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Summary

The Education and Bill of Rights Committee met on Thursday, August 14 at 9 a.m. in the Commission offices in the Neil House. Committee members in attendance were Chairman Bartunek, Mr. Norris, Mr. Roberto, Mr. Skipton, and Mr. Clerc. Brenda Avey, Julius Nemeth, and Craig Evans were present from the staff. Marie Pfeiffer of the A.A.U.W. was in the audience.

Mr. Bartunek asked Craig Evans to comment on the paper he had prepared on remittitur.

Mr. Evans: The paper is styled "Remittitur: Inviolability of the right to trial by jury." It looks towards three questions or objectives: namely, what would be the limits constitutionally on the use of remittitur. Secondly, what would be the distinction, if any, that might legitimately be drawn between remittitur and reduction of a verdict. And thirdly, a brief analysis of the constitutionality or potential constitutional difficulties which might arise given a revision of Article I, Section 5 which would allow for the determination of unliquidated damages in civil actions by a judge as opposed to a jury. Remittitur can be defined as a consent procedure thought to be within the limits of the constitutional requirements for the right to a jury resulting in a verdict which has been returned by a jury and has been reduced in money value. One can find, I think, no substantive difference between remittitur and reduction of a verdict. Those terms are used interchangeably. With respect to constitutional issues, it would be fair to say that requiring damages to be determined by a judge rather than a jury would certainly require change in Article I, Section 5. I think the avenues would be several, you could do it several ways, but it would require a change. If such a change were made, a challenge on the basis of the Seventh Amendment to the federal constitution and the Fourteenth Amendment to the federal constitution due process requirements might result and such a change might be found to be unconstitutional under the federal constitution.

Consent is absolutely essential to remittitur. If there is no consent and a judge requires reduction, he would deny the right to have a jury determination under Section 5 of Article I of the Ohio Constitution. When does remittitur come about? It's available when raised in connection with a motion for a new trial or subsequently an appeal on the denial of such a motion, the grounds for such a motion being that the verdict that was returned is excessive. The Ohio law is that if a verdict is excessive but appears to be within limitations that one might find reasonable, the work of a jury trying its best results in some kind of miscalculation. Some try to describe this quantum of error and it's difficult to say what that quantum is. I think we are talking about a verdict that is a little bit too big. Then remittitur is permissible under Section 5 for a judge to make the acceptance of the remittitur a condition precedent to the denial of the motion for a new trial. He can say to the party having been given the benefit of the verdict, "if you will accept the remittitur, I will deny the motion for a new trial. If you will not, I will grant it." At some point, which is very difficult to define, if it's possible to define at all, in an excessive verdict, the verdict reaches a point where it reflects a palpable excess, something that results from a jury which act outside the bounds of its normal charge and is colorably the result of prejudice and passion. Again, I don't think we can really put our thumb on what point that is, but when the judge feels that the verdict has reached the point of palpable excess, remittitur is no longer available. He then is, rather, in a position of having to grant a new trial.

Remittitur is not thought to be a violation of the right to jury determination

for essentially three reasons. First of all, the reduction of the award results in a judgment which is still within the bounds of an amount of money determined by a jury. It is not an increase, and when we get to the question of additur as opposed to remittitur, I think the constitutional issues are very much different. The reduction is within the limits found by a jury. Another argument for its constitutionality is that in that the right to a jury trial may be waived, a remittitur can be argued as a partial waiver, waiving some part of that jury right. Thirdly, it is argued that the right to a jury trial is not a bald right to have a panel of your peers determine an issue in any way they wish. It is the right to have a panel of your peers acting reasonably, absent influences of passion and prejudice, to determine an issue. If the jury's award begins to reach that point of passion and prejudice, then you do not really have a jury acting properly. I think the courts recognize that that argument is weak and it is at this point that the courts, the United States Supreme Court, has said that if remittitur were before a court on first impression at this point, it would be difficult to justify it constitutionally, but it's a device several hundred years old and deep in tradition and we look for arguments to support it, and I think that's one of them.

Having a judge determine damages and denying the right, by means of new legislation, perhaps, to a jury determination of damages, one certainly could do that by revision, perhaps by saying that the right to a trial by jury exists, except as otherwise provided by law, in civil cases, if you would. Then you would have an Ohio constitutional provision which would allow the legislature to say if this were that type of action you get a judge, you don't get a jury. And then the question of the federal constitution arises. Both the Ohio Constitution and the federal constitution in their civil jury provisions are interpreted to apply to causes of action which existed prior to the adoption of the constitution, or the protection of this civil jury right. A new cause of action is not necessarily protected by a jury right. What kind of dates are we talking about? We're talking about the date of the adoption of the Seventh Amendment to the federal constitution which was 1791? Something like that.

Mr. Norris: That's the right to jury - the Seventh Amendment?

Evans: The Seventh Amendment to the federal constitution is the civil jury right provision. Article I, Section 5 of the Ohio Constitution was in substantially the same form as Article VIII, Section 8 of the 1802 Constitution of Ohio. So it's an original provision of the Ohio Constitution. If we were to have a new type of action, then the jury question is not in. What is the problem under the federal constitution of removing that right? The problem is one, not of present case law, but of prediction. As you are aware, many of the federal bill of rights provisions have been made applicable to the states through the process of selective incorporation through the due process provision of the Fourteenth Amendment, but the Seventh Amendment has not. The criminal jury provisions have been, in the Fifth and Sixth Amendments. While the United States Supreme Court has, over the period of the last 30 years or so, modified the procedure of a civil jury in a federal case as to unanimity, I think there are various legitimate questions if the right to a jury would ever be removed totally. If the Ohio Constitution were to be revised to remove the jury right in a cause of action existing at the time of the adoption of the constitution, I think we might very well see a case go into the federal courts under the Seventh Amendment arguing that the Seventh Amendment must be incorporated to protect the substantial right of the jury trial.

Mr. Skipton: But it has not been decided yet.

Mr. Evans: It has not. As I said, this is not a present problem. This is a pro-

jection of what might happen. What the decision would be, I wouldn't guess, but certainly it would be appealed into the federal courts, and it might result in the incorporation of the Seventh Amendment made applicable to the states. The Ohio revision would then be unconstitutional by federal standards.

Mr. Bartunek: Are there any questions?

Mr. Norris: I want to pursue further this Seventh Amendment incorporation problem. What you are telling me is that there are no specific holdings where the federal Supreme Court has applied the Seventh Amendment to the states.

Mr. Evans: That's correct.

Mr. Norris: And it seems to me that that distinction is very logical because so many of those incorporation cases deal in the area of criminal law. That's specifically a civil jury case. Let's assume that the state just outright abolished civil juries, and as you speculate the case is brought to the Supreme Court asking for incorporation. What makes you speculate that the court would incorporate since this is a civil jury?

Mr. Evans: It is a speculation. I won't argue about that. That speculation is based upon looking at some of the federal cases which talk about and deal with questions of jury rights, in civil cases, and remittitur in particular. The court has repeatedly referred to the essential value to a governmental type we have of the jury right.

Mr. Norris: How old are those cases?

Mr. Evans: The cases and the commentary start about 1825 and run right up to the present. And it's often seen in remittitur because remittitur is a difficult thing to resolve constitutionally. Where are these lines? You can't really draw them. The cases, almost without exception, talk about how important it is that we must preserve the civil right to a jury - it's essential to the society. That's what leads me to assume that somewhere along the line they are going to draw the line and say we can't erase that right as to prior existing causes of action.

Mr. Norris: Do you think there is, or should be, or would be, a distinction between a state constitutional provision to provide for remittitur at the trial court level as opposed to remittitur upon appeal based on the manifest weight of the evidence? Would there be a distinction and what is it?

Mr. Evans: Remittitur is allowed at the trial court level. Am I misunderstanding you?

Mr. Norris: Well, we're talking about a voluntary remittitur. I'm talking about a remittitur that the judge may do without consent - a compelled remittitur. In other words, it's not mandatory. The judge may do it, but he can do it whether the parties want him to or not. Do you see any distinction or is it a difference without a distinction? You could have a constitutional provision that could say that the judge may compel a remittitur at the trial level or as we said, the jury verdict may be remitted on appeal, and then we could use some burden, for example, if it is against the manifest weight of evidence. And we could use that same burden at the trial level, too.

Mr. Evans: Clearly it would require revision of the Ohio Constitution.

Mr. Norris: Oh, yes.

Mr. Evans: Would it be offensive to the Federal Constitution, I really don't know because the Supreme Court has allowed procedural invasions of the traditional twelve man jury. It might be that a line can be drawn somewhere. Will it remove the right to the jury determination? If you limited it, perhaps that would pass.

Mr. Norris: What you are saying though is that it is either going to be offensive or not regardless of whether we do it at the trial or the appellate level.

Mr. Evans: I think that's probably true.

Mr. Norris: You don't see any particular advantage of doing it at the trial or appellate level from the standpoint of constitutional law?

Mr. Evans: Both the Ohio and the United States courts have said again and again when they talk about the right to trial by jury, we are dealing with a substantive right, not a procedural right. If we draw a distinction on the trial or the appellate level, we are talking about a procedural difference there, not a substantive difference. And the right to trial by jury is clearly identified as a substantive right.

Mr. Norris: But you don't think that we would stand less risk of infirmity, again, from a federal constitutional standpoint, if we impose remittitur at the appellate level as opposed to at the trial level.

Mr. Evans: I don't think that that distinction would matter.

Mr. Norris: I don't either. I was just wondering what you thought.

Mr. Evans: The fact that it was a compelled remittitur as opposed to removing the right to a jury determination at all, that might matter. But as to whether he did it at the trial or the appellate level, I don't think that would matter.

Mr. Norris: You could make an argument, of course, I don't know how persuasive it is, that it is like an appellate function when you reverse on the manifest weight of the evidence at the appellate level, the trial judge can't really do that. He can order a new trial, I guess, which is something like that. I don't know. I'm just fishing as to whether there would be any advantage to impose it at the appellate level as opposed to the trial level.

