



BEFORE THE CONSTITUTIONAL MODERNIZATION COMMISSION
COMMENTS PERTAINING TO ARTICLE V, SECTION 6
FROM
STATE SENATOR MICHAEL J. SKINDELL, COMMISSIONER
STATE REPRESENTATIVE KATHLEEN CLYDE, COMMISSIONER
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Co-Chairs Amstutz and Tavares and Members of the Constitutional Modernization Commission. Thank you for providing the opportunity to provide comment of the recommendation of the Bill of Rights and Voting Committee relating to Article V, Section 6, which denies the privileges of an elector to "idiots" or "insane" persons.

As you are aware, the committee has recommended, in a vote that was not unanimous, that Article V, Section 6 in its current form be repealed, and that a new section be adopted as follows:

The General Assembly shall provide that no person who has been determined under law to lack the mental capacity to vote shall have the rights and privileges of an elector during the time of incapacity.

Although we agree with repealing the language in Section 6, we are opposed to the language recommended by the Bill of Rights and Voting Committee.

Section 6, of Article V (Elective Franchise) of the Ohio Constitution currently denies the privilege of an elector to those identified by the archaic and now socially unacceptable terms of either being an "idiot" or "insane". The qualifications of an elector in Ohio are spelled out in Section 1 of the same Article. Under Section 1, an individual is qualified as an elector if they are 1) a citizen of the United States, 2) eighteen years of age or older, 3) a resident of the state, county, township, or ward, as provided by law and 4) for at least thirty days, registered to vote. Section 1 then specifically states that such individuals are entitled to vote.

It should be noted that Section 6, by stating that such persons are not entitled to "the privileges of an elector", not only denies an individual of the fundamental right to vote but also denies individuals all other privileges as an elector. In comparison, Section 4, dealing with persons convicted of a felony, states that the General Assembly has the power to deny convicted felons from the "privilege of voting" or "being eligible to office." The General Assembly is not empowered to deny convicted felons from being electors. The "privileges of an elector" covered by Article V, Section 6 includes, not only the fundamental right to vote, but the ability to run as a candidate, be a signatory on a candidate or issue petition, or hold public office, among others.

It is generally agreed that use of the terms "idiot" or "insane" in our constitutions or laws is no longer acceptable. Not only are these terms no longer valid in describing conditions or illnesses

affecting the mind, they are no longer valid descriptors to justify the denial of voting rights or privileges as an elector.

As America developed into a nation it was initially common to specify the qualifications of an elector in terms of property ownership then as tax-paying members of society. These limitations, for the most part, precluded women, African Americans, and those with disabilities from voting. Over time, voting rights were extended to ensure that all are partners in American representative government. The contemporary view of the U.S. Supreme Court is that the right to vote is not to be abridged by the states except in rare circumstances. In *Wesberry v. Sanders* (1964), 376 U.S. 1, 17-18, the court stated:

No right is more precious in a free country than that of having a voice in the elections of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

As the right to vote is a fundamental right, the denial of this right can only be accomplished through laws that are narrowly drawn to serve a compelling state interest. Moreover, as it has also been identified as a "liberty" interest, and an individual cannot be deprived of this liberty without due process of law.

With this context, there is no need to replace the existing language. Ohio Revised Code Chapter 3599, Elections Offenses and Penalties, makes it illegal for a person to vote for another who cannot knowingly and voluntarily cast a vote. This issue was addressed in committee by Wilson R. Huhn, professor emeritus at the University of Akron School of Law, who spoke on behalf of the American Civil Liberties Union of Ohio ("ACLU"). In discussing election fraud in this context, Professor Huhn, opined:

On the other hand, thousands of Ohio citizens cannot knowingly and voluntarily vote because of profound intellectual impairment, serious and uncontrolled mental illness, or advanced dementia. It would be wrong to allow a person or organization to commit election fraud by casting votes in place of those persons. The Committee's path is not an easy one -- steering between the invasion of personal choice that would occur if disabled but competent Ohio citizens are denied the right to vote, and preventing the invasion of personal rights and election fraud that could occur if the votes of incompetent Ohio citizens were converted by others.

Professor Huhn Remarks, November 12, 2015. If the current provisions of the Revised Code under Chapter 3599 are not sufficient to protect against someone improperly voting for another, the General Assembly has the ability to strengthen those provisions without causing conflict with Ohio's Constitution. It should be noted that some 15 states do not have constitutional disenfranchising provisions. Outright repeal of Article V, Section 6 would be the preferred course to ensure the protection of the fundamental right to vote, in the broadest sense.

In the alternative, if it is the consensus of the Commission to replace the existing language with language to disqualify those who lack the mental capacity to vote as electors, the Commission should permit such disqualification only after an adjudication. This was the approach taken by the Commission in 1975. Their recommended language was as follows:

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.

At the time, the Commission opined that "adjudication" was an adequate safeguard to ensure that people were not improperly denied the right to vote. Nevertheless, there are scholars who are of the opinion that such an adjudication provision cannot withstand strict scrutiny.

The preferred course is an outright repeal of Article 5, Section 6 of the Ohio Constitution.

Thank you for the opportunity to provide these comments.