is evident, or the presumption great".

The traditional right to bail permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction (*Stack v. Boyle*, 342 U.S. 1, 1951). Its purpose is to ensure that one accused of a crime would return to stand trial and submit to sentence if found guilty. The Supreme Court of the United States has held that an excessive bail is that greater than is necessary to assure this, stating that it would be unconstitutional to fix bail to ensure that the individual would not obtain his freedom (*Bandy v. United States*, 364 U.S. 477, 1960).

The Court has not yet ruled on the question whether the Eighth Amendment's "excessive bail" prohibition incorporates, from the common law, an absolute or limited right to bail before trial or before conviction. Nor is there a United States Supreme Court case clearly applying the excessive bail provision of the Eighth Amendment, whatever its interpretation, to the states, probably because every state has such a provision in its own constitution or has, as is the case in Ohio, an even greater right expressed in the Constitution in terms of a right to bail. A number of decisions, however, in both lower federal courts and in state courts at all levels, assume that the excessive bail provision of the Eighth Amendment applies to the states through the 14th Amendment, particularly since the "cruel and unusual punishments" provision of the Eighth Amendment has clearly been so applied.

The absence of express language in the Eighth Amendment guaranteeing the right to bail appears to imply that no absolute constitutional right was intended, and indeed, the historical development of the bail system so indicates. This concept was upheld in *Mastrian v. Hedman*, 326 F. 2d 708, *cert. den.* 376 U.S. 965 (1964) where the Court ruled that neither the Eighth nor the 14th Amendments require that everyone charged with an offense must be given his liberty or the right to bail pending trial.

The *Hedman* Court further held that while the right to bail was inherent in the American system of law, this did not mean that a legislature was required to make all crimes subject to that right or to administer it in such a way as to provide everyone with that right. As noted above, however, the Supreme Court has not ruled on this point.

Federal Statutes and Rules of Criminal Procedure applicable to persons charged with the commission of federal crimes grant a right to bail in all noncapital cases (18 U.S.C. 3146-3149 and Rule 46 of the Federal Rules of Criminal Procedure). Congress, however, has exercised its apparent authority to permit the denial of bail to certain persons charged with crimes in the District of Columbia. The D. C. statute has as its goal preventing the pretrial release of persons whose appearance at trial cannot be assured by any conditions of release or whose release might endanger the safety of any other person or the community. Specifically, persons charged with crimes of violence may be denied bail if they have been convicted of a crime of violence within a ten-year period immediately preceding the alleged crime or if the crime was allegedly committed while the person was on bail pending trial for the alleged commission of another crime of violence or on probation or other release pending completion of a sentence imposed upon conviction of another crime of violence. The statute permits detention in other limited areas, also. However, it is the permissible detention of the alleged "repeat offender" that is the goal of the Commission's proposed amendment to section 9.

Section 9 clearly states that "all persons shall be bailable . . ." except for capital offenses (the proposed amendment would correct the spelling of "offenses") and such case law as exists on the subject in Ohio states that the right to bail except in capital cases is absolute, *Locke v. Jenkins*, 20 Ohio St. 2d 45 (1969). Rule 46 (B) of the Ohio Rules of Criminal Procedure provides for pre-trial release on recognizance or unsecured appearance bond and for further conditions of release in felony cases and other cases in the discretion of the judge. The judgment of whether a person accused of a capital crime should be released prior to trial is within the sound discretion of the trial court, *State ex rel. Reams v. Stuart*, 127 Ohio St. 314 (1933). The absolute right to bail has been held, in Ohio, not to apply to juveniles pending a delinquency proceeding, since the bail provision applies only to offenses, *State ex rel. Peaks v. Allaman*, 51 Ohio Op. 321, (1952).

The Commission has concluded, as did the Ohio Crime Commission in 1969, that, in the Crime Commission's words, "there should be some means for holding the accused in detention where the public safety requires it." Bail has traditionally been the means of assuring the defendant's appearance at the trial; recent changes in the bail system, including those in Ohio, have assured pre-trial release to almost everyone except, of course, in capital cases. However, those in the criminal justice system who are concerned about the number of serious crimes committed by persons previously convicted of a crime believe that denial of pre-trial release to persons charged with a serious crime while awaiting trial for another crime may be one means of preventing the commission of further crimes.

The final portion of the proposed amendment would make it clear that the General Assembly may pass laws to implement this section, which cannot be superceded by Supreme Court Rule.

Comment — Cruel and Unusual Punishments

The "cruel and unusual punishments" clause of section 9 is identical to that of the Eighth Amendment. Moreover, the Eighth Amendment, with respect to prohibiting cruel and unusual punishments, has been applied to

the states by the Supreme Court through the 14th Amendment. (*Robinson v. California*, 370 U. S. 660, 1962) In the *Robinson* case, the Court held that a state statute making it a crime for a person to "be addicted to the use of narcotics" inflicted cruel and unusual punishment.

"Cruel and unusual punishments inflicted" comes from the British 1688 *Declaration of Rights*, and was originally thought to proscribe tortures employed during the reign of the Stuarts. Its meaning has, of course, been considerably broadened as society has evolved more humane standards for the treatment of persons convicted of crimes. Most recently, the imposition of the death penalty, under certain conditions, has been held by the Supreme Court to be "cruel and unusual punishment". (*Furman v. Georgia*, 408 U. S. 238, 1972) Because of the split nature of the decision and the fact that each judge filed a separate opinion, the ramifications of the decision are still being tested in courts and in legislatures across the country.

Matters other than the penalty imposed are being brought to the courts' attention today as violations of the prohibition against "cruel and unusual punishments". Prior to 1969, the Supreme Court had refused to consider prison conditions because it was felt that prison discipline and administration in the states was within the jurisdiction and competence of the states. In *Johnson v. Avery*, 393 U. S. 483 (1969), the Court changed that policy. Since then, courts have examined prison conditions and prison practices in relationship to "cruel and unusual punishment".

Even prior to the incorporation of the clause through the 14th Amendment, the Ohio Supreme Court followed the United States Supreme Court's interpretation of "cruel and unusual punishments" (*Holt v. State*, 107 Ohio St. 307, 1923). With the exception of *Zenz v. Alvis*, 66 Ohio Law Abs. 606 (Franklin Co. Ct. A., 1951) which held that consecutive life sentences were not violative of the Ohio Constitution, there is little other litigation on this clause and, since *Robinson*, there has been none.

ARTICLE I

Section 10

Present Constitution

Section 10. Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunityto be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

Commission Recommendation

The Commission recommends the amendment of Section 10 as follows:

Section 10. Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and in cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury in the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury ~~and may be the subject of comment by counsel~~. No person shall be twice put in jeopardy for the same offense.

In addition, the Commission has appointed a special committee to study the subject of the grand jury.

History: Comparison with Federal Constitution

Article I, section 10 is one of the few sections of the Ohio Bill of Rights that has been altered and enlarged from 1802 to the present. The guarantees of this section, which now largely follow both the Fifth and the Sixth Amendments of the Federal Constitution, originally appeared in Article VIII, section 11 of the Constitution of 1802. That section provided for the right to counsel, the right to know the nature and cause of the charge, the right to confrontation, and the right to compulsory service of process in approximately the same manner in which they were guaranteed in the Sixth Amendment. In prosecutions by indictment or presentment, it guaranteed the right to a speedy public trial by an impartial jury in the county where the offense was committed. It also provided two Fifth Amendment guarantees; the right against self-incrimination and the right against double jeopardy.

The Convention of 1850-51 added the first sentence and altered the remaining language of section 11 to follow more closely that of the Sixth Amendment. The first sentence, though, does not follow the Fifth Amendment exactly; several explanatory phrases were included. The Convention added "Except . . . cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary . . ." the opposite of "infamous crimes". The Fifth Amendment does not mention misdemeanors. Instead, it states that a grand jury presentment or indictment is necessary only for "capital and infamous crimes". Article I, section 10 also adds material dealing with grand juries only implied by the Fifth Amendment — that their size and the number necessary to return an indictment will be determined by law. With these additions but without the parts dealing with depositions or a failure to testify, Article I, section 10 was passed by the Convention.

The Convention of 1912 added those portions dealing with depositions and the failure to testify. Alarmed by the high crime rate and the small number of convictions, some members of the Convention of 1912 decided to counter what they believed was an overemphasis on the rights of criminals. The proponents of change cited several areas where changes could be made to neutralize at least some of the advantages the criminals enjoyed in any prosecution. Previously, depositions could be used only by the defendant. The reformers contended that this gave an unfair advantage to the defendant and often resulted in a guilty man being freed. Therefore, they proposed that the state also be given the opportunity to use depositions. Another addition in 1912 was permitting prosecutors in criminal cases to comment about the failure of defendants to testify. There have been no further changes since 1912.

As noted above, Article I, section 10 of the Ohio Constitution largely copies similar Amendments of the United States Bill of Rights.

The Fifth Amendment reads:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Sixth Amendment reads:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Not all provisions of the Fifth Amendment are incorporated in section 10; some are found elsewhere in the Ohio Bill of Rights.

Comment — The Grand Jury

The grand jury requirement of the Fifth Amendment is the only provision of the Fifth or Sixth Amendment that has not been applied to state criminal proceedings through the due process clause of the 14th Amendment. The states are, therefore, free to use or reject the use of a grand jury.

A considerable amount of controversy has surrounded the grand jury in recent years. Its use is viewed by some as one of the most important protections in the Bill of Rights against false accusations of crime being made public; others, however, tend to view the grand jury as a "witch-hunting" arm of government or the prosecutor.

The Commission has appointed a special committee to consider grand juries, and a report on that subject will be made in the future.

Comment — the Sixth Amendment Rights

Section 10 sets forth a series of rights of persons accused of crimes that are essentially the same as those found in the Sixth Amendment. In the Ohio order, they are:

1. Right to appear and defend in person and with counsel;
2. Be informed of the nature and cause of the accusation and demand a copy;
3. Confront witnesses;
4. Compulsory process to secure witnesses on the accused's behalf;
5. Speedy and public trial in the county where the crime was committed;
6. Jury trial.

The Sixth Amendment places the speedy and public trial first and the right to counsel last; the right to "appear and defend in person" does not appear in the Sixth Amendment but is certainly implicit in all the other rights. There are other language differences, but they do not appear to be differences of substance.

All the Sixth Amendment rights have been applied to state criminal proceedings through the due process clause of the 14th Amendment. The leading cases are:

1. Right to counsel — *Gideon v. Wainwright,* 372 U. S. 335 (1963)
2. Be informed of the nature of accusation — *Cole v. Arkansas,* 333 U.S. 196 (1948)
3. Confront witnesses — *Pointer v. Texas,* 380 U. S. 400 (1965)
4. Compulsory process — *Washington v. Texas,* 388 U. S. 14 (1967)

5. Speedy and public trial — *Klopfer v. North Carolina*, 386 U. S. 213 (1967)
6. Trial by jury (felonies) — *Duncan v. Louisiana*, 88 S. Ct. 1444 (1968)

Of course, the recitation of these rights and the citation of cases making them applicable to the states does not say much about them. Volumes can, and have been, and will be written about each one. The limits and extensions of each are not yet fully known and perhaps never will be. For the purposes of studying whether the Ohio Constitution should be revised with respect to any of these provisions of section 10, however, it seems sufficient to inquire whether any Ohio cases or statutes or rules go beyond present federal interpretations of the Sixth Amendment in any way that would seem to call for constitutional amendment in Ohio. No such cases, statutes, or rules have been found, and no person has appeared before the committee or the Commission recommending any change in any of these provisions.

Comment — Right to Take Depositions

Section 10 next provides for depositions of witnesses who cannot attend the trial to be taken either by the prosecution or the defendant, by authorizing the General Assembly to so provide by law. This provision has no parallel in the Federal Constitution nor is it generally found in the constitutions of other states. As noted above, it was one of the proposals of the 1912 Convention, and was added because delegates to that Convention believed that defendants had an unfair advantage over prosecutors because the statutes apparently only authorized defendants to secure testimony of absent witnesses by deposition. Although the provision does not guarantee either the defendant or the state the right to take depositions, it does guarantee the accused, if such depositions are authorized and taken, the right to be present and examine the witness face to face.

Comment — Self-Incrimination; Failure to Testify

The next provision in section 10 repeats one of the provisions of the Fifth Amendment — that no person shall be compelled, in any criminal case, to be a witness against himself. The privilege against self-incrimination was applied to the states as part of due process in *Malloy v. Hogan*, 378 U. S. 1 (1964).

The right not to incriminate oneself has been much litigated. It is available to witnesses as well as to defendants and is available in civil litigation, before grand juries, before legislative committees and before administrative agencies. As with the Sixth Amendment rights it has been, and undoubtedly will continue to be, explored for limits and uses, and much written about.

One aspect of self-incrimination deserves comment, because the Ohio provision contains language not found in the Fifth Amendment — ". . . but his failure to testify may be considered by the court and jury and may be believed that defendants had an unfair advantage over prosecutors be-the subject of comment by counsel." This clause was added in 1912. The United States Supreme Court, in *Griffin v. California*, 380 U. S. 609 (1965), overturned a conviction appealed from the California Supreme Court on the grounds that the judge and the prosecutor had violated the defendant's rights by commenting on his failure to testify. Under the California Constitution, with a section closely resembling its Ohio counterpart, the judge and prosecutor had been allowed to comment on this failure. The Supreme Court said that the rule of evidence that allowed this gave the state the privilege of tendering to the jury for its consideration the failure of the

accused to testify without any formal offer of proof having been made. The Court continued by saying that the prosecutor's comment and the court's acquiescence were the equivalent of an offer of evidence and its acceptance. This, the Court held, violated the defendant's Fifth Amendment rights, specifically the spirit of the Self-Incrimination Clause. It said that comment on the refusal to testify was a remnant of the inquisitorial system of criminal justice which the Fifth Amendment outlaws because it was a penalty imposed by courts for exercising a constitutional privilege.

The Commission concluded that, in light of the *Griffin* case, the permission for counsel to comment on the failure of a defendant to testify is unconstitutional, and proposes that this language be removed from section 10.

Comment — Double Jeopardy

Finally, section 10 says that "No person shall be twice put in jeopardy for the same offense." The Fifth Amendment provides that: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb."

In 1969, in *Benton v. Maryland* (395 U. S. 784), the Supreme Court applied this provision, also, to the states as part of the due process clause of the 14th Amendment. Its meaning, also, has been the subject of considerable litigation. However, neither research nor testimony disclosed any reason or recommendations to change the Ohio provision.

ARTICLE I

Section 11

Present Constitution

Section 11. Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libellous is true, and was published with good motives, and for justifiable ends, the party shall be acquited.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

The predecessor of section 11 was Article VIII, section 6 of the 1802 Constitution. Section 11 in 1851 altered the rights protected under the original section and subtly changed its focus. The first sentence of the original section was concerned with protecting freedom of the press and the right to publish information about the government and public officials, a burning issue in the colonies in the Eighteenth Century and in England well into the Nineteenth Century. The second sentence provided a general guarantee of freedom of speech and press and it is this guarantee which forms the opening clause of Article I, section 11 of the 1851 Constitution. One could surmise that the press's right to comment on government and political figures by 1850-51 was a recognized right and no longer a controversial issue and that emphasis was dropped in 1851. The second portion of the opening sentence of section 11 was added to further protect the basic rights of freedom of speech and press.