Mr. Evans: I think when we are talking about the manifest weight of the evidence, that gets us back into that very cloudy area, when is a remittitur permissible. The Ohio cases say when we've got a palpable excess.

Mr. Bartunek: Whatever that means.

Mr. Evans: If it is obviously an excess, and I don't know what "obviously" means, then you can't use a remittitur. You have to order a new trial or a reversal.

Mr. Norris: I'm thinking in terms of a constitutional amendment. Okay, that answers my question.

Mr. Evans: It's very difficult. I wish I could give you a precise answer.

Mr. Bartunek: Thank you, Mr. Evans. I think you did a good job on your research and we appreciate your coming here this morning and giving us in living color the description of what you have written. Very well, this deals with Section 5 of Article I,

which I thought we had agreed to earlier. It reads, "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 a jury." Does anyone want to propose an amendment to that?

Mr. Norris: Mr. Chairman, I would. As I recall I asked that this remittitur memo be done, and I don't remember where we are procedurally on it, but I'd like the opportunity to, at least raise the prospect of an amendment. I would propose at the end of Section 5 of Article I, we could add something like this, "..., and laws may be passed to authorize reduction by appellate courts of the amounts of jury verdicts where the amount is manifestly against the weight of the evidence."

Mr. Bartunek: I'm opposed to that.

Mr. Norris: I know you are.

Mr. Bartunek: I won't insist on a second because everybody isn't here, but we will vote on it.

Mr. Norris: The reason for my suggestion is this. I guess we all have had different experiences in our trial practice, but I've become increasingly disenchanted with the ability of juries to assess amounts. I think they still do a darn good job of deciding who should win. But I just have the feeling that has been building over the years that juries are less able, as time goes on, to cope with a solvent defendant. When they know they've got a solvent defendant, the verdicts seem to me sometimes to be way out of line. We just went through something like that in the legislature in this malpractice thing. Of course, I didn't have very much sympathy for our solutions since I was one of only two who voted against it. I sure can't be accused of being a dupe for the insurance industry. But I felt that one of the problems is that in many malpractice cases, although in those cases tried, the defendant is winning 80% of them, which is a pretty good track record. The jury is certainly able to say "no" that there will be no recovery. But when the jury does find for the plaintiff, the verdicts are really astronomical. Again, this is my feeling. The problem is that you've got, by definition, in the jury's mind, a very solvent defendant. All doctors are rich, you know, especially surgeons and anaesthesiologists, and so they really sock it to them. I would hate to see the civil jury abolished altogether. I'm just not sure whether or not we ought to have some better remittitur provision than we now have at the present time. As was pointed out in the memorandum, what we have now is voluntary remittitur. The judge uses his leverage to order a new trial. He says if you don't agree to a reduction we're going to have a new trial. That helps in some cases but is not appropriate everywhere. The effect of this amendment, if adopted, and enacted through law by the General Assembly, would be that the amount of the jury verdict would be before the court of appeals on the same basis as is reversal on the weight of the evidence. In other words, did the jury, in finding for the plaintiff, did find against the manifest weight of the evidence? It would be an evidentiary determination by the court of appeals and that's a pretty high burden, that it is manifestly against the weight of the evidence.

Mr. Bartunek: Can't the court of appeals do that now?

Mr. Norris: I don't think they can do that from what I read here on the amount of the verdict. Am I right?

Mr. Evans: If a jury has returned a verdict which is against the manifest weight of the evidence, I believe the court of appeals can...

Mr. Bartunek: They would reverse altogether.

Mr. Evans: They could reverse because they would have a decision that is not the

result of a jury trial, but is the result of some group of persons sitting and acting outside their charges and responsibility.

Mr. Nemeth: In other words, it's an error of law.

Mr. Evans: Yes, and this is a tough point. But if it is so excessive that it is against the weight of the evidence, then you can get a reversal.

Mr. Norris: But the court of appeals has no authority to remit, to reduce the amount of the verdict. All I'm suggesting is that under those same circumstances, in addition to having the ability to reverse, you could save a lot of time if the judge could reduce the verdict, if the court of appeals could reduce the verdict. Now that's what I intend. You tell me if what I have suggested accomplishes what I intend.

Mr. Evans: The court of appeals can, under its powers in Article IV, dispose of the case, do such things as are necessary to dispose of the case. They could, if it found that a new trial should have been ordered, it could oppose the remittitur so as to require it.

Mr. Bartunek: Or it could reverse as to the amount of the verdict as being excessive, and yet affirm the finding of liability, and limit the new trial just to the amount of damages.

Mr. Norris: Right. But again, it doesn't have any more authority to remit than the trial court.

Mr. Evans: Yes, under the provisions of Article IV, Section 3 (B) (f), it says the court of appeals in any cause on review has such jurisdiction as may be necessary to its complete determination. So they can impose remittitur, we're going to throw you out unless you remit. They can do that.

Mr. Norris: Consent remittitur.

Mr. Bartunek: It still doesn't given them an absolute right to say $100,000 is too excessive, we'll make it $10,000. Are there any comments from members of the committee. All those in favor of Mr. Norris' suggested amendment please state 'aye'. (Mr. Norris voted in the affirmative and Skipton, Clerc, and Bartunek voted 'no'.) Thank you again, Mr. Evans. Now we will proceed on. That was under 3d of the agenda. We will now proceed to the minutes of the last meeting. Does anyone have any objection? Without objection, they will be approved as distributed.

Research Study No. 42 deals with the grand jury, Section 10 of Article I. This is a long section, and if you will bear with me, I will read it quickly. "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 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." As an aside comment, I think his failure to testify may no longer be commented on by counsel. We are concerned here primarily with the grand jury or any part of this section that any of you gentlemen would care to comment on.

Mr. Norris: I would like to see us seriously consider a limitation on the function of the grand jury. It has come under an awful lot of criticism. Maybe that Illinois suggestion that is set out at the end of the memo is what we ought to do and is something that we could do very quickly, and that is to say that the General Assembly can either abolish the grand jury or limit its function. We don't have the ability to rewrite it to decide just what limitations ought to be put on them.

Mr. Bartunek: How do you think the grand jury system is failing?

Mr. Norris: It's awfully cumbersome. Let me see what some of the criticisms are that they raised here.

Mr. Nemeth: One of the things that is difficult to reconcile is that the federal decisions have come to a point where the defendant or potential defendant or witness is given certain rights at a preliminary hearing which he doesn't have before a grand jury, including the right to counsel which is a pretty substantive right. As of now, there is no right to counsel before a grand jury although there is a right, according to at least one lower federal court case, to a Miranda-type warning to a grand jury witness or potential defendant before he testifies. However, at a preliminary hearing he has a right to counsel being present. At a grand jury hearing, which could do his reputation or his liberty just as much damage as an improperly conducted preliminary hearing, he doesn't have that. So far, the Supreme Court has not made the right at preliminary hearings and before a grand jury co-extensive, but again we are in an area where there is some indication that this may happen in the future. And if it happens, it may very well be that the General Assembly or the people would decide that the institution of the grand jury as such is outdated and redundant.

Mr. Bartunek: You can come up with some more opportunity to get away.

Mr. Nemeth: I'm not sure I follow you, sir.

Mr. Bartunek: Well, they don't seem to have much trouble getting indictments in Cleveland. The only excess, if I were to see any excess in the system, is that it is easier to get an indictment than not to get one, because the prosecutor is there and he controls whatever evidence and whatever witnesses he wants to present to a bunch of people who I assume after they have been there for a few days naturally have him in high respect and high regard and pretty well could be led by him either inadvertantly or purposefully.

Mr. Nemeth: There appears to be some evidence, as a Philadelphia excerpt in this paper indicates, that in large cities, particularly, indictments are handed down with rather frightening speed, sometimes, on no more solid evidence than the affidavit of a police officer. And, on these bases and some others, the grand jury system as a whole has come under quite severe attack lately. Another illustration of what may go wrong are the leaks, whether accidental or planned, in the Watergate grand jury, for example. It's just another illustration of the potential pitfalls of the system.

Mr. Norris: Refresh my recollection, Mr. Chairman or Julius, if I waive a grand jury what happens to me then is that I am charged on the information. Is that it? Is that the technical term?

Mr. Bartunek: I'm not an expert on criminal law, I would have to turn that over to Julius but I think that's correct.

Mr. Nemeth: That's correct.

Mr. Norris: An information, as I recall, is a charge absent a grand jury proceeding, and the only way you can do that is if the grand jury has been waived. Is that right?

Mr. Nemeth: In some states, the prosecutor has the option of which way he wants to go and I think that is also true in Ohio.

Mr. Norris: I have some recollection that it is absolute.

Mr. Bartunek: The constitution says "no person shall be held for a capital or otherwise infamous crime". Of course, maybe they don't classify murder and rape anymore as infamous crimes. I agree with you that that's the only way.

Mr. Norris: I was municipal prosecutor for a while. In muni court, you have the preliminary hearing, which was a farce because if you won it, or as prosecutor if I lost it, it didn't make any difference because we would just go to the grand jury. The preliminary hearing really serves no substantive purpose except to allow defense counsel to fish. And it's a big game, as prosecutor, in that all you had to show was reasonable cause.

Mr. Bartunek: You want to give them enough, but not too much.

Mr. Norris: Oh, yes. We would fudge as much as we could, introducing as little evidence as possible. Defense counsel, on the other hand, wanted the preliminary hearing and would never waive the preliminary hearing because they wanted to cross-examine all the witnesses they could to find out what our case really was. The only practical benefit of the preliminary hearings was that we settled a lot of cases. But that is not a reason in itself. You could have a pre-trial conference and do that. We used to do that quite often and reduce a lot of charges and take pleas at that point. But you could manufacture some other confrontation that is much more efficient than that.

Mr. Skipton: That's the only purpose it serves theoretically.

Mr. Norris: It comes down to that.

Mr. Clerc: As the dockets now grow more and more crowded, aren't we seeing a trend in local court to do away with the preliminary hearing?

Mr. Norris: You can't do away with it, unless he waives it. He has a right to it under statute. I guess my feeling has been that emotionally I still have an attachment to the traditional concept of protection of the defendant as of the grand jury. On the other side of that argument is, of course, that the prosecutor can get an indictment in 99.99% of the cases anyway. He controls it and the other side doesn't even get in the room. I'm just not sure whether or not what we are going to have to do is just simply get to the point where you charge felons the same way you charge misdemeanors - you file an affidavit - except that in a felony you still call it an information. But why you go through the preliminary hearing and why you go through the grand jury, I'm not so sure that all of that fuss is really worth it. There isn't any public purpose in it. I'm just not sure.

Mr. Bartunek: Of course, the grand jury did serve a pretty good purpose in the Watergate thing and it serves a pretty good purpose in some of these secret indictments they come out with.

Mr. Norris: Again, as far as the secret indictments, the prosecutor could do that anyway, by having them charged on information. They wouldn't have to be made public until the arrest would be made. You might still want to retain the grand jury for investigative purposes. I have no problem with that. I'm not sure, maybe this memorandum covers all of that, but my first glance at it, I'm not sure that it gives more than surface treatment to the problem of the grand jury. I'm not criticizing the staff because we haven't really directed them to do that but I'm just wondering whether or not maybe we ought to understand better the preliminary hearing and the relationship with the grand jury and maybe we should take some testimony. Or, again, maybe in the interest of speed, we just might adopt something like the Illinois provision. Maybe we don't even have to give the General Assembly the authority to abolish it, maybe to limit it, and let the General Assembly be the forum for deciding what the proper function of the grand jury is. I'm sure that there is surplusage in the grand jury procedures now, but whether that means that there is nothing valid, nothing we should retain, - I can't say. My involvement was always at the misdemeanor level as a city prosecutor, but I am content that we retain more than we need to retain.

Mr. Skipton: The real question is what the real purpose for the existence of the grand jury is. Is it a protection to the accused, which I would tend to think of it in theory. Things are presented in secret and if they aren't valid then that's the end of it. And a guy doesn't have to have any damage to his reputation. Of course, it has been used for fishing expeditions, and witch hunting and that sort of thing, too. So I guess it comes back to what kind of prosecutor you have.

Mr. Bartunek: Yes, I think you're right. I would be inclined to leave the section just as it stands.

Mr. Clerc: If we leave it as it stands are we perpetuating something that should be constitutionally streamlined to make it more efficient?

Mr. Bartunek: In my opinion, no. We constituted this committee months and months ago and there has been no testimony, there has been no outside concern on this, apparently, either by the prosecutors or by the criminal bar. And, as Skip says, it is designed to give a protection to the innocent, to some fellow who maybe somebody would sign an information on, but maybe when the facts are brought to the grand jury, they would say no, he didn't do it, there was not probable cause. So it is intended to be some sort of protection for the innocent. I guess all our laws really are written with the idea to protect the innocent, but they have been so worked around that now they protect the criminal more than the innocent. The biggest problem that we have in Cleveland is that the chief justice of the Supreme Court has ordered that all criminal trials happen in 90 days, which is impossible. And the local judges are now violating that order and rule of the Supreme Court because you just can't do anything else but criminal trials if they were to do that.

Mr. Norris: Mr. Chairman, if I might for the record here, at least, just suggest two amendments. The first one would be, "The General Assembly by law may abolish the grand jury or further limit its use." That's the Illinois provision. Now, if that amendment fails, what I would propose to do, so you know how to vote on the first amendment, would be to propose a second amendment that would simply say, "The General Assembly may by law further limit the use of the grand jury." So the first amendment would be to abolish or limit and the second amendment, if the first failed, would be to simply limit.

Mr. Bartunek: Very well, we'll take a vote on it. Are there any comments by members of the committee? Mr. Skipton?

Mr. Skipton: I just don't know enough about this.

Mr. Bartunek: Well, I feel that really we have had no testimony, the research is somewhat superficial. I know we are tinkering here with a very big thing. My philosophy as a guide is that I don't want to change anything unless I see a reason for doing so.

Mr. Norris: One of the reasons for doing it in this kind of form rather than monkeying with the procedure would be, if we come out with a recommendation like this, you had better believe that we will have lots of testimony before the full commission. But if we don't have a recommendation, then it will be just like it was here. It will be silent and nothing will happen. This isn't really too radical a proposal because we are not abolishing the grand jury. We are just saying that the General Assembly may. I think our purpose, or my purpose would be accomplished, whichever is adopted. I don't really care. I think what it would do would be to put the public on notice that the Constitutional Revision Commission is thinking about tinkering with this and that would bring in the testimony and if the full commission thinks then that we shouldn't tinker at all, then fine, it comes out. I wouldn't abolish it. That's the reason for the middle ground.

Mr. Nemeth: As the memorandum indicates, I think a recommendation to abolish the grand jury, at this point, in Ohio, would draw quite strong negative reaction, as far as we can determine. Particularly from the prosecutors. The prosecutors like the grand jury system because it offers them insulation between themselves and the potentially accused individual, and they feel that as long as the grand jury exists, it shares with them the burden of deciding who should be or who should not be prosecuted. That is something that they do not want to take on their own shoulders.

Mr. Norris: It gets them off the hook when the newspapers are screaming at them. I'm not so sure that's a valid reason for retaining an institution.

Mr. Bartunek: We will vote on Mr. Norris' first motion which reads, in the appropriate part of the section, "The General Assembly may by law abolish the grand jury or further limit its use".

The vote was taken and Norris voted aye, all others voted nay.

Mr. Skipton: Al, wouldn't it be better if we have the report to the commission note the discussion of the issue and open the subject up for further commission perusal? Perhaps the commission would order further study of it. This is a technique used in the case of the legislative-executive. Some of those issues we discussed in the report but took no action on and individual members did make motions to do something further with them.

Mr. Bartunek: Maybe Mr. Norris would have time to at least give the jist of your ideas to Brenda so that we would include in our report that the committee seriously pondered the question.

Mr. Norris: I would like to see some testimony before the full commission.

Mr. Skipton: If it's stated in the report, then it's fair game for the commission to have some more on it if you wish to propose it.

Mr. Clerc: I would vote for the second motion for the reason of opening further discussion.

Mr. Norris: Maybe we have enough votes for the second one. I didn't expect the first one to carry.

Mr. Bartunek: The first one has lost and it really is unfair that everyone isn't here to vote. We've got to proceed, however. The second motion is, "The General Assembly may by law further limit the use of the grand jury."

Mr. Skipton: The question is what does that mean? In what ways do we contemplate that they may act? What limitations are possible? Limit the matters presented to them?

Mr. Bartunek: I think it's wide open. They can limit it to any extent: how often they meet, what they consider, who can appear.

Mr. Nemeth: They could possibly limit their function to an investigatory function as distinguished from an indicting function.

Mr. Skipton: That would be the one thing that I am opposed to in the grand jury. I want to limit their witch hunting.

Mr. Norris: The reason I chose the language is that I just lifted it directly from the Illinois Constitution.

Mr. Skipton: In other words, if I were going to put a limitation in myself, it would be to limit their ability to witch hunt. What do these words mean and what possible course of action could the General Assembly take affects how I vote.

Mr. Norris: I think the word 'limit' is better than the word 'modify'. That would give them the authority to expand the use of the grand jury, too. I suppose that's the reason they chose the word 'limit', so they could only go one way, to increase the authority of the grand jury to act. We know what we've got now, and this would mean they could cut back on whatever function there is now, as a result of the deliberation and legislative process. And I like that term better than using a term like 'modify', where you could go in either direction. I don't want to expand.

Mr. Nemeth: The law in Ohio at the present time, at least as expounded in the Hammond and Adamet cases which are the Kent State grand jury cases, is that Ohio grand juries have only those powers which are specifically granted to them by statute. In other words, I think this is somewhat of a limitation on their ability to go fishing. What they do has to be pretty specifically laid down in the law, and of course the law is subject to constitutional test. If the law does not meet due process standards and so on, it could be struck down.

Mr. Bartunek: Practically anything we do here is superceded by the federal anyway. Any other discussions? Alright. All those in favor of Mr. Norris' second amendment please state aye.

Mr. Clerc: Let me clarify one point before voting. In voting yes, are we putting ourselves in the position of having to defend this? Are we saying that the committee is indeed in favor of this or is there some way that we can, as Mr. Skipton suggested, open it up to further discussion and more testimony?

Mr. Bartunek: I would think that the proper way to open these matters that Mr. Norris has brought up in this committee would be in our report to the commission to state that these problems came up and we didn't really feel we had enough information on remittitur, on the duties and rights of the grand jury and things like that, and ask the commission to appoint a special committee to study these things. I think that would be a more proper way. I am concerned if we pass an amendment and a recom-

mendation we will have to defend it.

Mr. Norris: Mr. Chairman, if your thought is that we recommend to the commission that there be studies in these two areas, then I don't need my amendment. But to just have a committee report that says that we looked at these two areas, we didn't know enough about them and so we recommend no change, that doesn't help. Nobody is going to come forward. But if we say to the commission we looked at these two areas and we don't know enough about them, therefore we recommend special committee or study be undertaken so that a decision can be brought to the full commission, that's fine. That would contemplate testimony.

Mr. Bartunek: Then you could call the prosecutors in to say how and why we use these.

Mr. Norris: I just want to stir it up somewhat. I will withdraw that second motion.

Mr. Bartunek: So then the two things we are going to recommend further study on are Article I, Section 5, the remittitur thing, and Article I, Section 10, the grand jury, and maybe others as we go along. I do feel that we have not had testimony in the meetings and we are just going on things we know.

Mr. Norris: I agree with that. We need to know more.