Another major change in 1851 was to make truth a complete defense for criminal libel. Under the common law, the truth of a statement was not a defense to criminal libel. The 1802 Constitution allowed the truth to be admitted into evidence. The 1851 Constitution provides that the truth,

when published with good motives and for justifiable ends, is sufficient for acquittal. The final clause of Article VIII, section 6 of the 1802 Constitution, which provided that the jury would determine the law and the facts in all indictments for libel, was dropped in its successor and the section was then adopted in its present form.

Freedom of speech and of the press is guaranteed by the First Amendment to the Federal Constitution, as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

There is no federal constitutional provision regarding libel. The First Amendment rights of freedom of speech and press are applicable to the states through the 14th Amendment (*Gitlaw v. New York*, 268 U. S. 652, 1925).

Comment

As was the case in the rights relating to persons accused of crimes, the rights of freedom of speech and of the press are vast, complex, and in a continual state of flux. Important social issues such as censorship and obscenity come under First Amendment scrutiny, as well as political utterances, civil rights behavior, expressions regarding governmental policies on matters such as war, labor disputes, publication of material relating to criminal trials, and many more. The history and interpretation of First Amendment decisions is beyond the scope of this report.

The rights guaranteed by Article I, section 11 of the Ohio Constitution are very similar to the freedom of speech and press guaranteed by the First Amendment and many recent cases demonstrate a high degree of interchangeability between the two. There are, however, differences. In *Cincinnati Gazette Co. v. Timberlake*, 10 Ohio St. 548 (1860) the Ohio Supreme Court noted that the Ohio guarantee of the right to freely speak, write, and publish sentiments on every subject was specifically tied to responsibility for the abuse of the right, and every person for any injury done him on his land, goods, person or reputation would have a remedy by due course of law (Article I, section 16). Liberty of the press is not, therefore, inconsistent with the protection due to private character. The decision defined freedom of the press as the right to publish with impunity the truth, with good motives and for justifiable ends, concerning government, the judiciary or individuals. In *State v. Kassay*, 126 Ohio St. 177 (1932), the Court noted that the Federal Amendment was much more sweeping in its provisions than its Ohio counterpart, since the Ohio provision did not guarantee the rights without restraint.

In *State v. Davis*, 21 Ohio App. 2d 261, (Franklin Co. Ct. A., 1969), the Court averred that the maintenance of the opportunity for free political discussion was a fundamental principle of our constitutional system, and that the opportunity for free political speech could encompass the freedom of "pure speech" as well as freedom of other activities constituting expression. Such freedom could well envision the hanging of a red flag, and could encompass the wearing of a sign or a badge or involve gestures, including making the "V" sign. Absolute prohibitions of these gestures or symbols, the Court reasoned, would be unconstitutional, but not if they were used in such a manner that the rights of others were violated.

A Federal District Court, commenting on both the Ohio and federal guarantees, said that censorship in any form was an assault on freedom of the press, *New American Library of World Literature, Inc. v. Allen*, 114 F. Supp. 823 (D.C., Ohio, 1953). The power to censor, a drastic power, could only be vested by a valid express legislative grant. Otherwise, law enforcement officers only had the authority to examine suspected publica-

tions for violations of the obscenity laws to determine if there was probable cause to prosecute.

Licensing has also been attacked by the Ohio courts when it acts to restrain section 11 rights. In *Bowling Green v. Lodico*, 11 Ohio St. 2d 135 (1967), the Court overturned a conviction for failing to obtain a license to sell a purely political magazine, saying that initially the right to publish is unconditional. To the extent that the police are permitted to limit publication or circulation, the right to publish is diminished. An ordinance requiring a license to sell a political magazine in the streets is a prior restraint on speech and publication, and unconstitutional.

Door to door canvassing involves a balancing of convenience between some householders' desire for privacy and the publisher's right to distribute publications. Street soliciting does not involve the same balancing. Peripatetic solicitors on public streets do not invade privacy, and the right to be free from even the slightest interruption on a public street does not weigh as heavily in the balance as does the right to privacy in the home. In public the citizen must accept the inconvenience of political proselytizing as essential to the preservation of a republican form of government.

If a statute regulating the freedom of speech and press is not an unreasonable, arbitrary, or oppressive exercise of the police power, and if it is designed to accomplish a purpose within the scope of the police power, every reasonable presumption is given in favor of its constitutionality, and if it bears a reasonable relation to the public welfare, the courts will not declare it unconstitutional, *Davis v. State*, 118 Ohio St. 25 (1928).

Limits on freedom of the press, and the responsibility of the press, are still being debated.

ARTICLE I

Section 12

Present Constitution

Section 12. No person shall be transported out of the State, for any offence committed within the same; and no conviction shall work corruption of blood, or forfeiture of estate.

Commission Recommendation

The Commission recommends no change in section 12.

History; Comparison with Federal Constitution

The first clause of section 12 originally was Article VIII, section 17 of the 1802 Constitution. The Constitutional Convention in 1851 added the second clause of Article VIII, section 16 to that section to form the present section 12. It has remained unchanged since 1851.

There is no federal constitutional parallel to the prohibition against transportation as punishment for crime. Article III, Section 3 of the Federal Constitution provides a limited parallel to the second clause of section 12:

> "The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted."

Comment: Banishment

Limited types of exportation from the United States are imposed by the federal government on aliens and citizens who have lost their citizenship or been denaturalized. However, a citizen cannot be stripped of his citizenship as punishment for a crime, and a naturalized citizen can be de-naturalized only for fraud or concealment of facts upon attaining citizenship, not as punishment for a crime. At least one state court has held that it is

against public policy for a state to banish a person from the state as punishment for a crime (*People v. Baum*, 251 Mich. 187, 1930). There is no case law on the subject in Ohio, since the legislature has never authorized the imposition of such a penalty.

Comment: Corruption of Blood and Forfeiture of Estate

Corruption of blood and forfeiture of estate is generally defined as loss of all civil rights, a forfeiture of all estates and the loss of the ability to transfer them during the life of the person convicted. The federal provision limits this punishment for treason to the life of the guilty person. The Ohio provision prohibits the imposition of the punishment of corruption of blood and forfeiture of estate for any crime.

The Supreme Court held that there was no constitutional violation in *Miller v. State*, 3 Ohio St. 476 (1854) for a seizure to abate an existing nuisance. The property involved was seized and closed for a violation of the state liquor laws, and such actions were upheld since the property was being used illegally at the time of the seizure. During Prohibition, a similar case arose under the "Padlock" Law which authorized the closing of premises maintained for the keeping and selling of liquor. Following *Miller*, interpreting section 12, the Court held that there was no violation of the constitutional prohibition where the use of property, declared a public nuisance, was lost for one year (*State ex rel. v. Richardson*, 24 N. P. (n. s.) 540, Butler Co. C. P., 1923).

A beneficiary under a life insurance policy who murders the insured thereby forfeits all rights under the policy (*Filmore v. The Metropolitan Life Insurance Co.*, 82 Ohio St. 208, 1910). The Probate Court of Franklin County held that a statute which prohibits a person convicted of first or second degree murder from inheriting from his victim, does not act to divest an heir of property in violation of Article I, section 12. The Court noted that the statute does not provide that one shall be divested of property, but rather that he shall not be allowed to inherit. Therefore, he would have lost no property rights by operation of the statute. (*Egelhoff v. Presler*, 32 Ohio Op. 252, 1945) In *Thomas v. Mills*, 117 Ohio St. 114 (1927), the Ohio Supreme Court held that, absent any statutory provision, one sentenced to life imprisonment was not civilly dead although under the common law conviction of a felony did result in a corruption of blood (civil death).

ARTICLE I

Section 13

Present Constitution

Section 13. No soldier shall in time of peace, be quartered in any house, without the consent of the owner; nor, in time of war, except in the manner prescribed by law.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

Article I, section 13 was adopted as it now stands as part of the Constitution of 1851. It repeats Article VIII, section 22 of the 1802 Constitution with only minor word changes.

Except for punctuation, the section is identical to the Third Amendment to the Federal Constitution.

Comment

Litigation dealing with the Third Amendment is rare, and there are no Ohio cases. In *United States v. Valenzuela*, 95 F. Supp. 363 (D. C. Cal.

South. Dist., Central Div. 1951), involving reparations for rents for violations of the "Housing and Rent Act of 1947", the defendant charged that the Act was an incubator and hatchery of swarms of bureaucrats to be quartered as storm troopers on the people. The Court held the charge was not supported and that the Act, which gave certain preferences to soldiers and others in housing and established certain types of rent controls, was not violative of the Third Amendment. In one of the few other cases in which this Amendment is mentioned, the Supreme Court said that the Third Amendment protects one aspect of privacy from governmental intrusion, *Katz v. United States*, 389 U. S. 347 (1967).

ARTICLE I

Section 14

Present Constitution

Section 14. The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

Section 14 is the successor to Article VIII, section 5 of the Constitution of 1802, which guaranteed that people would be free from unwarrantable searches and seizures, and proscribed the use of the general warrant. The Constitutional Convention of 1850-51 replaced it with the present guarantee which has since remained unchanged.

Section 14 is nearly identical to the Fourth Amendment to the Federal Constitution. The differences are not significant.

Comment

The Fourth Amendment serves as a restraint on government officials invading the privacy of the individual and his home to look for evidence of crime. It does not prohibit all searches and seizures, only unreasonable ones; it does not outlaw warrants, only "general" warrants by requiring that warrants may be issued only upon probable cause and only after the officer seeking the warrant is able to identify the object of the search. The Fourth Amendment, and its parallel in nearly all state constitutions, is a direct result of colonial experience with British law enforcement practices of that day.

In *Weeks v. United States*, 232 U. S. 383 (1914), the Supreme Court first set out the federal exclusionary rule. The Court in *Weeks* said that it had the power to inquire into the source of any evidence it received as a prerequisite to its power to exclude evidence. Further, it said that evidence in violation of the Constitution was illegally obtained and was therefore inadmissible. The purpose was both to show disapproval of illegal acts by the government, removing any benefit obtained by these acts, and to maintain the dignity of the federal judiciary.

In 1949, in *Wolf v. Colorado*, 338 U. S. 25, the Supreme Court held that the proscriptions of the Fourth Amendment were implicit in the concept of liberty, and therefore applicable to the states through the due process clause of the Fourteenth Amendment. Interestingly, though, the exclusionary rule was not held to be implied in this concept of liberty. A series of decisions culminating in *Mapp v. Ohio*, 367 U. S. 643 (1961), applied the exclusionary rule, also, to state criminal procedures.

It is beyond the scope of this report to set forth the meaning and interpretations of the Fourth Amendment. Leading cases cover such matters as when a warrant is necessary for a search, the permissible extent of a search, electronic surveillance, administrative searches (such as housing and health searches), the requirements for securing a warrant, and similar matters.

As noted, the Fourth Amendment standards were made applicable to the states through *Weeks* and *Mapp*, and these cases established minimal standards for the states in the areas of search and seizure. This principle was recognized, at least in part, in *State v. Haynes*, 25 Ohio St. 2d 264 (1971). There, in a case dealing specifically with the sufficiency of a search warrant, the Court said, "It is now well established that the validity of a state search must be determined by federal standards." Rule 41 of the Ohio Code of Criminal Procedure requires that all the presently mandated technical Fourth Amendment requirements be satisfied, and in the area of reasonableness of the search, at least one Ohio court has ruled that the Fourth Amendment test of reasonableness for a search or seizure must meet federal constitutional standards. The Court said, "To hold otherwise would permit a situation where acts would violate the Fourth Amendment in Ohio which would not violate the Fourth Amendment in another state", *State v. Denning*, 32 Ohio Misc. 1 (Piqua, M. Ct., 1972).

Ohio courts have interpreted Article I, section 14, if used at all recently, in exact accordance with the Fourth Amendment.

ARTICLE I

Section 15

Present Constitution

Section 15. No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

Section 15 is derived from section 15 of Article VIII of the 1802 Constitution. The earlier version permitted imprisonment when the debtor refused to deliver his property to the creditor, after judgment, as prescribed by law.

There is no federal constitutional parallel to section 15.

Comment

An early Ohio case, *Spice and Son v. Steinruck*, 14 Ohio St. 213, (1863), held that the provision regarding fraud was not self-executing. Current Ohio statutes provide for debtor imprisonment after judgment under limited circumstances, including fraud in incurring the obligation or contracting the debt, removing property from the jurisdiction, or assigning or otherwise disposing of property with an intent to defraud creditors.

A number of cases have dealt with the distinction between debt and other obligations, for which imprisonment may be obtained for failure to pay. Among the latter are alimony and child support. (*Cook v. Cook*, 66 Ohio St. 566, 1902, and *State v. Ducey*, 25 Ohio App. 2d 50, Franklin County Ct. of A., 1970)

In a recent case, *Cincinnati v. DeGolyer*, 25 Ohio St. 2d 101 (1971), the Ohio Supreme Court ruled that a taxpayer may be imprisoned for a willful failure to pay a tax obligation, or for refusal, but not otherwise.

Although Ohio courts have upheld the practice of imprisoning one convicted of a criminal offense who is unable to pay a fine and court costs, the Supreme Court has outlawed this practice on the basis of the equal protection clause of the 14th Amendment. In *Williams v. Illinois*, 399 U. S. 235, (1970), the Court held that this practice, of imprisoning one beyond the maximum term for the offense or in lieu of a fine if imprisonment is not imposed for the offense, was unlawful discrimination because it imposed jail terms on the indigent whereas those who could afford the fine were not jailed or were not jailed for as long a term.

Following the *Williams* and subsequent Supreme Court decisions, the Ohio Supreme Court, in *In re Jackson*, 26 Ohio St. 2d 51 (1971), voided a court rule providing for holding a defendant in jail for nonpayment of a fine (credited at $10 per day) as long as failure to pay the fine was based on indigency and not refusal.

ARTICLE I

Section 16

Present Constitution

Section 16. All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

The first sentence of section 16 is an almost verbatim copy of its predecessor, Article VIII, section 7 of the Constitution of 1802. The original section, though, was not automatically included in the original draft of the Bill of Rights for the Constitution of 1851. It is not clear why this section was omitted, but its omission was noticed by a delegate who introduced a motion to include the original section in the new Bill of Rights. The motion carried among general laughter at the thought of being able to receive a speedy trial, and after some minor changes became what is now the first sentence of Article I, section 16.

The second sentence was added in 1912. A proposal to abrogate governmental immunity was made to the 1850-51 Convention, but was not adopted.

There is no federal constitutional parallel to this section as a whole, although both the Fifth and the 14th Amendments provide for due process of law. The relevant portions of these two amendments are as follows:

> Fifth — ". . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."
>
> Fourteenth — ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Comment: First Sentence

"Due process of law", as used in the 14th Amendment, expresses evolving concepts of justice and judicial processes, and applied them to the states on a one-by-one basis. These concepts are variously described as requiring "fair play" in judicial processes, restraining arbitrary or uncontrolled governmental action, or prohibiting governmental activity that

shocks the conscience or is oppressive, arbitrary or unreasonable in relationship to the individual's life, liberty, or property.