Mr. Bartunek: Alright. So at least those two we will recommend to the commission, although no change, that we request that a special committee be appointed to give this full and deeper study. We will proceed on now to research study no. 44H. That deals with Article I, Section 10, which we just talked about, except that this has to do with putting twice in jeopardy, self-incrimination, speedy trial, trial by jury. Essentially what you are talking about in this remittitur thing, if you will permit me to reword somewhere along the line. Well, we have just discussed this section, and I don't see any changes that have been offered, nor do I have any personally that I would like to see. Is there any other discussion on Section 10, any of these rights? Double jeopardy, grand jury rights, defending a person with counsel, face the witness, speedy trial, deposition of witnesses, compelled to be a witness against himself, whether failure to testify may be considered by the court. Is there discussion of any parts of these?

Mr. Clerc: You said something about a change in failure to testify.

Mr. Bartunek: I believe that the federal courts have held that you cannot comment on the fact that a person failed to take the stand and testify.

Mr. Norris: Didn't we used to have that in our constitution?

Mr. Bartunek: It is in it now.

Mr. Norris: Do we need to take it out, then?

Mr. Bartunek: Whatever your pleasure is. I would be against taking it out because I don't like Washington commanding me what to do. But if that were the sense of the committee certainly we could. Do you know if that is the law, Julius?

Mr. Nemeth: Yes it is. There is no doubt about that.

Mr. Norris: We used to do that and my recollection is that it was an Ohio case, wasn't it? Or maybe it was another state with exactly the same provision.

Ms. Avey: It was in California, in Griffin v. California

Mr. Clerc: Then we could remove the words "but his failure to testify may be considered by the court and the jury and may be the subject of comment by counsel".

Mr. Skipton: What was the basis of the federal decision?

Mr. Bartunek: They overturned the conviction because they commented on it, violating his civil rights.

Mr. Skipton: Where did they find something to the contrary, though?

Mr. Nemeth: Invasion of the right to remain silent.

Ms. Avey: Yes, the Fifth Amendment self-incrimination clause.

Mr. Bartunek: The Supreme Court held that the rules of evidence 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. The court continued by saying the prosecutor's comment and the court's acquiescence was the equivalent of an offer of evidence and its acceptance. This, the court held, violated the defendant's fifth amendment right, specifically the spirit of the self-incrimination clause. It said refusal to testify was a remnant of the inquisitorial system of criminal justice, which the fifth amendment outlawed, because there was a penalty imposed by the court for exercising the constitutional privilege. Do you want to make a motion?

Mr. Clerc: I would move that we strike the wording from "...but his failure to testify" to the end of that sentence, put a period instead of a semicolon after "himself".

Mr. Bartunek: Does anyone second that?

Mr. Norris: I'll second that.

Mr. Skipton: I have a question about that amendment. You say failure to testify may be considered by the court and jury. That sure opens up a loophole for a challenge to say that they did consider it.

Mr. Norris: I think what you need to do is just cross out "and may be the subject of comment by counsel".

Mr. Bartunek: The amendment will be approved without objection. The amendment which reads from about the third last line of Article I, Section 10, after the word "jury", strike out the remainder of the sentence, "and may be the subect of comment by counsel". All of those in favor please state aye. (All voted aye except Mr. Bartunek voted nay. The change was adopted). Now we will go on to Research Study No. 44I, which deals with Article I, 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." Does anyone have any comments about that?

Mr. Norris: Just this one. When we get to the question of remittitur, we'll want to be sure that this article is included as well as the one before. It bears on that subject.

Mr. Bartunek: Any other comments? Without objection then there will be no change to Article I, Section 19a.

Ms. Avey: When you say no change, that's not the same recommendation that you made with respect to the other sections passed on for further study, is it?

Mr. Bartunek: That's correct. We're not going to ask for a hearing to be held on the amount of damages recovered by civil action. We're asking for hearings on the remittitur which affects this section. But as far as changing it, we're not changing those other sections either. But now we are going to ask the commission to appoint a committee to consider Article I, Section 5, Article I, Section 10 on the grand jury, and Article I, Section 19a in connection with the remittitur. Because if we do decide that the judge can remit we'll run into this section as well as the other one. Now we will go on to Study No. 44J which has to do with Article I, Section 15. "No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud." Is there any discussion of Section 15?

The members requested a definition of the word "mesne".

Mr. Norris: I just wonder what in the world that final clause is, "unless in cases of fraud".

Mr. Bartunek: I guess it carries back to the old days in England where they imprisoned people for debt, and they didn't want them to do that in this country.

Mr. Norris: We don't have any statutes implementing that.

Mr. Skipton: Putting him in jail for fraud?

Mr. Norris: Not unless it's a criminal charge.

Ms. Avey: "Mesne" means intermediate in occurence or time of performance, according to our dictionary.

Mr. Norris: Okay, I guess what that permits us to do then is to promulgate the criminal statute which would say in essence that if you procure goods by fraud, then that's a crime. That's what that means.

Mr. Bartunek: Is there any discussion? Without objection then there will be no change. We will proceed on to Research Study 44K which deals with Article I, Section 2. If we ever do this again, we ought to do them in the order that they appear in the constitution. This says, "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." This is a restatement of the equal protection clause. It is the equal protection clause. It comes from the Declaration of Independence, and is a statement of principles.

Mr. Norris: The only clause I have any question about is "no special privileges shall ever be granted that may not be altered or repealed by the General Assembly." They are the only ones that can grant them in the first place. I see no reason to change it.

Mr. Bartunek: Without objection then, there will be no change in Article I, Section 2.

Mr. Skipton: That would be dangerous to change that, because people would find new rights.

Mr. Bartunek: We will now go on to 44L, which is Article I, 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." This restates the federal constitution. When I was a judge they used it twice on me and there are key phrases to put somebody in a mental institution, especially in cases where wives are having trouble with their husbands and they say the magic words and the husbands are taken by the police to the insane asylum. On two separate times, the husbands' lawyers came on a Saturday morning, in both cases, with a habeas corpus. In both cases, I let the guy out, but worried like heck whether he really was going to kill her. I certainly don't think anyone would want to take away the right of habeas corpus.

Mr. Norris: Have any problems been raised, Julius, about the Ohio provision? Has there been any current debate on this section?

Mr. Nemeth: Not that I'm aware of.

Mr. Norris: Well I see no reason to change that.

Mr. Bartunek: Without objection, then, there will be no change in Article I, Section 8. That completes Research Studies No. 44H through L. Then the University of Cincinnati Law Review Article on Smaller Juries, we talked about that the last time, so without objection, I will eliminate that from the agenda.

Ms. Avey: What about the question of the unanimous verdict? Does that have to be taken up separately?

Mr. Bartunek: I think we discussed that before.

Mr. Norris: Mr. Chairman, remind me where we are, because we have run into problems in wanting to reduce the size of juries, with that three-fourths provision. What have we decided to do?

Mr. Bartunek: The three-fourths provision still remains, and I thought it was the sense of this committee to keep the three-fourths provision but keep the unanimous requirement for a criminal jury.

Mr. Norris: You are always stuck whenever you reduce the juries with that particular three-fourths provision.

Mr. Bartunek: I have had six on a jury.

Mr. Norris: If you have six, then you've got to have five of the six?

Mr. Bartunek: Right.

Mr. Norris: That's what we did, then. I forget how we came out on that statute to allow the reduction in size. Is that the minimum size, six?

Mr. Bartunek: I don't know what the statute says. I know that I have tried cases with six jurors. Anyway, we should have an easier requirement for civil cases than for criminal cases.

Mr. Norris: Yes, I agree with that. Did the law review article deal with that? Did they think the three-fourths requirement limited the General Assembly in the size of juries? Did it raise that as a problem?

Mr. Bartunek: I don't remember.

Mr. Norris: The reason I raise that is I remember that we wanted to be able to make smaller juries available as a matter of efficiency, and I can remember that three-fourths provision hanging us up.

Mr. Bartunek: On page 607 of the article in the section entitled Revising the Ohio Constitution", it states that it is silent to the requirement of the jury size, however civil rule requires an eight member jury in civil cases and the criminal rule requires twelve members in felony and eight members in misdemeanors. If these rules are unconstitutional, the constitution could be revised to validate it. If they are constitutional, the constitution could be revised to establish minimum standards which must be met. I don't agree.

Mr. Norris: Why would it be unconstitutional to have an eight- man jury?

Mr. Bartunek: I don't know.

Mr. Norris: That disturbs me. We ought to be able to have a six-man jury.

Mr. Bartunek: We do. We not only ought to be able to, I think we do. I think the rules - we turn over all of these things to the Supreme Court to issue rules, and the civil rule #38 requires an eight-man jury.

Mr. Norris: Why did they do that. I bet it stems from the three-fourths requirement.

Mr. Bartunek: Sure.

Ms. Avey: I think the conflict is that Article XIII, Section 5 requires a 12-man jury for corporate right of way cases.

Mr. Bartunek: Eminent domain, yes.

Mr. Norris: Now, there's something else. Should we not be able to allow smaller juries? That question is not before us now, is it?

Mr. Bartunek: We already voted on that, and they are to remain, is that correct?

Ms. Avey: You eliminated the twelve-man jury.

Mr. Norris: Rule #38 says"...In an action for appropriation of a right of way brought by a corporation pursuant to Article XIII, Section 5, of the Ohio Constitution, the jury shall be composed of twelve members unless the demand specifies a lesser number; and in the event of timely demand by more than one party in such action the jury shall be composed of the greater number not to exceed twelve. In all other civil actions the jury shall be composed of eight members unless the demand specifies a lesser number; and in the event of timely demand by more than one party in such actions the jury shall be composed of the greater number not to exceed eight."

Mr. Bartunek: We already in this committee have taken out the requirement for twelve in corporate appropriation cases.

Mr. Norris: I wonder how the court took that away.

Ms. Avey: The constitution says "a jury of twelve men in a court of record, as shall be provided by law", so maybe they could provide by law for some variation of twelve.

Mr. Bartunek: I don't think they did that because I know that in eminent domain cases involving C.T.I., Cuyahoga County requires a 12-man jury.

Mr. Norris: Okay. "In all other civil actions, the jury shall be composed of eight members unless the demand specifies a lesser number. In the event of timely demand by more than one party to such action, the jury shall be composed of a greater number not to exceed eight." So this says we can go to six.

Mr. Bartunek: You can go to four.

Mr. Norris: In the staff note it says, "In addition, Section 1901.24 provided for six-man juries in civil cases in the municipal court, unless a specific demand is made for eight or twelve." Well, I think that permits six. I was concerned from what you read there that the lowest number permitted by the rules was eight and that they were hanging up on the provision, but they are not. I just wanted to be able to use six.

Mr. Bartunek: Well, yes, but I prefer to use twelve.

Mr. Norris: Yes, but especially in muni court actions, when they impanel the jury, it makes a lot of difference. Two hundred bucks is a lot more than one hundred dollars, in a thousand dollar law suit.

Mr. Bartunek: We will now proceed to an equal rights amendment from the public testimony. Now I thought we considered that. I thought we turned it down.

Mr. Clerc: I thought so too.

Mr. Bartunek: Is there any question about it? Without objection we will turn it down again. And the right to know and participate. About the fourth paragraph down, the memo mentions the Montana Constitution where people are guaranteed the right to participate in the decisions of governmental agencies, interpreted as the right to be heard on matters of interest. And another section guarantees the right to know. It provides that no person shall be denied the right to examine public records nor observe public deliberations. But people have that right now. In fact, there is a state law that gives you the right to look at any public record and have a copy made. What is your pleasure, gentlemen?

Mr. Norris: I don't see that we need it.

Mr. Roberto: I haven't had much of a chance to study this, but it does seem to duplicate the provisions for redress on the part of citizens. I don't see what it adds, quite frankly.

Mr. Bartunek: If ever I saw a state where they gave people more of a right to participate and know, more than Ohio. Well then, gentlemen, without objection, we will consider the right to know amendment and state that it is already covered in other provisions of the constitution and therefore not necessary. Now we come to the bail provisions of Article I, Section 9.

Ms. Avey: I have some extra copies to distribute of the two alternatives. In any case, a change has been approved to modernize the spelling of the section of "offenses".

Mr. Bartunek: Section 9 says that "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."

Mr. Norris: These two alternatives were drafted at my request. The reason for my requesting this was in drafting a bill in the house, I discovered that there is a very

distinct difference between the Ohio Constitution provision on bail and that of the federal constitution. The federal constitution simply outlaws excessive bail. It contains a provision against excessive bail. As a result of that, the courts have held that the Congress can by specific category restrict bail. So that they can provide, for example, for no bail for repeat offenders. Somebody is out on bail and commits a second offense, then Congress can provide that bail on the first offense can be revoked and bail will not be available on the second offense. The federal statutes to that effect has already been upheld in the lower courts, I think up through the court of appeals level. I'm really not certain, but I think the Court of Appeals for the District of Columbia has upheld that provision. I wanted to by statute propose that kind of a provision for Ohio. But Ohio's bail provision goes further than that and I think puts some question on our ability to enact that kind of a statute in Ohio. Because it is not only an excessive bail provision, it's a guarantee of bail. It says that everybody is bailable, except those accused of a capital offense, and it does not allow any restriction on bail, and I think if there is one thing that's got everybody upset it is these people who are committing offense after offense after offense on bail. I'm proposing that we go closer to the federal position so that the General Assembly would be in a position to restrict bail. It's been a while since I read the two alternatives and I notice in my response I told her I preferred the second because it was simpler and more restrictive.

Mr. Bartunek: I preferred alternative "B" because it sets it out in better language.

Mr. Norris: So it would not go clear to the federal position which is purely excessive bail. It would retain our guarantee of bail for everybody except in these limited situations of dangerous felons, and then the General Assembly could restrict bail in those areas. So it's not self-executing and not as broad as the federal provision. But I think it would allow the General Assembly to restrict bail.

Mr. Clerc: Would that also work in situations like that you mentioned earlier with repeat offenders, maybe a non-dangerous individual?

Mr. Norris: No, only if it's a felony. The main thrust is to dangerous offenders. The provision that I have drafted, for example, follows the D.C. Law, and it says that if somebody is out on bail, and they're picked up, although the D.C. law is not limited to felony, on the assaultive kind of offense, then the bail can be revoked and no bail available. Now that's the approach of this, when release would endanger other persons in the community then you could do that, the law could provide for that, and of course it could apply to any felony committed on the second offense while they are out.

Mr. Roberto: Mr. Chairman, I read the minutes of the last meeting and this seems to have the favor of most of the members of the subcommittee. I have been trying to convince myself that it is a good idea, but I can't do that. I think it offers a constitutional protection that prevents against some of the emotional kinds of legislation we pass in the house and in the senate. It's been my experience in the legislature that it is pretty difficult to keep from being a hero on the floor when somebody is prescribing a 99-year penalty or removal of probation or all of the other things that are built into the system to provide some flexibility. And I just simply foresee that with this kind of a provision it won't be too long before there won't be too many felony offenses that are bailable as a result of some of our political heroes who are caught up in the emotional context of a particular period of time. I think it has been in the constitution since 1851. I don't know whether that was when it found its way in there or not, but I think it has served well and I'm really hesitant to open that up to a whole flood of legislation which would restrict bail for what numbers of people consider to be obnoxious crimes. I consider all crimes to be obnoxious. But for repeat offenders, I'm not familiar with the case law and I'm certainly not an expert in this area but it seems to me that that would justify increasing the bail and dis-

courage bail in many cases anyhow. To open this up further, I did have some concern, and I can't convince myself that it's a good idea.

Mr. Norris: Mr. Chairman, just by way of quick rebuttal, I guess that's the reason I prefer the second alternative, because it's more restrictive. It retains the excessive bail provision. It does not alter that at all. It only talks about denial of bail, and you can only deny bail in one of two circumstances, one where the release would endanger other persons, so that would be the assaultive kind of a person. And, again, the situation would be you're going to have to make a case by case decision, the judge would, on granting bail, under any statute. Or the second alternative is, in any felony, where any person is charged with any felony, if no condition of release will insure appearance at the trial. Of course, you can't by legislation under that alternative say, well, everybody accused of every felony will never show up for trial and so there will be no bail for every felon. The only statute that could be under that thing would be giving the judge discretion to say of a person charged with a felony that no condition of release will insure the appearance at the trial. I think it's very restrictive.

Mr. Bartunek: That's not the problem you're trying to get at, that's not really second offenders.

Mr. Norris: Well, again, the second offenders problem is my number one concern, but I think this other provision here doesn't open it up enough to really...

Mr. Skipton: I feel somewhat like Mark. If you have a problem such as an offense committed while on bail, I would rather strike at that directly rather that write general language.

Mr. Bartunek: In reading some of these cases under this section, how do you solve that problem, where a man supposedly commits a robbery and is out on bail, and as is not uncommon he commits a robbery while out on bail so that he can pay his attorney.

Mr. Skipton: I think, for example, just pull him in for immediate trial. The hell with bail - we'll go into trial right now. Or, make it a form of contempt of court. The court's granted you bail and you've gone out and violated the terms of the bail. You committed another crime and you are in contempt of court and we'll jail you right now.

Mr. Bartunek: But he still is constitutionally entitled to bail. It says very clearly that all persons shall be bailable.

Mr. Norris: I have the statistics in another file, and this repeat thing is really a very serious thing. As I recall off the top of my head, the statistics are about 19%. It is really stunning the number of offenses that are committed by persons on bail.

Mr. Roberto: That may be true Al, but if you notice in your language, you are limiting it to assaultive type offenses. How many of those assaultive type offenses are that second condition, if no condition for release will assure appearance at a trial? I don't think you are tightening it up too much, with that language, with regard to repeat offenders anyhow.

Mr. Norris: Mr. Chairman, I think this kind of language would prohibit the General Assembly from going hog wild. Now if the committee feels that it would like to limit the amendment to second offenses while on bail, that doesn't bother me because that's my real problem, and I would have no objection to having this redrafted to limit this to that specific situation.

Mr. Clerc: Could it be redrafted where we would strike "if no condition for release will assure..." and put in after "the offense charged is a felony" something to the

effect that "committed while out on bail" or if you want to expand that to misdemeanors committed while out on bail.

Mr. Norris: I think that if you are going to limit it to bail on the second offense, then yes, I think you shouldn't limit it. If a person is on bail for a misdemeanor, then whether he commits another misdemeanor or a felony, it really doesn't make any difference. So if it's just going to be a repeat offender thing, I don't think it ought to have a distinction between a misdemeanor and felony.

Mr. Skipton: My problem is that they are making crimes out of so many things, today. And as Mark said, putting outrageous penalties on alleged criminal acts. I can just see the proposals in that legislature once they get going on one of these issues.

Mr. Norris: That's the reason I like the restrictive language.

Mr. Skipton: You make it a crime for spitting in the street and then limit your ability to get bail.

Mr. Bartunek: But in Cleveland it is a lot different, and there are a lot of serious crimes going on because of the 90-day rule imposed by the Chief Justice of the Supreme Court. They are practically letting murderers off on minor charges and plea bargaining.

Mr. Skipton: Well, what I'm saying is that if that's the problem, let's limit this to where that's the only case we are talking about. I'm not for giving the legislature very broad authority.

Mr. Roberto: I think it's dangerous.

Mr. Bartunek: I have confidence in my legislature.

Mr. Skipton: They have a tendency to make crimes out of too many things.

Mr. Bartunek: Would you and Skip be willing to go along if we limited to second offenses?

Mr. Roberto: I would be inclined to.

Mr. Skipton: Yes, if you could limit it to the specific types of cases you're talking about, fine.

Mr. Norris: Well, how about this, just as rough language here. "Persons may be denied bail prior to trial when the offense charged is a felony if the person was released on bail at the time the charged offense was committed."

Mr. Bartunek: Isn't that a little too specific for a constitution?

Mr. Clerc: I hate to throw out that clause about endangering other persons in the community.