Due process is a set of principles that are "the very essence of a scheme of ordered liberty", *Palko v. Connecticut*, 302 U. S. 319 (1937). It is not limited to criminal cases, but is a requirement also of civil proceedings and in administrative law.

Article I, section 16 of the Ohio Constitution provides for an "open" court as well as for "due course of law". According to court interpretations, these are distinct and severable rights, although in certain cases, "open courts" is one aspect of due process in the sense of "public" trial as used in the Sixth Amendment of the United States Constitution and Article I, section 10, of the Ohio Constitution. It is also a specific right for which there is no direct federal parallel.

State, ex rel. Christian v. Barry, 123 Ohio St. 458 (1931), raised the issue of an "open" court. The plaintiff, a policeman, brought suit against several superiors who had dismissed him because of his violation of a departmental rule stating that no police officer could submit to the prosecutor or an attorney any case without permission. In violation of the rule, the plaintiff secured an attorney in a personal injury suit and consequently was fired. The Supreme Court ordered him reinstated, holding that the rule violated the guarantee that all courts be open, and every person have a remedy by due course of law for an injury done him. In *Armstrong v. Duffy*, 90 Ohio App. 233 (Columbiana Co., Ct. A., 1951), the National Brotherhood of Operative Potters sought to discipline several of its members who had gone to court to prevent certain national officers from continuing alleged illegal acts. The suits violated union rules. The court ruled against the union discipline holding such rules violated section 16, Article I.

In *Scripps Co. v. Fulton*, 100 Ohio App. 157 (Cuyahoga Co., Ct. A., 1955), the plaintiff sued a Common Pleas judge to prohibit him from excluding reporters from a felony case or at any other time the court was in session. The order had been given solely upon the request of an alleged felon that part of the trial be conducted in secret. Basing its reasoning on Article I, sections 10 and 16, the Court of Appeals held that, where there was no question of public morals, safety or health advanced or considered in making the order of exclusion, the court must be open. To permit trials of persons charged with a felony to be held in secret entirely upon the defendant's request would take from the court its most potent force in support of the impartial administration of justice according to law. The Court continued by stating that the open court is as necessary and important in the interest of supporting the administration of justice as in the protection of the right of a person on trial for a criminal offense.

"Due course of law" was designed to provide the same protections as the Fifth or 14th Amendment "due process" clauses. (*In Re Appropriation for Highway Purposes*, 104 Ohio App. 243 (Lorain Co., Ct. A., 1957))

In *State ex rel. Smilack v. Bushing*, 159 Ohio St. 259 (1953), the Court held that an individual cannot be committed, even temporarily, for mental disabilities without due process which must include evidence tending to prove insanity.

Due process also acts to limit legislative acts or the use of the police power. Laws must have a reasonable relation to proper legislative purpose, and cannot be arbitrary or discriminatory. In *Akron v. Chapman*, 160 Ohio St. 382 (1953), the issue was whether the city could use zoning laws to terminate a lawful nonconforming use in existence prior to the passage of the zoning laws involved. The Supreme Court held that the right to continue to use one's property in a lawful business in a manner not constituting a nuisance, which was lawful at the time it was acquired, is within

the protection of Article I, section 16, which provides that no man shall be deprived of life, liberty, or property without due course of law. In a similar case, the City of Columbus attempted to force improvements to be made in a dwelling that had previously been conforming, by the use of new housing regulations, *Gates Co. v. Housing Appeals Board of Columbus*, 10 Ohio St. 2d 48 (1967). The cost of the improvements would be equal to half the value of the building, as would the possible fines for a failure to make the improvements. There was no evidence to support an inference that the failure of the building to conform would constitute an imminent threat to the health, safety, morals, or welfare of the public. The Court ruled against the city, holding that Article I, section 16 protected the lawful nonnuisance use of property. The Court concluded that to hold otherwise would permit requiring improvements of any real property merely upon a legislative finding that the improvements are required to promote the public health, safety, or welfare, rather than upon a factual determination that continued use of the property without improvements immediately and directly imperilled the public health, safety, or welfare.

This section, like sections 1 and 19, with which this section must be read, is limited by the police powers of the state. The police power of the state extends to the protection of the health and safety of all persons, and the protection of all property within the state. It is within the range of legislative action to define the mode and manner in which everyone may use his own life or property so as not to injure others. By this general police power, persons and property are subject to restraints and burdens in order to secure the general comfort, health, and prosperity of the state. (*The Cincinnati, Hamilton, and Dayton Railroad Company v. Sullivan*, 32 Ohio St. 152 (1877)) A Toledo statute which limited the hours of grocery stores while expressly excluding other stores from the operation of the law, was held unconstitutional on the basis of due process, *Olds v. Klotz*, 131 Ohio St. 447 (1936), since the Court held that the regulation was not within the police power, having no substantial relation to the public health, safety, or welfare.

Courts cannot usurp the legislative function by substituting their judgment for that of the legislative body, particularly since governing bodies are better qualified in light of their knowledge of the situation. The courts will not interfere unless such power is exercised in such an arbitrary, confiscatory or unreasonable manner as to be in violation of constitutional guarantees, *Willott v. Village of Beachwood*, 175 Ohio St. 557 (1964).

A legislative enactment may be void as violating "due process" for failure to comply with the common law requirement that laws, to be valid, must be sufficiently certain and definite to permit courts to be able to enforce them and individuals to know their rights and obligations. A statute which either forbids or requires the performance of an act in terms so vague that men of common intelligence must guess at the meaning and differ as to its interpretation, violates the first essential for due process, *Chicone v. Liquor Control Commission*, 20 Ohio App. 2d 43 (1969).

"Persons" has a broad scope as defined by the courts in Ohio. It includes an enemy alien, who has the right to prosecute a civil action unless restrained by statute or executive order (*Lieberg et al. v. Vitangeli*, 70 Ohio App. 479 Stark Co. Ct. A., 1942). In *Williams v. Marion Rapid Transit, Inc.*, 152 Ohio St. 114 (1949), the Supreme Court held that it was natural justice to allow a child, if born alive and viable, to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of his mother. Being born and living, after having been injured as a viable fetus, qualifies the individual as a "person" within the scope of Article I, section 16.

Comment: Second Sentence

The doctrine of sovereign immunity — i.e. that a state cannot be sued without its consent — is one that legal historians have traced to outgrowths of the maxim, "The King can do no wrong". "The real basis of the king's immunity from suit," writes an Ohio commentator,[1] "was the impossibility of enforcing a judgment against him".

The sovereign immunity that was inherited by American states has thus come to be viewed as immunity from unconsented-to suits. The explanation for adoption of the doctrine following the American Revolution is said to be one of practicality — the necessity of protecting economies of the early states, which were at that time faced with huge debts and slim revenues. The Ohio Constitutions of 1802 and 1851 were silent on the question of governmental immunity, but case law shows that it was recognized from an early date.

After lengthy debate, the Constitutional Convention of 1912 proposed the addition to section 16 of the second sentence, reading "Suits may be brought against the state, in such courts and in such manner, as may be provided by law." It was subsequently adopted by the people. Although the 1912 debate on the question of sovereign immunity indicates that the delegates thought the section gave the people the *right* to bring suit against the state, the *method* by which such suits could be brought had to be established by the legislature. The section was apparently intended to end the practice of petitioning the legislature for a settlement of claims against the state.

The Ohio Supreme Court consistently held that the provision for suits against the state is not self-executing. (See, for example, *Krause Admr. v. State*, 31 Ohio St. 2d 132 (1972)) And, until recently, the General Assembly failed to provide for the bringing of suits against the state except in specific instances, and the method of settling claims against the state remained subject to legislative action, either by award in small claims by the Sundry Claims Board (if money was appropriated to cover the awards) or by direct legislative action, subject to gubernatorial veto.

In 1974, the General Assembly created a Court of Claims, waived its sovereign immunity and gave consent to be sued in the Court of Claims in both contract and tort claims, subject to the limitations set forth in the act.

To some degree, the state's immunity from suit has extended to political subdivisions in Ohio, and the new Court of Claims act does not waive immunity with respect to political subdivisions. The General Assembly has permitted suits against various political subdivisions for various types of actions.

ARTICLE I

Section 17

Present Constitution

Section 17. No hereditary emoluments, honors, or privileges, shall ever be granted or conferred by this State.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

Article I, section 17 is another original section of the Constitutions of 1802 and 1851. First adopted as part of the Constitution of 1802, after

1. Comment, "Ohio Sovereign Immunity: Long Lives the King", 28 Ohio St. L. J. 75 (1967).

the deletion of one word and the alphabetizing of "emoluments, privileges, or honors," it was made a part of the Constitution of 1851 and has not been changed.

This section is similar to Article I, section 10, cl. 8 of the United States Constitution. The United States Constitution prohibits the grant of any title of nobility by the United States. This is self-explanatory, and courts have further held that this clause prohibits American-born citizens from adding words to their names which have noble connotations, as "von"; *Application of Jama*, 272 N.Y.S. 2d 677 (Civil Ct. 1966). This section in the Ohio Bill of Rights was designed to serve the same purpose "so that there shall be no Lord Stanbury, nor Earl Nash, no Baron Von Groesbuck, no Count Von Mason", nor any person holding hereditary privileges conferred by the State, 2 *Ohio Convention Debates* 335 (1851).

No cases construing section 17 have been found.

ARTICLE I

Section 18

Present Constitution

Section 18. No power of suspending laws shall ever be exercised, except by the General Assembly.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

With minor changes, section 18 as adopted in 1851 is section 9 of Article VIII of the 1802 Constitution. No changes have been made since 1851.

There is no federal parallel.

Comment

Few instances in which this section is cited have been located. In an early case, *Fox v. Fox*, 24 Ohio St. 335 (1873), it was determined that the power given to certain officials to issue permits providing an exception to a law (in this case, a law prohibiting certain animals from running loose) did not violate this section. Giving the Civil Service Commission the power to make and enforce rules was not an unlawful delegation of legislative power and did not violate section 18 (*Green v. State Civil Service Commission*, 90 Ohio St. 252, 1918). The power of a city to enact ordinances falling within its home rule powers, which ordinances are contrary to a state law, does not violate this section (*Hile v. City of Cleveland*, 107 Ohio St. 144, 1923).

ARTICLE I

Section 19

Present Constitution

Section 19. Private property shall ever be held inviolate but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money; and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

The predecessor of this section was Article VIII, section 4 of the Constitution of 1802, which provided that private property would be held inviolate but subservient to the public welfare, and that compensation would be paid to the owner of any property condemned. In 1851, the 1802 section was felt to be inadequate to protect the property rights of the people. Eminent domain, it was believed, was used for personal enrichment. The abuse arose because of the absence of guidelines specifying when property could be taken, who was to determine the amount of compensation, when such compensation was to be paid and how possible benefits accruing to the property owner due to public improvements should affect his compensation. The framers of the 1851 Constitution directed their efforts to resolving these issues and added new language to the old section to form what is now section 19. The section has remained unchanged since 1851.

The last clause of the Fifth Amendment to the Federal Constitution provides: ". . . nor shall private property be taken for public use without just compensation."

Comment

The last clause of the Fifth Amendment, requiring just compensation to be paid for private property taken for public use, has been made binding on the states through the due process clause of the 14th Amendment. (*Griggs v. Allegheny Co.* 369 U. S. 84, 1962)

The Federal Constitution does not confer on the federal government (nor, of course, on the states) the right of eminent domain — that is, the right to take property, or to authorize others to take property, without the owner's consent, for public use. However, the right to take is an inherent right of sovereignty and is an attribute of both the federal and the state governments without express constitutional language. The United States can exercise its right of eminent domain without the consent of the state in which the land is located. (*Monongahela Nav. Co. v. United States*, 148 U. S. 312, 1893). It may not only take land for governmental purposes but may also authorize the taking of land by a private corporation for public uses within the sphere of federal control, such as interstate commerce.

Eminent domain power is necessary for the independent existence and perpetuation of government, *Kohl et al. v. United States*, 91 U. S. 367 (1875). The power is also very extensive, and may be used to aid in accomplishing any permissible governmental enterprise, *Berman et al. Executors v. Parker*, 348 U. S. 26 (1954).

In early cases, the property had to be touched for there to be a taking. More recently, the trend has been away from the physical touching or taking requirement, although blocking access or interfering with certain riparian rights might not result in compensation. However, an owner has a right to be free from certain kinds of annoying activity from occupants of other land, and if the occupant is the government and if the harm is serious and peculiar to the plaintiff, the owner can receive compensation even though there has been no touching of his land, *Richards v. Washington Terminal Company*, 233 U. S. 546 (1914).

Compensation has come to be regarded as a fundamental principle of law by the courts, even in the absence of any express constitutional requirement. The Fifth Amendment, though, provides this express requirement for the federal government and this principle has been applied to all the states through the due process clause of the Fourteenth Amendment. The extent of compensation is determined by the highest and best

use rule; the market value of the land determined by an appraisal of its value for the best use to which the land could be used. In *Goodlin v. Cincinnati and Whitewater Canal Co. et al.*, 18 Ohio St. 169 (1868), the court ruled that the value for possible use had to be considered rather than merely present value for present use. Later, following this same reasoning, the Supreme Court of the United States ruled that the inquiry into the value of the land should go beyond its present value for the uses to which it was being put and consider its worth from its availability for valuable uses, *Mississippi and Rum River Boom Co. v. Patterson*, 98 U. S. 403 (1878).

The Ohio provisions restrict the freedom of local and state governmental bodies in their actions by placing limitations on their ability to condemn beyond those required by the Fifth Amendment and the requirements of due process.

In *Pontiac Improvement Co. v. Bd. of Commissioners of Cleveland Metropolitan Park District*, 104 Ohio St. 447 (1922), the plaintiff sought to enjoin park commissioners appropriating his land. There were two parcels involved, and the commissioners sought to obtain outright possession of one-half of the first and controls over the remainder and easements over the second. The court held that, under an appropriate statute, a park board had the power to acquire land by appropriation and that either a fee or a lesser interest could be acquired. However, the rights and privileges to be secured in the second parcel were not certain and their exercise would be entirely too indefinite. When an interest less than a fee is sought to be acquired, the owner should be appraised of the exact extent of the interest involved and this lesser interest to be taken must be described with sufficient accuracy to enable a jury to assess the compensation to be paid. Section 19 contemplates physical possession and use, not the regulatory power exercised under the police power, which is different from eminent domain. All interference with an individual's use of his land, however, does not constitute a seizure requiring compensation and may be a legitimate exercise of the police powers. A statute regulating billboards, irrespective of ownership or location, was upheld in 1964, in *Ghaster Properties, Inc. v. Preston*, 176 Ohio St. 425.

There are other types of interference with the use and enjoyment of property that are not of a regulatory or prohibitory nature which are not violative of Article I, section 19. In *McKee v. City of Akron*, 176 Ohio St. 282 (1964), the plaintiff brought suit against the city for damages to her property from odors arising from a sewage treatment plant which she alleged constituted a compensable taking. The Court held that the section limited the right to compensation to cases where private property is *taken* for public use, and that if the framers of the Ohio Constitution had intended to provide for compensation whenever property is damaged, they would have provided so in unmistakable language.

Physical displacement, though, is not always necessary. A person may be deprived of his property by an invasion of the airspace above his property because a property owner has the right to so much of the airspace above his property as he might reasonably use. If flights over private land are so low and frequent that they constitute a direct and immediate interference with the enjoyment and use of the land, there is a "taking" in the constitutional sense of an air easement for which compensation must be made (*State ex rel. Royal v. City of Columbus*, 3 Ohio St. 2d 154, 1965).

A later case succinctly summarized the problem of damage (*State ex rel. Frejes v. City of Akron*, 5 Ohio St. 2d 47, 1966). The case involved damage caused by vibrations from nearby road construction. The damage, it was alleged, constituted a *pro tanto* taking. However, the Court held

that construction of public improvements often results in the lessening of the value of nearby property; this was not a taking but rather *damnum absque injuria.* Citing *McKee* and its emphasis on the "unmistakable language" of Article I, section 19, the Court noted that the constitutional phrase "taken or damaged" found in some constitutions is much broader and more comprehensive in the scope of its protection than "taking" where it is used as in the Ohio Constitution. The Ohio Constitution did not provide the fuller protection that would be afforded by the words "taken or damaged".

A direct encroachment upon land which subjects it to public use that restricts or excludes the dominion of the owner is a compensable taking. For adjoining property owners, any use of land for a public purpose which inflicts an injury upon adjacent land, and deprives the owner of a valuable use if it would be actionable if caused by a private owner, is a taking within the meaning of the Constitution. (*Lucas et al. v. Carney et al. Bd. of County Commissioners of Mahoning County,* 167 Ohio St. 416, 1958) Section 19 is an available protection in a court against any actual confiscation of property made under a power of assessment, *Rogers v. Johnson,* 21 Ohio App. 292 (Athens Co. Court of Appeals, 1926). In *Domito v. Maumee* (140 Ohio St. 229, 1942) the assessment was substantially equal to or greater than the value of the property. No advantage accrued and there was no justification for the assessment. A special assessment against property in excess of its value after the improvement is made is not an assessment at all, but constitutes a taking of property for public use without compensation.

Section 19 operates as a limitation of the sovereign power of eminent domain in the same manner as the Fifth Amendment by requiring compensation, and further restricts this power by requiring payment or deposit before land may be taken for public use except in certain specified exceptions. "Quick take" is available only in those circumstances. (*Biery v. Lima* 21 Ohio App. 2d 154, Allen Co., Ct. A., 1969, *Worthington v. Carskadon,* 18 Ohio St. 2d 222, 1969) The City of Columbus attempted to use "quick take" by depositing the money as security before acting, and the owner withdrawing the money; on this basis, the city claimed to have the authority to proceed under Article I, section 19. The court (*Cassady v. Columbus,* 31 Ohio App. 2d 100, Fr. Ct. Ct. A., 1972) said that only under the specific circumstances outlined in the section would a quick take be valid. Depositing money is not enough; the amount may or may not adequately compensate the property owner, and this would not be known until a jury returned its appraisal. The deposit of the money and its withdrawal, though, acted to remove the owner's power to maintain full property rights.

The Ohio rule for valuation in land appropriation proceedings is not what the property is worth for any particular use, but what it is worth generally for any and all uses for which it might be suitable including the most valuable use to which it would reasonably and practically be adopted (*Sowers v. Schaeffer,* 155 Ohio St. 454, 1951).

Although damages are not recoverable in Ohio, where the value of a piece of property taken by appropriation has depreciated because of the actions of the authority in appropriating surrounding property and destroying the buildings with an attendant loss of income to and the deterioration of the property remaining, the owner is entitled to compensation which reflects the value of the property before its depreciation. (*Bekos v. Masheter, Dir. of Highways,* 15 Ohio St. 2d 15, 1968) In somewhat similar situations, a court held that where depreciation had resulted from changing government purposes and appropriations, the value would be estab-

lished at the time prior to the commencement of appropriation proceedings. (*In Re Appropriation for Highway Purposes*, 18 Ohio App. 2d 116, Montgomery Co., Ct. A., 1969)

Compensation must be assessed by a jury, although the right to a jury determination may be waived. Further, although the legislature may not limit the right to a jury trial, it can establish procedures by which a jury appraisal is obtained. In *Cincinnati v. Bossert Machine Co.*, 16 Ohio St. 2d 76, 1968, the Court held that the operation of section 163.08 of the Revised Code which limits the length of time available to answer an appraisal by the state for appropriation purposes, to refuse their offer and to seek a jury determination, was valid.

Zoning regulations often raise due process and equal protection questions involving the Fifth and 14th Amendments of the United States Constitution and Article I, section 1, 2, 16, 19 of the Ohio Constitution. The problems in Ohio, though, are more specifically related to Article I, section 19, so these issues will be considered here but within the framework of due process. Do zoning regulations constitute a "taking"? *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926) was the first major zoning case decided by the Supreme Court of the United States. By 1919 the Supreme Court had upheld governmental power to set height limits and to eliminate near nuisance uses for particular zones or areas. It had also indicated that the imposition of restrictions could not be delegated to neighbors and had held that zoning could not be used, at least openly, to discriminate on the basis of race. *Euclid* involved a number of large contiguous parcels of land suited for industrial development, but zoning had restricted this growth to a small area while the remainder had been zoned for less profitable uses. Ambler attacked the zoning as a violation of their property rights. The question involved was the same for both the Ohio and the United States Constitutions — whether the city's comprehensive zoning regulations, operating under the police power, were unreasonable and confiscatory in regulating the use of the plaintiff's land. In upholding the zoning ordinance, the Supreme Court said that Euclid was a separate municipality and as such had the right to exercise its police power to relegate industries to locations separated from residential districts. Segregation of the land into residential, business, and industrial areas had many more benefits for the community. These reasons, it continued, were sufficiently cogent to preclude it from saying that the zoning laws were clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, general welfare and, in the absence of such a showing, the court could not find against Euclid. Succeeding cases more clearly defined the extent of the new decision. Then, for about 30 years, the Supreme Court added nothing new to its position on zoning until, in dictum in *Berman et al. Executors v. Parker*, 348 U. S. 26 (1954), Justice Douglas suggested that the government had a legitimate concern in the beauty of cities and that aesthetics might be one criterion used to establish the legitimacy of governmental use of the police power. More recently, in *Village of Belle Terre v. Boraas*, 416 U. S. 1 (1974), the Supreme Court upheld a New York village ordinance that restricted land use to one-family dwellings with certain exceptions. The ordinance, in defining a family, prohibited occupancy by more than two unrelated individuals and on this basis ordered Boraas to comply and to remove extra people from the house he had leased to students. He refused claiming that he was being deprived of liberty and property without due process. The Court did not agree, saying that the definition of a family and this ordinance were within the realm of economic and social legislation, where the legislature had drawn lines in the exercise of its discretion, and that these discretionary de-

cisions would be upheld if they were not unreasonable or arbitrary and bore a rational relationship to a permissible governmental objective.

Ohio courts have followed the lead of the United States Supreme Court. In 1942, the Village of Upper Arlington sought to prevent the building of a church in the village by the denial of a permit to build in a residential district (*The State, Ex Rel. The Synod of Ohio of the United Lutheran Church in America v. Joseph et al., Commissioners of Village of Upper Arlington et al.*, 139 Ohio St. 229, 1942). The Ohio Supreme Court though, ruled in favor of the church. Noting that *Euclid* decided nothing with regard to the exclusion of public or semi-public humanitarian uses like churches, schools and libraries, the Court ruled that the power to interfere with the general rights of the landowner by use of zoning restrictions was not unlimited, and that the act enabling municipalities to adopt comprehensive zoning plans clearly indicated a legislative recognition that the restrictions upon uses which could be imposed were limited to those designed to achieve some objective within the scope of the police power. Therefore, restrictions could not be imposed if they did not bear a substantial relationship to the health, safety, morals or welfare of the public. The village's reasons for the attempted exclusion of the church could not be justified on the basis of the protection of health, safety, or welfare.

Even though *Joseph* held that there are limits to the police powers, these powers are extensive. The regulation by a municipality of the use of property within its borders is within the Ohio constitutional powers of local self-government, including its police powers. The exercise of this power does not create any obligation to provide for any particular use nor can a court question the laws on the grounds of inexpediency and the question of reasonableness is, in the first instance, for the determination of the council which enacted it, *Valley View Village v. Proffett*, 221 F. 2d 412 (6th Cir. 1955). In *Willott v. Village of Beachwood*, 175 Ohio St. 557 (1964), the Court in finding for the village, said that, where a municipal council makes a determination of land-use policy which involves considering the control, burden and volume of traffic, the effect of the policy upon land values, the revenues produced, and the use consistent with the first interests of the general welfare, prosperity and development of the whole community, the courts are without authority to interfere. A court cannot usurp the legislative function by substituting its judgment for that of the legislative body. The power of a municipality to establish zones, to classify property, to control traffic, and to determine land use policy is a legislative function not to be interfered with by the courts unless such power is exercised in such an arbitrary, confiscatory or unreasonable manner as to be in violation of constitutional guarantees.

ARTICLE I

Section 19a

Present Constitution

Section 19a. The amount of damages recoverable by civil action in the courts for death caused by the wrongful act, neglect, or default of another, shall not be limited by law.

Commission Recommendation

The Commission has appointed a special committee to study civil juries and the question of reduction of the amount of verdicts in civil cases.

History; Comparison with Federal Constitution

Section 19a was added by the 1912 Convention and adopted by the people. No changes have been made since then. There is no federal counterpart.

Comment

In both the English and American common law, no right existed at all for the recovery of damages founded upon the tortious death of a person. While, of course, one could recover actual, special, and exemplary damages for injuries to his person, it was consistently held that a victim's cause of action did not survive his death. The English law was first to recognize a cause of action for damages after the victim's death when, in the mid-nineteenth century, a statute was adopted allowing surviving relatives of a deceased whose death was wrongfully caused to recover for their losses.

After 1850, wrongful death statutes became increasingly common and presently they exist in one form or another in every state. Two basic types of acts are found, survival acts and death acts. The survival acts provide for a decedent's personal representative to recover damages suffered by the victim during his life. Death acts recognize a new cause of action after death for loss to the decedent's estate or his surviving relatives. The Ohio wrongful death statute (section 2123.01 *et seq.* of the Revised Code) is a death act for the benefit of the surviving spouse, the children, and other next of kin.

By the time of the Convention of 1912, Ohio had adopted its death act, but the legislature had placed a limitation upon the amount of damages recoverable regardless of damages shown. At the Convention, a rather vigorous debate occurred over whether or not a constitutional amendment prohibiting such limitations was advisable.

Proponents of the provision which eventually became Article I, section 19a asserted several arguments in support of their position. A basic rationale put forward suggested that the primary purpose of a statute allowing persons who were dependent upon a victim killed by the wrongful acts or omissions of another was to keep such dependents from becoming public charges. Advocates of prohibiting limitation upon recovery argued that a limitation prevented any reasonable consideration of future increases in the living expenses of the victim's survivors. It was even suggested that limiting recovery to actual pecuniary loss not to exceed a stated amount had a direct and highly undesirable result in shamefully and ridiculously small compensation for the loss of human life. Proponents of the section said that limiting compensation to pecuniary loss only denied full compensation and offended the sense of natural justice.

The delegates who opposed adoption of a prohibition upon limiting the amount of recovery in wrongful death actions asserted that the potential of unlimited liability for contributing to the wrongful death of an employee would greatly discourage manufacturing businesses. However, this argument loses its force in the light of section 35 of Article II which provides for workmen's compensation in which recovery for death is limited. Opponents also argued that the possibility of unlimited loss would cause the necessary premiums on casualty insurance to be so exorbitant as to make coverage impractical.

Perhaps because of the very direct language of Article I, section 19a, the provision has not been tested by the General Assembly, nor been the subject of any substantial court interpretation. The brevity and clarity of the statement in section 19a has obviated the need for extensive construction.

Potential Effects on "No-Fault" Insurance Programs

Significant attention, in both the legal profession and the general public, has been devoted in recent years to proposed and enacted changes in casualty and liability, particularly automobile, insurance laws from traditional systems to plans which have been popularly styled "no-fault" insur-

ance. There are several fundamental approaches to no-fault insurance, but the basic proposition is to have an injured party's own insurance compensate him for his damages up to a set dollar amount and to abrogate the right to seek redress in court for damages less than that set amount, or "threshold". The cause of action for damages above the threshold amount survives in a "no-fault" system.

When no-fault insurance with its threshold concept is placed in juxtaposition to the Article I, section 19a prohibition upon statutory limitation of the amount recoverable in an action for wrongful death, the question arises as to whether or not the abrogation of the right to sue when damages do not exceed the threshold amount is a violation of the constitutional bar on limiting recovery. If the damages arising from the wrongful death are less than the threshold amount imposed by the insurance statute, a conflict would occur. Many no-fault proposals solve this problem by preserving the cause of action in every case involving a wrongful death, regardless of the amount of damages.

ARTICLE I

Section 20

Present Constitution

Section 20. 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.

Commission Recommendation

The Commission recommends no change in this section.

History; Comparison with Federal Constitution

Section 20 had its origins in Article VIII, section 28 of the 1802 Constitution, although the first part of the section is substantially different from the 1802 version. The result is that Article I, section 20 provides two guarantees, similar to the Ninth and Tenth Amendments of the United States Constitution.

The Ninth Amendment to the Federal Constitution reads:

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others maintained by the people.

The Tenth Amendment is as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

Comment: The Ninth Amendment

Ohio has few cases exploring the meaning of the first part of section 20, perhaps because cases involving the Ninth Amendment are more recent than those interpreting other sections of the Federal Bill of Rights, and are applied to the states through the 14th Amendment.

Ninth Amendment cases are varied in subject matter, and are beyond the scope of this report. Recent cases of interest have dealt with subjects such as the right of privacy, enunciated in *Griswold v. Connecticut*, 381 U.S. 479 (1964), and further explored in the abortion decision, *Roe v. Wade*, 410 U.S. 113 (1973). The latter held that the right to privacy is not absolute. Once again, the interests of the state and those of the individual must be balanced.

Comment: The Tenth Amendment

The Tenth Amendment of the United States Constitution reserves those powers not delegated to the federal government to the states and to the

people. A full explanation of its working is unnecessary since it exists entirely to protect state rights against their infringement by the federal government. Where the Tenth Amendment is concerned with the balance between state and federal rights, Article I, section 20, cl. 2 is concerned with the balance between private and state rights.