Mr. Norris: We could leave that in there, too.

Mr. Bartunek: I think that's what you are really trying to get at. You don't care if a guy goes and commits a victimless crime. What you do care about is his going out and hitting someone else over the head.

Mr. Norris: That could be left in there, "when their release would endanger other persons or the community."

Mr. Bartunek: Period.

Mr. Norris: Well, if you want to do it for second offenses, then you would have to say, "or the community" cross out the "or", "if the offense charged is a felony" then the repeat offender language, "and if the person released on bail..."

Mr. Bartunek: Why do you have to have the repeat language? Don't you get that under if their release would endanger the community?

Mr. Norris: Then you could deny bail on the first offense.

Mr. Clerc: That's a point I think we ought to investigate. What we're saying here in this alternate "B" as written, we're making two conditions for denial of bail: one, in the case of an accused who may be deemed a threat to the community; and then the second one, I thought it was the sense of the committee that we were trying to deny bail to people who commit offenses while out on bail. So in that situation, then, the "or" would stay in after "community".

Mr. Bartunek: They would be alternates rather than two conditions.

Mr. Norris: That doesn't offend me. What I'm trying for is a consensus here and if the only way we can get a majority is to have to limit it only to repeat offenders, that's what I was drafting. But you are right. An alternative would be to leave in the first clause and then tack on as an "or the repeat offender" thing.

Mr. Clerc: Could we say something to the effect, looking again at that second paragraph, "Persons may be denied bail prior to trial when their release would endanger other persons or the community, or the offense charged has been committed while on bail release."

Mr. Skipton: That restricts it to the same type of crime. It could be a different kind of a felony. It could be murder in one case and assault in the next.

Mr. Norris: I think in that second alternative, John's point is well taken. If a fellow is out on a misdemeanor and then he is picked up on a traffic offense, you don't want to deny him bail. The second offense probably ought to be a felony.

Mr. Roberto: I still have problems. If a guy embezzles funds and then the judge has to decide whether he is going to be dangerous or not, he has the same problem. If he has to go out and steal some more money to make his bail, it doesn't matter whether he assaulted somebody in the first offense or whether he embezzled money. He is still dangerous in the judge's mind. That doesn't limit it very much in my mind. I understand the problem with some characters we have that if it's a second offense or a third offense or whatever, the bail should be limited. And I'm sorry that I don't know what the case law is. It would seem to me that if you have a repeat offender before the court, the bail ought to be pretty stiff.

Mr. Bartunek: You are supposed to jack it up.

Mr. Roberto: Yes. And if judges are not doing that then that's a different kind of problem.

Mr. Norris: But if they can raise it they go out.

Mr. Roberto: Yes, if they can raise it.

Mr. Norris: In the cases then, they flip back to the excessive bail, and they have got to let them out.

Mr. Roberto: If it's a second or a third offense, I don't know how you could sustain

that's excessive bail.

Mr. Norris: They do. It really is unbelievable.

Mr. Roberto: As I say, I can go along with, if you are trying to limit it to second or third offenses or whatever, I have no problem with that. But I sure would hate to turn over to the legislature the law-making authority to eliminate bail for any kind of felony, just carte blanche.

Mr. Norris: Mr. Chairman, just as a suggestion, why don't we take it in two parts and see what we have for alternatives.

Mr. Bartunek: Maybe this is one of the things we should ask the commission to study more in depth, and get some additional information. Or maybe we can work out a compromise.

Mr. Norris: I'm just wondering. I'd like to see whether we can work out a compromise and if we can do it quickly. If we can't, yes, let's put it to the commission.

Mr. Bartunek: Why don't you propose some language.

Mr. Norris: Okay.

Mr. Skipton: Are there any examples of language available in any other state constitutions? If there is something already existent and has been through interpretation, that would make it easier.

Mr. Norris: You see, you don't have that problem in the federal law or in those states that adopted the federal provision, because there is no problem, because they can already do it. It's simply an excessive bail provision and the courts have held that you can categorize. The courts have held, for example, that the federal congress can come in and say no bail for anybody accused of burglary. Here's what Hawaii's constitution says. "The Court may dispense with bail if reasonably satisfied that the defendant or witness will appear when directed, except for a defendant charged with an offense punishable by life imprisonment". Which is going the other way. That's a little more liberal than what we've got.

Mr. Bartunek: Alaska says, "Penal administration shall be based on the principle of reformation used to perpetuate the republic. All penalties shall be determined according to the seriousness of the offense and the objective of restoring to the individual his citizenship." I don't see how that...Here's the Model State Constitution, "Persons shall, before conviction be bailable by sufficient sureties, but bail may be denied to persons charged with capital offenses or penalties punishable by life imprisonment, giving due weight to the evidence and to the nature and circumstances of the event. "

Mr. Norris: No, that's not as good as what we have. It doesn't have anything on excessive bail.

Mr. Roberto: Ours looks better all the time.

Mr. Norris: Ours is the most restrictive of any of them. Well, here is what I would propose, and this language is not too far off. "Persons may be denied bail prior to trial if the offense charged is a felony and was committed while the person was released on bail." And then, of course, that second paragraph would have to stay in, "Notwithstanding any other provision..."

Mr. Roberto: To overcome the Supreme Court rule-making authority? Is that the purpose

of that one?

Mr. Norris: Yes. You've got to decide who is going to make the laws and who is going to implement it. It's either going to be the General Assembly or the courts.

Mr. Roberto: That sounds alright to me.

Mr. Bartunek: Skip, what about you?

Mr. Skipton: Alright.

Mr. Bartunek: Bob?

Mr. Clerc: Okay. We are going to get rid of that first section then, the endanger thing?

Mr. Norris: Well, then I'll come back and see if there's any feeling to tack that on as a second alternative. In other words, this is kind of the bottom line. I think most people can agree on that. Let's see if we have a consensus to increase it.

Mr. Bartunek: Without objection then, the new clause will read, "Persons may be denied bail prior to trial if the offense charged is a felony and was committed while the person was released on bail." Is there any objection? Without objection then, that will be adopted.

Mr. Norris: That would include the other changes suggested in alternative "B" as far as the first and last paragraph. Then, Mr. Chairman, just to see what kind of consensus we have to add an alternative that would also allow the denial of bail even on a first offense when release would endanger other persons or the community. Is that a fair statement of what we've talked about?

Mr. Clerc: I think so. I'm not a lawyer and I don't understand how the word "endanger" would be interpreted. I'm endangered if someone is going to burglarize my home or steal my car. I'm not so concerned about that as I am about violent crimes: rape, assault. The rape situation, at least in Hamilton County, is bad but it seems to be getting worse rather than better as far as people being released. We had one man convicted of rape the other day and given a 90-day sentence.

Mr. Norris: What you could do is tighten that language by saying in essence if a person is charged with a felony of violence then if a judge thinks that his release would endanger the community...I think that's what you're talking about, isn't it?

Mr. Clerc: Yes.

Mr. Norris: If a fellow is charged with any of these violent felonies. We have a definition in the criminal code of an offense of violence, so if that's what we're talking about, that would limit it even further, but would allow denial on the first offense. And it would allow denial for a second or third offender who didn't happen to be out on bail.

Mr. Bartunek: Mark, what do you think?

Mr. Roberto: I think I'm stuck on the bottom line, Mr. Chairman.

Mr. Bartunek: How about you, Skip?

Mr. Skipton: I don't mind language dealing with endangering other people and if it can be limited in some way, I'm in favor of it.

Mr. Bartunek: Then the amendment before us which states in the second paragraph "persons may be denied bail prior to trial when their release would endanger other persons or the community, or if the offense charged is a felony and the offense was committed while the person was released on bail.

Mr. Norris: Mr. Chairman, if I might, I think we want to limit it more than that.

Mr. Skipton: This "endangering the community" bothers me, because that's a phrase that could mean almost anything.

Mr. Clerc: Could we put some kind of definitive clause after "endanger", "endanger the health and safety"?

Mr. Norris: The legislature would still have to act. I don't think that language from a constitutional standpoint is bad at all.

Mr. Skipton: For myself, I would limit it to persons, because when you say the community, I think, you've got open-sesame.

Mr. Nemeth: How about arson and things like that, which are not necessarily directed against persons, but are nevertheless...

Mr. Bartunek: Arson isn't bailable now is it?

Mr. Norris: I think it is.

Mr. Bartunek: Yes, you're right. It's bailable put probation is not permissible.

Mr. Norris: Here is what I would suggest there on that first clause. "Persons charged with felonies of violence may be denied bail prior to trial when their release would endanger other persons or the community, or". And then obviously, you'd have to collate those two clauses if this one's adopted, so they both work. So all we're really doing is inserting after "persons charged with a felony" is "of violence".

Mr. Skipton: I don't know whether you are creating more problems. Is that a new term to be defined?

Mr. Norris: It would have to be defined by statute.

Mr. Skipton: Is this defined in any existing statute?

Mr. Norris: Yes, we have in the criminal code at the present time, one of the definitions in the definitions chapter is "crimes of violence", "offenses of violence".

Mr. Roberto: I'm still greatly troubled because what you are talking about is a person charged with an offense. Now a person charged with an offense is not the same thing as a person who is guilty of an offense. That's for the court to determine. You're throwing an awful lot of words at judges here to decide when somebody's going to be given their freedom and when they're not. I have trouble convicting people before they have had their day in court. I think that's what you are doing by throwing a number of words in there that are difficult to define. I appreciate the problem and I don't like violent people either. I don't like violent crimes, but I think the constitution as a basic document is intended to protect the right of freedom to individuals, and until somebody's convicted of a crime, I'm hesitant to move in this direction. I just have trouble with it.

Mr. Norris: I understand that. I guess the defense of the language would be, again,

it does not go as far as the federal provision. The federal provision, for example, under that Congress could say that all persons charged with embezzlement are not bailable. And so this more limited than the federal one.

Mr. Roberto: Mr. Chairman, my response to that analogy with the federal law, I don't think the federal criminal law is nearly as extensive as the state's criminal law, or any state's criminal law. You're talking about a limited application. When you start putting misdemeanors and felonies together, and prohibiting bail under the great variety of crimes that John has mentioned we have under state statute, I think it creates a problem. That's the reason it is limited to felonies of violence.

Mr. Bartunek: Don't you think there would be good benefits to giving this to the commission and having further study on it?

Mr. Norris: Of the alternatives, I would prefer going to the full commission with the one we have already adopted.

Mr. Bartunek asked how the rest of the committee felt and they all agreed so Mr. Norris withdrew his second amendment.

Mr. Clerc: The commission will have a chance to consider it and amend it to include the felonies of violence provision?

Mr. Bartunek: Sure. Anything that is done here is not sacrosanct as far as the members of the committee are concerned. I would expect if anybody has any thoughts that they would present them to the full commission. Is there anything else to come before this honorable and august body?

Mr. Nemeth: Mr. Bartunek, before we close, if you will permit me, I would like to set the record straight on one point and perhaps make a comment on another. This first one relates to the right to indictment in Ohio, the right to a grand jury in Ohio. I think perhaps I gave an answer before that was either wrong or misleading. There is the right to a grand jury, except that the accused may waive in writing. This is pointed out on page 3 of Research Study No 42 and the Revised Code section which refers to this is 2941.021, and it reads as follows: "Any criminal offense which is not punishable by death or life imprisonment may be prosecuted by information filed in the common pleas court by the prosecuting attorney if the defendant after he has beenadvised by the court of the nature of the charge against him and of his rights under the constitution is represented by counsel or has affirmatively waived counsel by waiver in writing and in open court prosecution by an indictment." I think at least for the record, that's straight. And the second one, I would like to ask what the committee's decision is and could perhaps get it from the tape, but perhaps it is better to get it down now before we adjourn, in regard to the amendment of Article I, Section 10 concerning that sentence which refers to comment by the prosecutor and consideration by the court of the fact that an accused or a defendant does not testify.

Mr. Bartunek: That's the language "and may be the subject of comment by counsel". That's all stricken.

Mr. Nemeth: So the sentence would read, "No person shall be held in any criminal case to be a witness against himself, but his failure to testify may be considered by the court and the jury."

Mr. Bartunek: Right.

Mr. Nemeth: It's been quite some time since I read the Griffin case and the ones that follow it, but I am somewhat concerned as to whether that amendment goes far enough in view of the federal constitutional changes. I can't give you an answer at the moment.

I merely raise the question.

Mr. Bartunek: I think this is the decision of the committee. I don't think we should have a constitutional provision that says what a jury can consider.

Mr. Norris: My recollection of the Griffin case was that the only infirmity was comment.

Mr. Bartunek: That was my understanding.

Mr. Nemeth: Would that mean that the judge could give the jury an instruction to the effect that failure of the defendant to testify may be considered by them?

Mr. Bartunek: I think the court would have to read the federal cases and determine that.

Mr. Norris: They do it in the federal cases. They instruct the jury both ways, failure to take the stand shall not be used against them but on the other hand you are entitled to determine why he didn't.

Mr. Bartunek: That's our decision.

Mr. Norris: If I might make sure that I understand exactly what we did, now in the special study, we said that as far as remittitur is concerned, Article I, Section 5, Article I, Section 19a would remain as they are - we're not recommending any change, but that those sections should be the subject of a special study on the subject of remittitur. And that also we are not recommending any change in Article I, Section 10 except the one we just discussed on the comment to the juries, but that that section would be the subject of the same special study in so far as the grand jury is concerned.

Mr. Bartunek: Right. We would ask that the commission appoint a special committee and hold hearings and ask prosecutors and criminal defense lawyers and others to come in and explain to the committee the office of the grand jury and how it is performing and give them statistics.

Mr. Nemeth: You don't want to do this yourself as a committee. You want another committee?

Mr. Bartunek: Right. And another chairman.

Mr. Norris: I'd like to serve on the committee, but I don't want to be the chairman.

Mr. Bartunek: I think if we get more information we will be able to make a more intelligent decision.

Mr. Norris: I think we would be subject to criticism, at least in the grand jury, particularly, if we did not develop testimony in that area. I just think we've got to do this.

Mr. Nemeth: This matter was originally on the calendar of the judiciary committee but as the study evolved it was determined that it was more appropriately a matter for this committee.

Mr. Bartunek: Well, we'll pass the buck on to a new committee. If there are no further comments, this will be the last meeting of the committee.

The chairman instructed the staff to send copies of the draft report on education to all members and invite their comments and prepare the report on the bill of rights and send that to all members and invite their comments.

Mr. Bartunek: If there are any problems or if any member wishes to have a further meeting of this committee we will do so. Otherwise we will stand adjourned sine die.

Ohio Constitutional Revision Commission
Education and Bill of Rights Committee
November 20, 1973

Education: Constitutional Provisions and Issues

The major educational provisions in the Ohio Constitution are found in Article VI, with a few relevant provisions found elsewhere. Article VI contains five sections as follows:

> Section 1. The principal of all funds, arising from the sale, or other disposition of lands, or other property, granted or entrusted to this State for educational and religious purposes, shall be used or disposed of in such manner as the General Assembly shall prescribe by law.
>
> Section 2. The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State; but, no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this State.
>
> Section 3. Provisions shall be made by law for the organization, administration and control of the public school system of the state supported by public funds: provided, that each school district embraced wholly or in part within any city shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education, and provision shall be made by law for the exercise of this power by such school districts.
>
> Section 4. There shall be a state board of education which shall be selected in such manner and for such terms as shall be provided by law. There shall be a superintendent of public instruction, who shall be appointed by the state board of education. The respective powers and duties of the board and of the superintendent shall be prescribed by law.
>
> Section 5. To increase opportunities to the residents of this state for higher education, it is hereby determined to be in the public interest and a proper public purpose for the state to guarantee the repayment of loans made to residents of this state to assist them in meeting the expenses of attending an institution of higher education. Laws may be passed to carry into effect such purpose including the payment, when required, of any such guarantee from moneys available for such payment after first providing the moneys necessary to meet the requirements of any bonds or other obligations heretofore or hereafter authorized by any section of the Constitution. Such laws and guarantees shall not be subject to the limitations or requirements of Article VIII or of Section 11 of Article XII of the Constitution. Amended Substitute House Bill No. 618 enacted by the General Assembly on July 11, 1961, and Amended Senate Bill No. 284 enacted by the General Assembly on May 23, 1963, and all appropriations of moneys made for the purpose of such enactments, are hereby validated, ratified, confirmed, and approved in all respects, and they shall be in full force and effect from and after the effective date of this section, as laws of this state until amended or repealed by law.

In addition, section 7 of Article I, part of the Bill of Rights, places upon the General Assembly the duty to"encourage schools and the means of instruc-

tion" and also provides that "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." It seems apparent that there is some overlapping between the provisions of the Bill of Rights and those of Article VI; but insofar as mandating the General Assembly to provide for a school system is concerned, the language of sections 2 and 3 of Article VI is stronger.

Also related to education is a provision in section 26 of Article II which prohibits the General Assembly from passing any act to take effect upon the approval of any other authority than the legislature except "such as relates to public schools." Finally, some provisions of Article VIII authorizing the issuance of bonds for capital improvements include higher education institutions, but they are not discussed here because, although they constitute a recognition of the fact that institutions of higher education are provided for and supported by the state, they do not indicate a duty on the part of the state to so provide and do not contain any reference to how such institutions are organized or governed.

The constitutional scheme for education in Ohio can be summarized as follows:

1. The General Assembly is required to make provisions (presumably financial) to secure a thorough and efficient system of common schools throughout the state.

2. The General Assembly is further required to provide by law for the organization, administration and control of the public school system of the state supported public funds.

3. No religious or other sect may gain exclusive control of any portion of the State's school funds.

4. No person shall be compelled to support or maintain any form of worship against his consent.

5. School districts which are partially or wholly within a city must be permitted to determine by referendum the number of members and the organization of the board of education.

6. A state board of education is required to be provided by law, and a superintendent of public instruction is required, to be appointed by the state board of education. Powers and duties of both the board and the superintendent are left to the general assembly.

   The General Assembly has fulfilled this mandate by providing for an <u>elected</u> state board of education of 23 members, one elected from each congressional district.

7. The state may guarantee loans made to residents of the state to assist them in meeting the expenses of attending an institution of higher education.

8. There is no direct provision for financing education, except the reference to the income from the school trust fund mentioned in section 2

and the provision of section 1 which authorizes the General Assembly to dispose of the principal of the funds arising from the sale or lease of the property for educational and religious purposes entrusted to the State. Locally, education is financed by levying property taxes, which are restricted by the provisions of section 2 of Article XII. There is, of course, no constitutional directive that this is the only tax available for education. There is no constitutional earmarking of any particular state tax for education, although school districts are included in the list of governmental entities in section 9 of Article XII which requires the return of 50% of the state's income and inheritance taxes to certain local units.

9. There is no provision for higher education in the Constitution, except, as noted, for guaranteeing loans to students and for bond issues for capital improvements.

Each of these points will be developed further in subsequent memoranda. However, it is possible to state briefly the issues which may be raised on a constitutional level by considering the above provisions and comparing Ohio's educational system with that of other states:

1. Should the goal of the educational system be expanded? The General Assembly is presently directed to "secure a thorough and efficient system of common schools." The new Illinois Constitution expanded the goal of the old Illinois Constitution from "provide a thorough and efficient system of free schools whereby all children of this State may receive a good common school education" to "a fundamental goal of the people of the State is the educational development of all persons to the limits of their capacities."

2. Should there be specific provisions for higher education? Either for providing for and administering a system, or for specific institutions? Should there be a mandate to provide such a system?

3. Should there be a board of education? Should it be elected or appointed and should such provisions be in the Constitution? How should the head of the department of education (superintendent of public instruction) be selected?