In dealing with the question of delegation of power, the Ohio Supreme Court, in *C., W., and Z Railroad Co. v. Commissioners of Clinton Co.*, 1 Ohio St. 77 (1852) said that all power resides with the people, which may be delegated. The manner and extent of this delegation is contained in the Constitution and all government officers and agencies must look to this document as the source of any authority to exercise governmental powers. To prevent the enlargement of this power, Article I, section 20 declares that nondelegated powers remained with the people.

ARTICLE XIII

Section 5

Present Constitution

Section 5. No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation: which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law.

Commission Recommendation

The Commission recommends that Section 5 of Article XIII be amended as follows:

Section 5. No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation: which compensation shall be ascertained by a jury ~~of twelve men~~ in a court of record, as shall be prescribed by law.

History; Comparison with Federal Constitution

Section 5 of Article XIII, dealing with appropriation of right of way by corporations, was adopted in its present form by the 1851 Convention, to curb the abuses of the commission system of assessing the value of condemned land then in use. Under this prior system, the value of land to be condemned was fixed by three commissioners appointed by the court and there was no means of appeal available. Many landowners felt that they had been cheated by pro-railroad commissioners appointed by pro-railroad courts and that they were left completely without recourse.

Section 5 was designed to alleviate these problems by providing for the determination of property values by a twelve man jury in a court of record and payment of the value prior to the taking. The convention debates indicate that the delegates intended the phrase "in a court of record" to provide for a hearing in accordance with the due process and accompanied by the right of appeal. Some discussion was heard in the floor debates that section 5 might be too pro-property owner and would thus impede capital improvements. Other delegates greatly feared the abuses of private corporations and their ability to influence the legislature.

It was argued that there is no difference in a taking by a public body and a taking by a private corporation, and that they could be governed

by the same provision (i.e., section 19 of Article I). This argument, however, did not prevail.

There is no comparable federal provision.

Comment

The state could grant to private corporations the power of eminent domain as part of its inherent governmental power, and this section is intended only to place limits on the corporate use of such power. The basic elements of eminent domain are discussed in the comments to section 19 of Article I, and it is unnecessary to repeat them here. Since the state can take property only for the public use or benefit, it cannot confer a greater right on private persons, so whatever restrictions are placed on the state are also applicable to corporations which derive their power from the state.

The section 5 requirement that a jury consist of twelve men uses the word "men" in the generic sense and does not exclude women from sitting on condemnation juries. *Thatcher v. Pennsylvania, Ohio and Detroit Road Co.*, 121 Ohio St. 205 (1929)

Because a delegation of the eminent domain power is a delegation of sovereign power and contravenes the rights of property owners, such delegations are strictly limited to their stated purposes and terms. *Currier v. Marietta and Cincinnati Railroad Co.*, 11 Ohio St. 228 (1860) for example, in *Iron Railroad Co. v. City of Ironton*, 19 Ohio St. 299 (1869), the Ohio Supreme Court held that the wharf owned by the railroad was not within the specific purpose of its grant of eminent domain and not entitled to the special exemptions which it granted. In *Currier, supra*, the court held that a grant of eminent domain to build a railroad did not, without special provisions to that effect, permit the company to condemn land for temporary tracks. In *Little Miami Railroad v. Naylor*, 2 Ohio St. 236 (1853), the court, again narrowly construing a delegation of eminent domain, held that a grant to build a railroad between two named points did not give the railroad the right to relocate the tracks once they had been initially located.

The language of section 5 can be seen to be elaborate compared to that of section 19 of Article I.

However, after examination of the differences, the Commission concluded that, although section 5 of Article XIII gives more explicit protections to the property owner than does section 19 of Article I, these differences have been almost entirely eliminated by court decisions. The Commission could see no reason to recommend either a repeal of the section nor any changes in its provisions, except to recommend the removal of the words "of twelve men" as a requirement for a jury under section 5. The committee believes that the number of persons to serve on a jury should not be fixed at 12, but should be more flexible as is the case for other civil juries.

ARTICLE V

Section 1

Present Constitution

Section 1. Every citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state six months next preceding the election, and of the county, township, or ward, in which he resides, such time as may be provided by law, shall have the qualifications of an elector, and be entitled to vote at all elections.

Every citizen of the United States being twenty-one years of age who is not entitled to vote at all elections shall be entitled to vote for the choice of electors for President and Vice President of the United States if he shall have been a resident of the state, county, township or ward in which he desires to vote such time as may be provided by law, provided that he is not entitled to vote for the choice of electors for President and Vice President of the United States in any other state.

Commission Recommendation

Section 1. Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, in which he resides, such time as may be provided by law, has the qualifications of an elector, and is entitled to vote at all elections.

Commission Recommendation

The Commission recommends the amendment of Section 1 of Article V as follows:

Section 1. Every citizen of the United States, of the age of ~~twenty-one~~ EIGHTEEN years, who ~~shall have~~ HAS been a resident of the state, ~~six months next preceding the election, and of the~~ county, township, or ward, in which he resides, such time as may be provided by law, ~~shall have~~ HAS the qualifications of an elector, and ~~be~~ IS entitled to vote at all elections.

~~Every citizen of the United States being twenty-one years of age who is not entitled to vote at all elections shall be entitled to vote for the choice of electors for President and Vice President of the United States if he shall have been a resident of the state, county, township or ward in which he desires to vote such time as may be provided by law, provided that he is not entitled to vote for the choice of electors for President and Vice President of the United States in any other state.~~

History and Background of Section

The elective franchise was granted in the Ohio Constitution of 1802[1] to white male inhabitants above 21 years of age who resided in the state for one year prior to an election and were eligible to pay a state or county tax. An elector was permitted to vote only in the county or district in which he actually resided at the time of the election. The 1802 Convention Reports indicate that a motion to strike the word "white" from the Constitution was defeated.[2] By the time of the 1850 Constitutional Convention, sentiment for extending the franchise to non-whites and women had strengthened. The report of the Standing Committee on the Elective Franchise retaining the restriction of suffrage to white males was debated extensively; the movement for female suffrage had support from some delegates, especially from the northern and eastern counties of the state, although the movement for non-white suffrage had fewer supporters. Section 1, as adopted by the convention, restricted the franchise to white males, aged 21, who resided in the state for one year preceding an election and resided in their county, township or ward such time as was provided by law. The initial report of the Standing Committee on the Elective Franchise did not include as a condition to vote the eligibility to pay a state or county tax, as was required in the 1802 Constitution. There was no discussion of why the taxation requirement was omitted.

The 1873-74 Constitutional Convention also considered extending suffrage to women, non-whites, and to aliens who had declared their intentions to

[1] Constitution of Ohio, 1802, Article IV, Section 1.
[2] 1802 Constitutional Convention page no. 21 as reprinted in *The Historical Magazine*, July 1869.

become citizens of the United States. The female suffrage movement had support and opposition from all parts of the state, and some delegates proposed letting women who would be eligible voters were they males decide the issue, but the proposal was defeated by the convention.[3] In the post-Civil War era, pro-Negro sentiment influenced the delegates to remove the restriction of the vote to "white" males. Several years earlier, the Fifteenth Amendment to the United States Constitution, prohibiting disfranchisement on the basis of race, creed, color, or previous condition of servitude, had been adopted. The rejection of the proposed Ohio Constitution by the voters in 1874 left the language restricting suffrage to white males intact.

The extension of the vote to non-whites and females was again considered by the 1912 Constitutional Convention. A proposal to submit female suffrage to a referendum by women alone was again defeated.[4] Two amendments proposed by the convention — one restricting the vote to males of requisite age and residence and omitting "white", and one enfranchising all state citizens meeting the age and residency requirements — were both defeated in 1913 by the electors. In 1920, the Nineteenth Amendment to the United States Constitution was adopted, prohibiting the denial or abridgement of the right to vote to United States citizens on account of sex. Article V, Section 1 was finally amended in 1923 to remove "white" and "male".

The second paragraph of present Section 1 of Article V, providing for the election of President and Vice-President of the United States by electors who are not entitled to vote at all elections, was added in 1957. In 1971, the section was further amended to provide for a residency requirement of six months rather than one year.

Effect of Change

The Commission proposal reduces the age requirement for voting from twenty-one years to eighteen years, deletes the six month residency requirement, and omits the provision enabling persons not entitled to vote at all elections to vote for President and Vice-President of the United States. Grammatical changes are made to conform with the rules of bill drafting in Ohio.

Rationale for Change

The provision of Section 1 that sets twenty-one as the minimum age to vote has been rendered unconstitutional by the Twenty-Sixth Amendment to the United States Constitution, ratified in 1971. It provides, "The right of the citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." Durational residency requirements for voting were held unconstitutional as violating the equal protection clause of the Fourteenth Amendment to the United States Constitution in *Dunn v. Blumstein*, 405 U.S. 330, 92 S. Ct. 995 (1972). Ohio's six month state residency requirement was specifically ruled unconstitutional in *Schwartz v. Brown*, by the United States District Court for the Southern District of Ohio in Civil Action 72-118 on August 7, 1972.

The Elections and Suffrage Committee considered recommending the repeal of Section 1 entirely, since it probably grants no power to the General Assembly that it does not already have, but concluded that it should be retained because of the importance of stating the basic right to vote in the Constitution. In addition, the Constitution makes reference elsewhere to the qualifications of an elector as a prerequisite to holding public office, and the committee felt that it was necessary to retain a statement of the qualifications in Section 1. Therefore, the recommendation is to retain the section but lower the voting age to eighteen and

[3]Debates, Ohio Constitutional Convention 1873-74, Vol. II, Pt. 3, p. 2808.
[4]Proceedings and Debates of the 1912 Ohio Constitutional Convention, Vol. II, p. 1856.

remove reference to a durational residency requirement. A state may impose a reasonable length of time for registration — perhaps thirty days. The recommendation gives the legislature the flexibility to impose residency requirements that are in accord with the requirements of the Federal Constitution as interpreted.

The second paragraph of Section 1 provides that if an elector does not qualify to vote for state and local officials, he may nevertheless be qualified to vote for President and Vice-President, in Ohio, if he has fulfilled the residency requirements provided by law. Since durational residency requirements have been declared unconstitutional, different residency requirements for voting in state, local and federal elections are no longer needed.

Intent of the Commission

The Commission, recognizing the importance of stating the basic right to vote in the Constitution, believes that Section 1 of Article V should conform with the Twenty-Sixth Amendment to the United States Constitution, and with judicial decisions on residency requirements. Commission members agree that reasonable residency requirements may be desirable to enable potential voters to register.

ARTICLE V

Section 2

Present Constitution

Section 2. All elections shall be by ballot.

Commission Recommendation

No change.

Commission Recommendation

The Commission recommends that no change be made in present Section 2 of Article V.

History and Background of Section

The Ohio Constitution of 1802 provided for elections to be by ballot in Article IV, Section 2. The 1851 Ohio Constitution retained the same language in Article V, Section 2. Court interpretation of the provision has occurred on two issues. In *State ex rel. Bateman v. Bode,* 55 Ohio St. 224, 45 N.E. 195 (1896), the Court affirmed that the discretion to prescribe the form of the ballot resided in the General Assembly. The question whether the constitutional requirement for elections by ballot prohibited the use of voting machines was resolved in *State ex rel. Automatic Registering Mach. Co. v. Green,* 121 Ohio St. 301, 168 N.E. 131 (1929). In that case, the Court interpreted "ballot" to designate a manner of conducting elections to insure secrecy as opposed to viva voce vote, concluding that the use of voting machines was not in violation of Article V, Section 2.

Rationale for Retaining Section

The Ohio Constitution states the fundamental principle of the secret ballot in Article V, Section 2, permitting electors to express their views on election matters without fear of retaliation. The Ohio Supreme Court has held that the use of voting machines conforms with the constitutional requirement for a secret ballot. The Commission believes that this fundamental principle is a proper matter for the Ohio Constitution and should be retained.

ARTICLE V
Section 2a

Present Constitution

Section 2a. The names of all candidates for an office at any general election shall be arranged in a group under the title of that office, and shall be so alternated that each name shall appear (in so far as may be reasonably possible) substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs. Except at a Party Primary or in a non-partisan election, the name or designation of each candidate's party, if any, shall be printed under or after each candidate's name in lighter and smaller type face than that in which the candidate's name is printed. An elector may vote for candidates (other than candidates for electors of President and Vice-President of the United States) only and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate.

Commission Recommendation

Section 3. The names of all candidates for an office at any election shall be arranged in a group under the title of that office. The general assembly shall provide by law the means by which ballots shall give each candidate's name reasonably equal position by rotation or other comparable methods to the extent practical and appropriate to the voting method used. At any election in which a candidate's party designation appears on the ballot, the name or designation of each candidate's party, if any, shall be less prominent than the candidate's name. An elector may vote for candidates (other than candidates for electors of President and Vice-President of the United States) only and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate.

Commission Recommendation

Section ~~2a~~ 3. The names of all candidates for an office at any ~~general~~ election shall be arranged in a group under the title of that office ~~; and shall be so alternated that each name shall appear (in so far as may be reasonably possible) substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs~~. THE GENERAL ASSEMBLY SHALL PROVIDE BY LAW THE MEANS BY WHICH BALLOTS SHALL GIVE EACH CANDIDATE'S NAME REASONABLY EQUAL POSITION BY ROTATION OR OTHER COMPARABLE METHODS TO THE EXTENT PRACTICAL AND APPROPRIATE TO THE VOTING PROCEDURE USED. ~~Except at a Party Primary or in a non-partisan election.~~ AT ANY ELECTION IN WHICH A CANDIDATE'S PARTY DESIGNATION APPEARS ON THE BALLOT, the name or designation of each candidate's party, if any, shall be ~~printed under or after each candidate's name in lighter and smaller type face than that in which the candidate's name is~~ printed LESS PROMINENT THAN THE CANDIDATE'S NAME. An elector may vote for candidates (other than candidates for electors of President and Vice-President of the United States) only and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate.

History and Background of Section

Section 2a of Article V was added to the Ohio Constitution in 1949, making Ohio the only state to provide for rotation of candidates' names on the ballot in its Constitution. In addition to the rotation feature, the section also requires that candidates be listed by office on the ballot and that the voter vote for each candidate separately, except for electors for President and Vice-President of the United States, who run in tandem. The requirement that voters must vote for each candidate separately prohibits straight party voting, thus precluding casting a vote for all of the candidates of one political party by pulling one lever. Of the several provisions contained in Section 2a, only the language on ballot rotation appears to have raised any significant problems, and it has been the subject of judicial interpretation as recently as 1974.

The Ohio Supreme Court, in *State ex rel. Russell v. Bliss*, 156 Ohio St.

147 (1951) held that the constitutional provision is self-executing and a statute varying the prescribed procedure is unconstitutional and void. Since 1951, two statutes prescribing rotational procedures have been held to violate this section.[1]

Section 2a has been construed to require perfect rotation of names on the ballot, in so far as may be reasonably possible. The issue has been raised in Ohio Courts whether the use of voting machines complies with the constitutional mandate, since this method of voting raises peculiar problems for rotation of names on the ballot. The use of paper ballots permits the voters to be presented with numerous configurations of candidates' names. Statutes require that paper ballots be printed and compiled in planned sequences. Voting machines, however, do not permit rotation in this manner; the order is fixed once the machine is locked, and all voters using the same machine will be presented with the same sequence of candidates' names. Moreover, the expense of a voting machine may result in there being only one or two at a polling place, and many, if not all, voters are exposed to the same order of candidates on the ballot.

In the opinion of the Court of Common Pleas of Mahoning County in *Bees v. Gilroncn*, 66 OLA 130 (1953), and of the Attorney General (1957 OAG 984), the constitutional provision permits the use of voting machines, since it requires perfect rotation in so far as may be reasonably possible and perfect rotation may not be reasonably possible, when voting machines are used. In 1974, the Ohio Supreme Court affirmed that Section 2a of Article V of the Ohio Constitution does not absolutely prohibit the use of voting machines (*State ex rel. Roof v. Bd. of Commrs.*, 39 Ohio St. 2d 139 (1974)). In that case, the Court found that statutory language concerning rotation of machine ballots on a precinct by precinct basis (Section 3507.07 of the Ohio Revised Code) was not in compliance with Article V, Section 2a. In its opinion, the Court offered an acceptable way of using voting machines to comply with the Constitution, stating that each precinct using voting machines must have at least two or an even number of machines which, prior to the general election, have been arranged by the board of elections in a serial sequence throughout the county. Voters would be directed to alternate machines so that the various voting machines at a polling place would be used in serial sequence. In the formula proposed by the Court, although the number of alternative sequences in a given precinct is limited by the number of voting machines, when the use of machines by voters is regulated by a planned serial sequence, compliance with the constitutional requirement for rotation in Section 2a is achieved.

Effect of Change

The Commission recommendation removes the self-executing language which has been held to require perfect rotation of names on the ballot, as far as reasonably possible. The amendment, using relative rather than absolute terms, places the responsibility of providing for rotation with the General Assembly. In addition, the amendment removes the words "except at a Party Primary or in a non-partisan election . . .". This misleading language could imply that, in these elections, the political party may be given more prominence than the candidate's name. The word "general" has been removed from "general elections" in the first sentence, so that the provision will apply to all elections. The section number of the provision is changed from 2a to 3, and present Section 3 is being recommended for repeal. A discussion of the reasons for repeal will be found under present Section 3. Throughout, language referring to the method

[1] A provision for voting machine rotation in Section 3507.07 of the Revised Code was declared void in *State ex. rel. Wesselman v. Bd. of Elections of Hamilton County*, 170 Ohio St. 30 (1959). *Bliss* invalidated General Code 4785-80.

of voting has used very general terms to permit the section to apply to new methods of voting and technological changes.

Rationale for Change

The Elections and Suffrage Committee considered several alternative ways of dealing with the rotation provision of Section 2a. Most agreed that ballot rotation is a statutory matter, nothing that Ohio is the only state to provide for rotation in its Constitution. The idea of repeal was rejected because it would open the possibility of the enactment of a law like one in California which places the incumbent's name first on the ballot. The author of a Southern California Law Review article[2] suggests that the California statute violates the Fourteenth Amendment to the United States Constitution. His research indicates that the first-listed candidate has an advange: ". . . as a minimum, one can attribute at least a 5 percent increase in the first listed candidate's vote total to positional bias, and . . . this will be exceeded in most elections." He views this positional advantage as in violation of the one-man, one-vote rule, giving citizens voting for the first person listed an advantage over a group of equal strength with less favorable ballot position.

All shared a desire to retain the principle that no candidate should have an undue advantage or disadvantage by virtue of ballot position. However, the Commission viewed the present language as too restrictive on several accounts. When the constitutional provision is read as an absolute standard of rotation, there are unfortunate consequences. One paper ballot with a printing error or out of order may result in an entire election being invalidated. While fair treatment on the ballot is desirable, the invalidation of an election because in a small number of instances proper rotation did not occur exaggerates the importance of rotation. The constitutional language as presently interpreted restricts the use of new methods of voting, as evidenced by the difficulties encountered in trying to conform the use of voting machines to the rotation language in Section 2a. The tremendous difficulties and expenses boards of elections were encountering in the effort to conform with the Supreme Court ruling in the *Roof* decision were described in detail to the Commission.

One alternative is rotation by precincts rather than rotation by individual ballots. The Court of Appeals in the *Roof* decision suggested that equalization of population by precincts would be acceptable. Precinct population equalization, however, presents considerable problems for election officials, especially in areas with a highly mobile population. In any event, it seemed unwise to write such a specific provision into the constitution.

The Commission's proposal is more flexible than either the present language or the precinct equalization proposal; at the same time, it retains the principle of equal treatment in order to preclude a situation like that of California. The substitution of a relative standard of fairness to candidates for the rigid standard of perfect rotation wherever possible, the Commission thought, would enable the General Assembly and the courts to judge whether the value of a new voting technique might outweigh the advantages of exact rotation. A recent Florida election employed telephonic voice prints, and cable television holds out the possibility of voting by digital return systems. These and other electronic voting methods are being discussed and tested. The Commission felt that Ohio should be free to explore new technology, and believes that the proposed language permits the positional treatment to correspond to the voting method used.

There is a change in the first sentence of the section, "The names of

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[2]W. James Scott, Jr. "California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents", 45 So. California Law Review 365 (1972).

all candidates for an office at any general election . . ." The word "general" has been deleted in order to make the provision applicable to all elections. The Commission believes that fair treatment on the ballot by rotation or other comparable methods should be available at all elections, including special elections, which are not included under the present language.

The second part of Section 2a concerns the appearance of the office-type ballot, and permits electors to vote only for candidates individually, except for electors for President and Vice-President of the United States who run as a team. The Commission recommends a language change to remove a misleading statement. The section presently reads "Except at a Party Primary or in a non-partisan election, the name or designation of each candidate's party, if any, shall be printed under or after each candidate's name in lighter and smaller type face than that in which the candidate's name is printed". The sentence could be read to mean that at a party primary or non-partisan election the candidate's party can be more prominent than the candidate's name. The Commission did not believe that this was the intention of the authors of the section, but that the exception had been included because at a party primary or non-partisan election, the political party does not appear on the ballot. The Commission recommends removing the clause excepting party primaries and non-partisan elections to remove the apparent ambiguity. The Commission recommendation also removes reference to the size and darkness of type, because election methods of the future may not use the printed media for balloting.

The Commission notes that, should a prior recommendation for the joint election of Governor and Lieutenant Governor be adopted, Section 2a will have to be amended to enable voters to vote for these two executive officers jointly.

Intent of the Commission

The proposed revision of Article V, Section 2a is intended to afford every candidate, by law, equitable treatment appropriate to the kind of ballot used in his election. The Commission views the removal of an absolute standard of rotation and the substitution of a relative standard as a more flexible and workable approach to achieving fairness in the balloting process — a result deemed desirable by all Commission members.

ARTICLE V

Section 3

Present Constitution

Section 3. Electors, during their attendance at elections, and in going to, and returning therefrom, shall be privileged from arrest, in all cases, except treason, felony, and breach of the peace.

Commission Recommendation

Repeal

Commission Recommendation

The Commission recommends the repeal of Section 3 of Article V.

History and Background of Section

First included in the 1802 Constitution,[1] the electors' privilege from arrest was retained in the 1851 Constitution. The 1912 Constitutional Convention Debates contain no discussion or interpretation of the provision. There is no case law in Ohio interpreting the provision, and information on the limitations of the privilege implied by the exceptions of treason, felony, and breach of the peace is inferred from cases having to do

[1]Constitution of Ohio, 1802, Article IV, Section 3.

with a similar privilege from arrest extended to legislators in Article II, Section 12 of the Ohio Constitution, and to other groups who are granted the privilege from arrest by statute. Article II, Section 12 grants senators and representatives the privilege from arrest, except for treason, felony, and breach of the peace, during their attendance at or going to and from a legislative session. Section 2331.11 of the Ohio Revised Code grants a similar privilege to many groups of individuals, including electors, going to, attending or returning from an election; and others not granted the privilege in the constitution: e.g., judges, attorneys, clerks of courts, sheriffs, coroners, constables, criers, suitors, jurors, and witnesses, while going to, attending or returning from court; a person doing militia duty or going to or returning from the performance of such duty. The privileged groups seem to have in common the fact that the performance of the duties during which time they are so privileged is essential to the progress of government or protection of religious freedom.

An investigation of the historical basis for the provision revealed a desire to permit elected officials to do the job to which they were elected, without constant interruption of having to answer to creditors, much like the earlier privilege given to members of Parliament under English law. By implication, electors should not be obstructed from exercising their franchise by having to answer to minor offenses. The privilege from arrest granted a Senator by the United States Constitution was examined in *Long v. Ansell*, 69 F. 2d 386, 94 A.L.R. 1467 (1934). The plaintiff charged Senator Long with publishing a false and malicious libel by distributing a publication containing a report of a speech made by the defendant on the floor of the Senate. Senator Long claimed immunity from service of summons on account of Article I, Section 6 of the United States Constitution: "Senators and Representatives . . . shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses . . ." The Court of Appeals held that the Senator was not exempt from service of civil process by virtue of the constitutional provision. The opinion states, in part, "At the time of the adoption of the Constitution, there were laws in the states authorizing imprisonment for debt in aid of civil process. Undoubtedly, it was to meet this condition that the exemptions in federal and state Constitution; were aimed."[2]

The actual privilege granted to electors (and other persons immune from arrest for crimes other than treason, felony, and breach of the peace) has been limited by court decisions and other constitutional provisions. The phrase "breach of the peace" has been interpreted to include all criminal offenses by the United States Supreme Court in connection with Article I, Section 6 of the United States Constitution in *Williamson v. U.S.* 207 U.S. 425 (1908). The Ohio Supreme Court in *Akron v. Mingo*, 169 Ohio St. 511 (1969), stated that the interpretation in *Williamson* of "treason, felony, and breach of the peace" is applied to the same words appearing in the Ohio Constitution, Article II, Section 12, and in Revised Code Section 2331.13. In Ohio, therefore, there can be no immunity from arrest for a criminal offense, because the exception to the immunity provision includes all crimes and misdemeanors of every character.

If "treason, felony, and breach of the peace" are interpreted to include all criminal offenses, then it would seem that the privilege extends only to civil arrest. The instances where one is liable for civil arrest are limited. Section 15 of Article I of the Ohio Constitution says "No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud." The Ohio Revised Code, in Chapters 2713. and 2331., provides for arrest in civil actions before judgment and in the case of a judgment debtor when attempts at fraud are involved. Thus, the reason

[2] *Long v. Ansell*, C.A.D.C. 69 F. 2d 386, 94 A.L.R. 1467 (1934).

for the privilege from arrest offered in *Long v. Ansell* has been substantially nullified by Article I, Section 15 of the Ohio Constitution and by judicial interpretation of "breach of the peace" to include all criminal offenses. *Long v. Ansell* observes "The reason for incorporating this provision in the Constitution has largely disappeared . . . That which at the time of the adoption of the Constitution was of substantial benefit to a member of Congress has been reduced almost to a nullity."[3]

Effect of Change

The Commission's recommendation to repeal Article V, Section 3 would have no substantive effect on the privilege of electors from arrest while going to, attending, or returning from, elections. The Ohio statutes grant this privilege to electors as well as other groups of people who are not granted this privilege in the Constitution.

Rationale for Change

The Commission considers Article V, Section 3 obsolete and of little, if any, effect. The privilege from arrest has been restricted by other constitutional provisions and by court interpretations so that the section has very limited application. Some Commission members suggested that the constitutional language was potentially misleading to the voters, making them think they were privileged when, in all likelihood, they were not. Recognizing that the legislature has provided a similar privilege for persons not mentioned in the constitution, e.g., jurors, witnesses, attorneys, and noting that electors have been included in the statute granting the privilege, the Commission views the constitutional privilege as unnecessary. Research did not uncover any evidence that the erroneous arrest of an elector on his way to or from the election booth would affect the outcome of an election. The apparent absence of any consequence to the election from denying an elector his constitutional privilege strengthened the Commission's opinion that the section should be removed from the Constitution.

Intent of the Commission

The Commission recommends the repeal of Article V, Section 3, which it considers ineffective. The constitutional privilege has been rendered insignificant by Article I, Section 15 of the Ohio Constitution and judicial interpretation of its language. The Commission recognizes that if the privilege were removed from the Constitution, the legislature may provide for the privilege, and, in fact, has done so, for electors, and for other groups not mentioned in the Constitution.

[3] *Ibid.*, p. 1468.

ARTICLE V

Section 4

Present Constitution

Section 4. 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.

Commission Recommendation

Section 4. 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.

Commission Recommendation

The Commission recommends the amendment of Article V, Section 4 as follows:

Section 4. 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~~ A FELONY.

History and Background of Section

The Ohio Constitution of 1802[1] included a provision giving the General Assembly full power to disfranchise persons convicted of bribery, perjury, or other infamous crime, and to bar them from any elected office. There is no parallel provision in the Federal Constitution. A comparable provision was included in the 1851 Ohio Constitution with no mention of the provision in the Debates of 1850. "Infamous crime" has generally been interpreted to mean a felony. Section 2961.01 of the Ohio Revised Code formerly denied the right to vote, to hold an office of honor, trust, or profit, and to serve on a jury, to any person convicted of a felony in this state, unless the conviction was reversed or annulled, or the rights restored by pardon. An effect of the statute was to provide mandatory restoration of rights to a person serving the maximum term of his sentence or granted release by the adult parole authority, but, with respect to a convicted person on probation, the Common Pleas Court could restore to the defendant his rights of citizenship. The new criminal code, effective January 1, 1974, amends Section 2961.01, retaining the provision disfranchising any person convicted of a felony, and expanding it to include felonies of other states or the United States. The section now provides 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. Full pardon of a convict restores all rights and privileges forfeited under this section.

Effect of Change

The language recommended by the Commission defines the offenses for which a person may be denied the rights of suffrage or eligibility to office by the word "felony" instead of the present language, "bribery, perjury, or other infamous crime".

Intent of the Commission

The Commission desires 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. The retention of permissive language enables the legislature to respond to changes in criminal rehabilitation; at the same time, the electors are assured that the purity of the elective process will be regulated by the General Assembly in this regard.

[1]Constitution of Ohio, 1802, Article IV, Section 4.

ARTICLE V

Section 5

Present Constitution

Section 5. No person in the Military, Naval, or Marine service of the United States, shall, by being stationed in any garrison, or military, or naval station, within the State, be considered a resident of this State.

Commission Recommendation

Repeal of present Section 5 and enactment of a new Section 5, unrelated in subject matter. For discussion of the proposed new section, see Section 6.

Commission Recommendation

The Commission recommends repeal of present Section 5 and enactment of a new Section 5, unrelated in subject matter. The proposed new section is discussed under Section 6.

History and Background of Section

Ohio and other states have denied voting residence to persons living in a federal enclave. Ohio's provision was first included in the 1851 Constitution. The reason for such a provision may have been suggested in *Carrington v. Rash*, 380 U.S. 89 (1965), where Texas argued that its interest in prohibiting servicemen stationed in the state from voting was to prevent the small local civilian community vote from being over-

whelmed by the collective vote of military personnel, and to protect the franchise from infiltration by transients. The Court rejected this reasoning saying that "Fencing out from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." The United States Supreme Court, in *Evans v. Cornman*, 389 U.S. 49, 90 S. Ct. 1752 (1970), held that such restrictions violated the Fourteenth Amendment equal protection clause. In 1973, a United States District Court declared Section 5 of Article V of the Ohio Constitution unconstitutional insofar as it denies a person the right to register because he lives on the grounds of a federal enclave (*Stencel v. Brown*, U.S.D.C., Southern District of Ohio, #72-331).

Rationale for Change

The Commission believes this language should be removed from the Constitution because it is unconstitutional and because the Commission agrees with the principle of an expanded franchise.

ARTICLE V

Section 6

Present Constitution

Section 6. No idiot, or insane person, shall be entitled to the privileges of an elector.

Commission Recommendation

Repeal and enact new section 5:
Section 5. The General Assembly shall have power to deny the privileges of an elector to any person adjudicated mentally incompetent for the purpose of voting only during the period of such incompetency.

Commission Recommendation

The Commission recommends the repeal of Section 6, and enactment of a new section 5 as follows:

Section 5. THE GENERAL ASSEMBLY SHALL HAVE POWER TO DENY THE PRIVILEGES OF AN ELECTOR TO ANY PERSON ADJUDICATED MENTALLY INCOMPETENT FOR THE PURPOSE OF VOTING ONLY DURING THE PERIOD OF SUCH INCOMPETENCY.

History and Background of Section

The Ohio Constitution of 1851 contained a provision disfranchising idiots and insane persons, who were not denied the vote in the 1802 Constitution. The language of section 6, "No idiot, or insane person, shall be entitled to the privileges of an elector", is self-executing, requiring no action by the General Assembly to implement the prohibition. The terms "idiot" and "insane" are not defined in the Constitution, and their application arises from legislation and judicial determination. Although most state constitutions at one time used the words "idiot" and "insane", these have become archaic and devoid of standard meaning. Newer state constitutional provisions regarding competence to vote use terms such as "mentally incompetent."[1] Scientific progress has revealed that the myriad of mental impairments do not fall into just two groups, and even the currently acceptable terms "mentally retarded" and "mentally ill" are thought to blur the distinctions among many types and extremes of mental disabilities.

The body of legislation which has been created regarding mental illness and mental retardation has several consequences for the constitutional prohibition against idiots and insane persons voting. The Ohio Revised Code contains provisions regarding mentally ill patients in Chapters 5122., 5123., and 5125. An earlier movement to promote treatment for mental illness advocated voluntary as well as involuntary admittance procedures to encourage persons to seek help, and the 1952 Draft Act, proposed by the National Association of Mental Health, recommended the retention of all civil rights by patients, unless adjudicated incompetent and not re-

[1] E.g. Constitution of Virginia, Article II, Section 1.

stored to capacity. The Ohio statutes reflect these recommendations. Voluntary patients do not appear before the probate court for a determination of the need for hospitalization and therefore retain their civil rights. A person who is involuntarily committed appears before the court and, after a finding of the need for indeterminate hospitalization, the person is declared legally incompetent and loses such civil rights as the right to vote. As a consequence, a voluntary patient who may be severely disabled is, theoretically, able to vote. This result contravenes the intent of the constitutional prohibition of idiots and insane persons voting.

The General Assembly is not expressly given the power to determine which mental conditions are such that a person should not vote nor to establish procedures for determining who does or does not fall into the categories. A voter could be challenged at the polls on the grounds that he is an idiot or insane person. In the absence of standards to be used in making the determination, a person could be denied his right to vote without benefit of any medical testimony on his mental fitness, with the determination heavily dependent on the judge's personal opinion of what an idiot is.

Effect of Change

The Commission recognizes that the present constitutional language is antiquated and probably too broad to pass the Fourteenth Amendment equal protection and due process requirements for depriving a person of a fundamental right.[2] Therefore, the Commission recommends language that will give the General Assembly authority to create some useful standards to determine incompetency for the purpose of voting. Testimony presented to the Commission included cogent reasons why a person incompetent to serve on a jury or to drive may be competely competent to vote.

Rationale for Change

The Commission believes that the present constitutional provision is unacceptable for several reasons. The Elections and Suffrage Committee suggested, in its report to the Commission, that large scale and possibly arbitrary exclusion from voting is a greater danger to the democratic process than including in the franchise some who may be mentally incompetent. Repeal of present Section 6 and omission from the Constitution of any provision excluding persons from voting on the basis of mental incompetence was considered but rejected on the grounds that the Constitution should contain a recognition of the problem, leaving a specific solution to the General Assembly. The Commission's approach is to rewrite the provision so it will exclude only those persons who should not participate in the electoral process, and specifically to give the legislature the right to regulate the procedures for determining that one is mentally incompetent for the purpose of voting. An important factor in the Commission's decision to repeal the prohibition against idiots and insane persons voting was the testimony received from Professor Michael Kindred, a professor of law at The Ohio State University and an expert on the legal rights of mentally ill and mentally retarded persons. Professor Kindred suggested that Section 6 of Article V was probably unconstitutional under the equal protection clause of the Fourteenth Amendment to the United States Constitution and possibly unconstitutional under the due process clause of the Fourteenth Amendment. "It seems to me very clear at the present time that the provision is unacceptable. It's unacceptable because it is ambiguous, it's unacceptable because if it has any substance to it it's too broad, and it's unacceptable because the terms that it uses are basically insulting, stigmatizing terms."[3] The United States Supreme Court has begun to recognize the right to vote as a fundamental right, and restrictions on the right to vote must bear a necessary and rational relation to a compell-

[2] *Kramer v. Union Free School District No. 15*, 359 U.S. 621 (1969).

ing state interest.[4] Because the terms "idiot" and "insane" are ambiguous, it would be difficult to show how they meet the test for exclusion. In addition, it was suggested that the mentally retarded might qualify as a "suspect class", having certain relevant characteristics from birth, so that the due process clause of the Fourteenth Amendment might present another constitutional barrier to excluding them from exercising a fundamental right.

The Commission desires to preclude any wholesale exclusion from the electoral process on the basis of mental incompetence. The proposed language requires an adjudication of mental incompetence. The Commission also believes that the restoration to competency should restore the right to vote, and this restoration should be guaranteed by the Constitution. Hence, disfranchisement is limited by the words "only during the period of such incompetency."

Intent of the Commission

The Commission recommends the repeal of present Section 6 and enactment of a new Section 5 to fill the section vacated by the repeal of present Section 5 proposed earlier. The language disfranchising persons "adjudicated mentally incompetent for the purpose of voting only during the period of such incompetency", is deemed a sufficient safeguard of the electoral process with less likelihood of excluding persons who should vote than the present prohibition of Section 6 appears to permit. The Commission believes that by placing these procedures under the auspices of the General Assembly, new attitudes regarding mental illness can be implemented and more uniform standards for determination and review will be possible than are provided under the present language.

[3]Minutes of the Ohio Constitutional Revision Commission, June 17, 1974, p. 11.
[4]*Kramer v. Union Free School District No. 15*, supra.

ARTICLE V

Section 7

Present Constitution

Section 7. All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law, and provision shall be made by law for a preferential vote for United States senator; but direct primaries shall not be held for the nomination of township officers or for the officers of municipalities of less than two thousand population, unless petitioned for by a majority of the electors of such township or municipality. All delegates from this state to the national conventions of political parties shall be chosen by direct vote of the electors. Each candidate for such delegate shall state his first and second choices for the presidency, which preferences shall be printed upon the primary ballot below the name of such candidate, but the name of no candidate for the presidency shall be so used without his written authority.

Commission Recommendation

No recommendation.

Commission Recommendation

The Commission has no recommendation with regard to Section 7 at the present time.

History and Background of Section

A provision regarding the selection of delegates to political party conventions first appeared in the Ohio Constitution in 1912. At the 1912 Constitutional Convention, the evils of the convention method of nominating candidates were discussed. Delegates expressed their preference for direct primaries and Theodore Roosevelt, addressing the convention, advocated direct preferential primaries for the election of delegates to national nominating conventions. He referred to the use of the convention

system by "adroit politicians" to thwart the popular will. Suggestions regarding the application of the direct primary included one that officers such as school board members and judges be nominated by petition to remove these offices from politics, and that townships of less than two thousand population not be required to go to the expense of an election for township offices. The Convention proposed Section 7, which has remained unchanged since approved by the voters in 1912. The section requires, concerning presidential nominations, that all delegates to national conventions be chosen by direct vote of the electors. Each candidate for delegate must state his first and second choice for president, which preferences appear on the ballot below the name of the candidate. In addition, the name of no candidate may be used without his written authority.

The listing of the names of all candidates for delegate on the ballot has resulted in the problem of the "bedsheet" ballot, occasionally presenting voters with a sizeable list of candidates, and at times making the use of electronic voting machines impossible in those circumstances. In the primary election in May, 1972, the Democratic Party departed from the earlier tradition of both parties to bring one slate of delegates and alternates before the voters at the party primary, pledged to a "favorite son". Numerous slates of delegates were offered, and when voting machines could not accommodate all of the names, some precincts used paper ballots instead of or in addition to machines. The confusion that occurred led some groups to call for an end to the individual listing of delegates and alternates of each candidate.

The Elections and Suffrage Committee, together with the Assistant Secretary of State studied several proposed solutions for dealing with the "bedsheet ballot" problem. Committee members felt that the Delegates to the 1912 Constitutional Convention wished to offer voters maximum flexibility, but that they did not anticipate the resultant problem of the extremely long and complicated ballot. A consensus developed to eliminate the requirement that delegates be listed individually with their first and second preferences for president, and substitute language whereby the voters would be able to express their wishes by a variety of methods, as provided by law. The proposal stated that the names of candidates for delegate need not be separately identified on the ballot and may be identified in the manner provided by law. The recommendation, however, failed to secure the 2/3 majority necessary for adoption by the Commission.

ARTICLE XVII

Section 1

Present Constitution

Section 1. Elections for state and county officers shall be held on the first Tuesday after the first Monday in November in even numbered years; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years.

Commission Recommendation

Section 1. Elections for state and county officers shall be held on the first Tuesday after the first Monday in November in even numbered years; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years.

The term of office of all elective county, township, municipal, and school officers shall be such even number of years not exceeding four as may be prescribed by law.

The general assembly may extend existing terms of office so as to effect the purpose of this section.

Commission Recommendation

The Commission recommends the amendment of Section 1 of Article XVII as follows:

Section 1. Elections for state and county officers shall be held on the first Tuesday after the first Monday in November in even numbered years; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years.

THE TERM OF OFFICE OF ALL ELECTIVE COUNTY, TOWNSHIP, MUNICIPAL, AND SCHOOL OFFICERS SHALL BE SUCH EVEN NUMBER OF YEARS NOT EXCEEDING FOUR AS MAY BE PRESCRIBED BY LAW.

THE GENERAL ASSEMBLY MAY EXTEND EXISTING TERMS OF OFFICE SO AS TO EFFECT THE PURPOSE OF THIS SECTION.

History and Background of Section

Article XVII, which consists of only 2 sections, was adopted in 1905. Section 1 fixes the date of a general election for state and county officers in even years on the first Tuesday after the first Monday in November, and states that all other elective offices shall be filled in the odd-numbered years at elections to be held on the first Tuesday after the first Monday in November.

In 1954, the Elections Article and related sections of the Constitution were amended when the terms of executive officers were increased from 2 to 4 years with the auditor's term remaining at 4 years.

Effect of Change

The Commission proposal attaches to Section 1 two sentences which are presently in Section 2 of Article XVII, making no substantive change from existing constitutional provisions. As a result of the Commission's decision to repeal the language in Section 2 regarding terms of office for offices covered elsewhere in the Constitution (discussed following this section), the language regarding the term of office of elective county, township, municipal and school officers presently in Section 2 was considered more appropriate for inclusion in Section 1. The amended section also includes language from present Section 2 empowering the General Assembly to extend existing terms of office in order to effect the purpose of the section - viz., that state and county officers be elected in even years, and all other officers mentioned in the odd-numbered years.

Rationale for Change

The retention of language regarding the terms of office of elective county, township, municipal and school officers is deemed desirable because these officers are not covered elsewhere in the Constitution. There was discussion about the appropriate length of the term of office for these offices, or whether this matter should be left to the General Assembly. The proposed language specifies the length as "such even number of years not exceeding four . . ." The final resolution of the matter was to leave the language regarding terms of office as it is since there seemed to be no compelling reason for making any change.

The language giving the General Assembly the power to extend the terms of existing offices to effect the purpose of Section 1 has value since some are provided by statute, and, should they be changed, the General Assembly's power would prove useful.

Intent of the Commission

The Commission's recommendation for amending Section 1 contemplates no substantive change from the authority presently in the Constitution. The proposal is based in interests of better constitutional drafting and a desire to have all relevant information in the same section. The changes recommended are consistent with the proposed revision of Article XVII, Section 2, discussed below.

ARTICLE XVII

Section 2

Present Constitution

Section 2. The term of the office of the Governor, Lieutenant Governor, Attorney General, Secretary of State, Treasurer of State and the Auditor of State shall be four years commencing on the second Monday in January, 1959. The Auditor of State shall hold his office for a term of two years from the second Monday of January, 1961 to the second Monday of January, 1963 and thereafter shall hold this office for a four year term. The term of office of judges of the Supreme Court and Courts of Appeals shall be such even number of years not less than six years as may be prescribed by the General Assembly; and that of the Judges of the Common Pleas Court six years and of the Judges of the Probate Court six years, and that of other Judges shall be such even number of years not exceeding six years as may be prescribed by the General Assembly. The term of office of the Justices of the Peace shall be such even number of years not exceeding four years, as may be prescribed by the General Assembly. The term of office of all elective county, township, municipal and school officers shall be such even number of years not exceeding four years as may be so prescribed.

And the General Assembly shall have power to so extend existing terms of office as to effect the purpose of Section 1 of this Article.

Any vacancy which may occur in any elective state office other than that of a member of the General Assembly or of Governor, shall be filled by appointment by the Governor until the disability is removed, or a successor elected and qualified. Such successor shall be elected for the unexpired term of the vacant office at the first general election in an even numbered year that occurs more than forty days after the vacancy has occurred; provided, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term. All vacancies in other elective offices shall be filled for the unexpired term in such manner as may be prescribed by this constitution or by law.

Commission Recommendation

Section 2. Any vacancy which may occur in any elective state office created by Article II or III or created by or pursuant to Article IV of this Constitution shall be filled only if and as provided in such articles. Any vacancy which may occur in any elective state office not so created shall be filled by appointment by the Governor until the disability is removed, or a successor elected and qualified. Such successor shall be elected for the unexpired term of the vacant office at the first general election in an even numbered year that occurs more than forty days after the vacancy has occurred; provided, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term. All vacancies in other elective offices shall be filled for the unexpired term in such manner as may be prescribed by this constitution or by law.

Commission Recommendation

The Commission recommends the amendment of Section 2 as follows:

Section 2. ~~The term of the office of the Governor, Lieutenant Governor, Attorney General, Secretary of State, Treasurer of State and the Auditor of State shall be four years commencing on the second Monday in January, 1959. The Auditor of State shall hold his office for a term of two years from the second Monday of January, 1961 to the second Monday of January, 1963 and thereafter shall hold this office for a four year term. The term of office of judges of the Supreme Court and Courts of Appeals shall be such even number of years not less than six years as may be prescribed by the General Assembly; and that of the Judges of the Common Pleas Court six years and of the Judges of the Probate Court, six years, and that of other Judges shall be such even number of years not exceeding six years as may be prescribed by the General Assembly. The term of office of the Justices of Peace shall be such even number of years not exceeding four years, as may be prescribed by the General Assembly. The term of office of all elective county, township, municipal and school officers shall be such even number of years not exceeding four years as may be so prescribed.~~

~~And the General Assembly shall have power to so extend existing terms of office as to effect the purpose of Section 1 of this Article.~~

ANY VACANCY WHICH MAY OCCUR IN ANY ELECTIVE STATE OFFICE CREATED BY ARTICLE II OR III OR CREATED BY OR PURSUANT TO ARTICLE IV OF THIS CONSTITUTION SHALL BE FILLED ONLY IF AND AS PROVIDED IN SUCH ARTICLES. Any vacancy which

may occur in any elective state office NOT SO CREATED ~~other than that of a member of the General Assembly or of Governor,~~ shall be filled by appointment by the Governor until the disability is removed, or a successor elected and qualified. Such successor shall be elected for the unexpired term of the vacant office at the first general election in an even numbered year that occurs more than forty days after the vacancy has occurred; provided, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term. All vacancies in other elective offices shall be filled for the unexpired term in such manner as may be prescribed by this constitution or by law.

History and Background of Section

Section 2 of Article XVII, adopted in 1905, specifies the terms of office for elected executive officials and for some judges, and limits the terms of justices of the peace and of all elective county, township, municipal and school officers to not more than four years, and of Common Pleas Judges to not more than six years. The section empowers the General Assembly to extend existing terms of office to comply with the times for holding elections in Article XVII, Section 1. Provisions for filling of vacancies are set forth, requiring that the Governor fill vacancies in any elective state office other than that of a member of the General Assembly or of Governor until the disability is removed or a successor elected and qualified. It specifies when successors will be elected.

Prior to the adoption of Article XVII, the terms of office of and filling of vacancies in the executive, legislative and judicial departments were provided in Articles II,[1] III, and IV, pertaining to these three branches of government. For example, Article III, Section 18, adopted in 1851, stated, "Should the office of auditor, treasurer, secretary or attorney general, become vacant, for any of the causes specified in the fifteenth section of this article, the Governor shall fill the vacancy until the disability is removed, or a successor elected and qualified." Article IV, Section 13 empowers the governor to fill vacancies in judicial offices. Article XVII, adopted in 1905, changes some judicial terms. The terms of probate court judges were set at three years in Article IV, Section 8, adopted in 1851, and Article XVII, Section 2, set the terms at four years. Amendments to the judicial article in 1883 specified the terms of supreme court and circuit court (court of appeals) judges as not less than five years as provided by the General Assembly (Art. IV, Sec. 2) and as provided by law (Article IV, Sec. 6) respectively: Article XVII, Section 2 stated that the terms of supreme court and circuit court judges shall be terms of an even number of years, not less than six years, as prescribed by the General Assembly. In some cases, Article XVII contains difference in language that could result in different interpretations. In 1947, Article XVII, Section 2 was amended, changing reference to circuit courts to the new words "courts of appeals". The term of office of a probate judge was increased to six years and reference to members of the board of public works was omitted from the 1947 version. In 1954, an increase in the terms of members of the executive branch from 2 to 4 years, involved a revision of Article XVII, Section 2 and related sections of the constitution. In 1970, Section 2 was amended to prevent filling a short-term vacancy by an election, and in the same year, Article III, Section 18 was also amended to conform with the change.

Effect of Change

The Commission's recommendations with respect to Section 2 do not propose any substantive change in existing constitutional powers; rather, the proposal eliminates duplication and inconsistent language, and some language is transferred to Section 1 of Article XVII as a matter of style.

[1]Article II, Section 11 provides for filling of vacancies in the General Assembly.

Rationale for Change

Much of the subject matter in Article XVII, Section 2 is dealt with in other sections of the Constitution. The Commission is of the opinion that the terms of office and filling of vacancies in legislative, executive and judicial offices is a proper subject for those articles, individually, and notes that the Constitution already provides for these matters in Article II, III, and IV.

The Commission recommends the repeal of the first and second sentences of the first paragraph of Section 2, pertaining to executive officers. Article III, Section 2 contains the same provisions (four year terms for governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, and attorney general), and has already been approved by the Commission.

The third sentence of the first paragraph pertains to judicial terms. Article IV, Section 6 defines the terms of Supreme Court justices and Courts of Appeals judges as does Section 2 of Article XVII — not less than six years. Common Pleas and Probate judges are assigned terms of six years in Article XVII, thus differing from Article IV, Section 6 which specifies their terms as "not less than six years". Terms for other judges are not covered elsewhere. The fourth sentence defines the terms of Justics of the Peace, which no longer exist in Ohio. The Commission believes that judicial terms is an appropriate topic for the Judiciary Article, and recommends removal of the provisions from this section.

The final sentence in the first paragraph, regarding terms of office of other elective officers, has been transferred to Article XVII, Section 1, as has the second paragraph empowering the General Assembly to extend terms of elective office to conform to the prescribed election dates.

The third paragraph is concerned with filling vacancies in the offices of state elected officials other than Governor and members of the General Assembly. The filling of a vacancy in the office of a member of the General Assembly is provided for in Section 11 of Article II. Vacancies in the office of the secretary of state, auditor of state, treasurer of state, and attorney general are to be filled by the Governor, as provided in Article III, Section 18. The latter section does not include the office of lieutenant governor as one to be filled by the Governor in case of a vacancy. The Commission, in recommendations dealing with the Executive Branch, provides for succession to the office of governor in the event of a vacancy, but does not recommend that a vacant office of lieutenant governor be filled unless both offices become vacant before the middle of the term. Article XVII, Section 2 could be construed to empower the Governor to fill the vacancy in the office of lieutenant governor, in the language "Any vacancy which may occur in any elective state office other than that of a member of the General Assembly or of Governor, shall be filled by appointment by the Governor . . ." and this is not entirely consistent with Article III, Section 18. The language proposed by the Commission retains the method of filling vacancies in legislative, executive and judicial offices provided in their respective articles, and, in addition, empowers the Governor to fill vacancies in statutorily created elective offices which may be created at some future time in the manner specified in Section 2.

Intent of the Commission

The amendments proposed with respect to Section 2 do not make any substantive changes in the existing constitutional provisions. The Commission desires to remove duplicative and inconsistent language, and to retain authority granted by Section 2 that is not provided for elsewhere in the Constitution.

ARTICLE III

Section 18

Present Constitution

Section 18. Should the office of Auditor of State, Treasurer of State, Secretary of State, or Attorney General become vacant, for any of the causes specified in the fifteenth section of this article, the Governor shall fill the vacancy until the disability is removed, or a successor elected and qualified. Such successor shall be elected for the unexpired term of the vacant office at the first general election in an even numbered year that occurs more than forty days after the vacancy has occurred; provided, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term.

Commission Recommendation

No change.

Commission Recommendation

The Commission recommends that no change be made in Article III, Section 18.

Comment

Article III, Section 18 was referred to the Elections and Suffrage Committee for consideration because its provisions overlap those of Section 2 of Article XVII, and is included in this report for that reason. No change is recommended in the section. The Commission proposes changes in Section 2 of Article XVII to make it clear that Article III governs filling of vacancies in the offices of elected executive officials. A more detailed explanation can be found under the discussion of Article XVII, Section 2.

ARTICLE III

Section 3

Present Constitution

Section 3. The returns of every election for the officers, named in the foregoing section, shall be sealed up and transmitted to the seat of Government, by the returning officers, directed to the President of the Senate, who, during the first week of the session, shall open and publish them, and declare the result, in the presence of a majority of the members of each House of the General Assembly. The person having the highest number of votes shall be declared duly elected; but if any two or more shall be highest, and equal in votes, for the same office, one of them shall be chosen by the joint vote of both houses.

Commission Recommendation

Section 3. The returns of every election for the officers, named in the foregoing section, shall be sealed up and transmitted to the seat of government, by the returning officers, directed to the President of the Senate, who, during the first week of the next regular session, shall open and publish them, and declare the result, in the presence of a majority of the members of each House of the General Assembly. The person having the highest number of votes shall be declared duly elected; but if any two or more shall be highest, and equal in votes, for the same office, one of them shall be chosen by the joint vote of both houses.

Commission Recommendation

Section 3. The returns of every election for the officers, named in the foregoing section, shall be sealed up and transmitted to the seat of ~~Government~~ GOVERNMENT, by the returning officers, directed to the President of the Senate, who, during the first week of the NEXT REGULAR session, shall open and publish them, and declare the result, in the presence of a majority of the members of each House of the General Assembly. The person having the highest number of votes shall be declared duly elected; but if any two or more shall be highest, and equal in votes, for the same office, one of them shall be chosen by the joint vote of both houses.

History and Background of Section

The language of this section, unchanged since adopted in 1851, resembles a provision of the 1802 Constitution concerning the returns of the election for governor.[1] Prior to 1851, the members of the executive branch were not constitutional officers, or, as in the case of the secretary

[1]Constitution of Ohio, 1802, Article II, Section 2.

of state, were appointed rather than elected. The 1851 Constitution required that the lieutenant governor, secretary of state, auditor of state, treasurer of state and attorney general, be elected at a general election. These are the officers "named in the foregoing section" in Article III. At the time the section was drafted, the state had no state elections officer. The legislature, being a body with continued existence, was a likely choice to receive, open, and publish statewide election results. Ohio statutes currently designate the secretary of state as chief elections officer and contain detailed procedures as to how the Secretary shall declare election results.

Section 3 also provides for the resolution of tie votes. The constitution provides that both Houses of the General Assembly shall choose the winner of a tie by joint vote. The section states, in addition, that "the person having the highest number of votes shall be declared duly elected" — a stipulation which prevents run-off elections for those offices.

Effect of Change

The Commission proposes a modification of the section concerning the time when the election results would be presented to the General Assembly. By specifying that the presentation be made at the next regular session, the Commission intends to preclude the possibility of a special session being called in the event of a tie vote, or the vote being decided by a General Assembly already in session.

Rationale for Change

The initial recommendation considered by the Commission was to repeal this section. The Secretary of State, as the chief elections officer, is empowered by statute to publish and declare the results of the election, which are known before January. The Secretary of State has statutory authority to decide who is elected in case of tie votes for all officers other than executive officers. However, many Commission members favored retention of the ceremonial function of the General Assembly regarding declaration of election results. Moreover, the Commission wishes to retain the language defining the winner as the person having the highest number of votes, in order to preclude the possibility of run-off elections. The Commission, therefore, recommends retaining the ceremonial and tie-breaking functions of the General Assembly and precluding run-off elections. The Commission recommends the addition of language specifying that the declaration of election results and tie-breaking votes should be made at the next regular session of the legislature. Section 8 of Article II provides that the General Assembly shall meet in "first regular" and "second regular" session. The six executive officers and members of the General Assembly, except approximately half of the state senators, will usually be elected at the same time. The Commission believes that should there be a tie vote for any of the six elected officers, the General Assembly elected at the same election should be the General Assembly to resolve that tie-vote. By requiring that such resolution be at the *next regular* session, it is intended to preclude the calling of a special session to resolve the tie and prohibit the vote from being decided by a General Assembly already in session.

Intent of the Commission

The recommendation of the Commission is intended to retain all of the powers of the present section, and to modify the procedures of declaring election results and resolving tie votes by requiring that these procedures be performed by the General Assembly elected at the same election as those elected officials who might have received an equal number of votes for the same office.

ARTICLE III

Section 4

Present Constitution

Section 4. Should there be no session of the General Assembly in January next after an election for any of the officers aforesaid, the returns of such election shall be made to the Secretary of State, and opened, and the result declared by the Governor, in such manner as may be provided by law.

Commission Recommendation

Repeal.

Commission Recommendation

The Commission recommends the repeal of Article III, Section 4.

History and Background of Section

Section 4, proposed by the 1851 Constitutional Convention, had no parallel in the 1802 Constitution. The original language was introduced as an amendment to Section 16 of the Executive Article which provided that members of the executive branch be elected for 2 year terms and that the Governor would fill any vacancies for the remainder of the term or until the disability was removed. Revision of the article by the committee on drafting severed the two sections. Article II, Section 25 provided that the legislature would commence on the first Monday of January, *biennially*, commencing in 1852. A problem arose if an election was held in a November before a January when the legislature was not in session. In this event, the President of the Senate would be unable to declare the results to the legislature. Section 4 was adopted as a solution. Pertinent statutes detailing the method in which election returns are made to the Secretary of State are found in Sections 3505.33 to 3505.35, inclusive, of the Ohio Revised Code.

Rationale for Change

The Commission recommends the repeal of Section 4. The problem to which it was proposed as a solution no longer exists. The adoption of a constitutional amendment by the voters in 1972 to Section 8 of Article II requires the General Assembly to be in session every January. Thus, there would not arise an election for statewide officers occurring in a November immediately preceding a January when the legislature would not be in session.

ARTICLE II

Section 21

Present Constitution

Section 21. The General Assembly shall determine, by law, before what authority, and in what manner, the trial of contested elections shall be conducted .

Commission Recommendation

No change.

Commission Recommendation

The Commission recommends that no change be made in Article II, Section 21.

History and Background of Section

With the expansion of the executive department proposed by the 1851 Constitutional Convention, and all state officials being elected by the voters of the state at large, it was considered important to provide for an orderly way of resolving contested election results. The legislative committee of the Convention considered two methods of resolving election contests. The first proposal allowed contested elections for the executive department, judges of the Supreme Court and all officers elected by the voters of the state at large to be determined by both houses of the General

Assembly in the manner provided by law. The proposal was not well received because some members feared that the law might allow the board of county commissioners, for example, to decide contested election cases regarding its own membership, since such persons were not elected by the voters of the state at large. The second alternative empowered the General Assembly to provide by law for the conduct of all election contests, with the proviso that no election be contested before the legislature except with reference to its own body. The proviso was omitted when it was observed that it was merely a repetition of the legislature's power under Article II, Section 6 to judge its own elections, returns, and qualifications of members. The language finally agreed to remains unchanged in the present Constitution.

Rationale for Retention of Section

The power to determine the conduct of contested elections granted to the General Assembly in Article II, Section 21 is not believed to be a significant addition to powers the legislature already possesses. The Commission considers it a plenary power of the legislature by virtue of Section 1 of that article, "The legislative power of the state shall be vested in a General Assembly". Consistent with the Commission's philosophy of making no changes in areas that are not presenting problems, however, it recommends that no change be made in this section.