4. Should any changes be made in the Constitution with respect to private, including parochial, schools? If so, what?

5. Should any provisions be made with respect to school financing, or any constitutional provisions changed which relate to the method of financing schools?

Ohio Constitutional Revision Commission
Education Committee
November 30, 1973

State Constitution Education Provisions

The specific constitutional provisions in state constitutions related to education may be very broad in scope or may cover every detail of the educational system of a state. The broadest provision is like that found in Vermont's Constitution which doesn't even require schools if ". . . the general assembly permits other provisions for the convenient instruction of youth." Vermont Constitution Ch. II, section 64. One of the most detailed approaches to education is Kansas' Constitution which presents every detail from a statement against any discrimination on the basis of sex, through the constitutional establishment of a state board of education, a commissioner of education, a statement as to how schools are to be supported, local school boards, and provisions for a state board of regents and municipal universities.

Some Generalizations

Generally, every state places a duty in the state legislative body to establish and maintain, by some means, a statewide school system. Some states enumerate the various types of schools provided for in such a system; most states do not. Some states stipulate that the funds for maintenance are to be state funds, as poll taxes or proceeds from land sales, most states do not list particular sources except to say "taxes."

If there is a state department of education provided for, it is to be headed by a superintendent of education, or person in a like position, who may be elected or appointed, most are appointed by the governor or board of education. There is usually a state board of education appointed or elected if there is a department of education, and the board usually serves without compensation. Qualifications for any of these positions may be set forth in the constitution in terms of age or residency or even familiarity with education administration, but usually such qualifications are to be "provided for by law."

Very seldom is the local education system provided for, as city school districts, and references to local districts and boards are usually made only in situations of peculiar circumstances, as where such districts existed prior to the making of the constitution and are merely recognized in the constitution, as in Utah Constit. Art X, section 6. County level organizations are usually mentioned in those institutions which provide for the most detailed structures.

When a university is particularly mentioned in a constitution, the board of regents or similar body is usually provided for it. A state board overseeing colleges may be established, as in Michigan, for the limited supervision of junior colleges. There is seldom a statewide board of regents over all state universities, although one is provided for in Mississippi Constit. Art 8, section 213-A. Boards of Regents are almost always appointed and may have to meet a specific qualification of age, and perhaps education and may even have to be a graduate of the school on whose board of regents he is serving.

Most constitutions do not detail the duties, qualifications, compensation, or powers of particular officers or members of boards in the education area, but leave such details for later legislative enactments.

The following table summarizes the provisions found in the constitutions of all 50 states in three categories: general, elementary and secondary, and higher education.

Under "general provisions," "a" includes provisions indicating, generally, a right to an education while "b" includes the duty of the state to establish a school system. Under "Elementary and Secondary Education", "a" includes statewide organization and supervision of the school system; provisions for city or other local organization are under "b". In the category "Higher Education" "a" contains provisions for general organizations of supervision and control while "b" includes provisions for particular institutions.

Ohio is placed first in the table, followed by the other 49 states in alphabetical order, except that Kentucky appears last. Both the present and the proposed new Delaware Constitutions are included.

State	General Provisions Recognition of right to education Duty to establish and maintain school system	Elementary and Secondary Education	Higher Education Organizations of supervision and control Provisions for particular institutions
Ohio	a) Art. VI, Sec. 1. Funds from sale or disposition of state lands for educational purposes-used or disposed of by law of G. A. b) G.A.-system of common schools-by taxation or school trust fund. No religious sect may have exclusive right or control of any part of school funds.	a) State Bd. of Ed.-selected as provided by law. Sup't of Public Instruction-appointed by St. Bd. of Ed. with powers and duties prescribed by law. Art. VI, sec. 4.	a) Art. VI, Sec. 5. State guarantees of repayment of student loans to higher education.
Alabama	b) Art. XIV, Sec. 256. Legislature maintain public schools for children ages 7 to 21. b) Art. XIV, sec. 259-poll taxes for support.	a) Art. XIV, Sec. 262. Sup't of Ed.-supervise public schools (no constitutional provisions for election or compensation).	a) Art. XIV, sec. 264. State university under management of board of trustees consists of 2 members from congressional district where U. located, 1 from every other congressional district. Sup't of Ed. and Gov. as ex officio pres. a) Art. XIV, sec. 267 Ala Polytechnic, Ala.School for Deaf & Blind, or Ala. Girls Industrial School b) Art. XIV, sec. 266. Bd. of Trustees manage Ala. Polytechnic Institution
Alaska	b) Art. VII, Sec. 1 - legislature establish and maintain public schools.	a) Art. VII, sec. 1-Dept. of Ed. headed by Commissioner of Ed. (provided by statute)	b) Art. VII, sec. 2-Establishment of U. of Alaska. b) Art VII, sec. 3 - U. of Alaska-Bd. of Regents. Bd. of regents chosen by governor. Pres. of University elected by Bd. of Regents.

State	General Provisions	Elementary and Secondary Education	Higher Education
Arizona	a) Art. XI, Sec. 6-no sex discrimination in universities and state educational institutions b) Art. XI, Sec. 1-legislature enact laws providing for uniform public school system including: Kindergarten, common schools, high schools, normal schools, industrial schools and a university.	a) Art. XI, sec. 2-Supervision in state bd. of education, state sup't of public instruction, city school supervisor, and such governing boards for state institutions as may be provided for by law. a) Art. XI, Sec. 3-(1964 Amendment) State Bd. of Ed.-governor, state sup't of public instruction, president of university, lay members appointed by governor. Powers and duties as prescribed by statute. a) Art. XI, sec. 4-State Sup't of Public Instruction. Art. V, sec.1-State Supt of Public Instruction-elected for 2 yr. term. a) Art. XI, sec. 6-common schools, free, 6 mos. out of a year, students aged 6 to 21 years.	a) Art. XI, sec. 5-Regents appointed by governor.
Arkansas	b) Art. IX, sec. 1-General Assembly establish and maintain free schools. b) Art. XIV, sec. 1-(Amendment No. 53) Free school system. Gen. Assembly expend money for all persons to be educated-no age limit.	a) Art. IX, sec. 2-Sup't of Public Instruction. b) Art. IX, sec. 3 (b) township or school districts may receive public school funds if school is open and operating more than 3 months.	b) Art. IX, sec. 3-state university instruct in agricultural and natural sciences.
California	b) Art. 9,sec. 1 -legislature encourage the means of promoting intellectual, scientific, moral, and agricultural improvement.	a) Art. 9, sec. 5-Common school system established by legislature-maintain it 6 mos/yr. Art. 9, sec. 7-St. Bd. of Ed. provided by the legislature. a) Art. 9, sec. 2-Sup't of Pub. Inst. elected by state electors at every gubernatorial election. Salaried same as Sec'y of State. a) Art. 9, sec. 2.1-Deputy Sup't of Pub. Inst. and 3 associate	b) Art. 9, sec. 9-U. of California administered by Regents of U. of Calif. b) Tax exemptions for: Cal. School of Mechanical Arts Art. 9, sec. 11 Cal. Academy of Sciences Art. 9, sec. 12 Cogswell Polytechnical College Art. 9, sec. 13

State	General Provisions	Elementary and Secondary Education	Higher Education
California cont'd		superintendents-exempt from civil service, appointed by St. Bd. of Ed. for 4 yr. terms. b) Art. 9, sec. 3-Sup't of schools for each county elected at gubernatorial election. b) Art. 9, sec. 3.1-legislature prescribe county sup't qualifications and salaries.	
Colorado	b) Art. VIII, sec. 1-State establish educational institutions and support them. b) Art. IX, sec. 11- Compulsory education for persons ages 6 to 18. b) Art. IX, sec. 2-uniform system of free public schools	a) Art. IX, sec. 1-St. Bd. of Ed.-members elected at general election, serve without compensation. b) Art. IX, sec. 6-County sup't of schools-4 yr. term, duties, qualifications and compensation prescribed by law.	a) Art. XI, sec. 2a-Gen. Assembly may establish student loan programs. b) Art. VIII sec. 5-U. of Boulder and Agricultural College at Fort Collins-state institutions under state control with University Regents. b) Univ. of Colo.-Board of Regents Art IX, sec. 12-6 elected Art. IX, sec. 13-regents elect Pres. of U. who holds office until removed for cause.
Connecticut	b) Art. 8, sec. 1-free public school system.	No relevant provisions	b) Art. 8, sec. 2-System of higher education includes Univ. of Conn. Gen. Assembly determines size, number, terms, method of appointment of governing board. b) Art. 8, sec. 3-confirms charter of Yale College
Delaware 1897 Const.	b) Art. 10, sec. 1-Gen. Assembly establish and maintain general and efficient system of free public schools and require attendance.	a) Art. 10, sec. 5-Gen. Assembly may provide for transportation of students of nonpublic, nonprofit elementary and high schools.	No relevant sections
Delaware (proposed constitution)	b) Art. 7, sec. 7.01 (a) Gen. Assembly shall provide for the establishment and maintenance of a general system	a) Art. 7, sec. 7.03-no public funds shall be apportioned to, or used by, or in aid of any private, sectarian,	

State	General Provisions	Elementary and Secondary Education	Higher Education
Delaware (Proposed Const.) cont'd	of free public schools open to all children in this state. b) Art. 7, sec. 7.01 (b)-Gen. Assembly provide for such other public educational institutions and services as may be necessary or desirable. b) Art. 7, sec. 7.02 (b) Assignments of pupils to schools shall be determined without regard to race, creed, sex, or national origin.	church or denominational school. b) Art. 7, sec. 702(a) may require attendance.	
Florida	a) Art. 9, sec. 1-Uniform system of free public schools and higher learning.	a) Art. 9, sec. 2-State Board of Ed. consists of governor and members of the cabinet. a) Art. 4, sec. 4(a) Commissioner of Ed. is a member of Governor's cabinet. a) Art. 9, sec. 4(b) School boards operate, control, supervise free public schools. b) Art. 12, sec. 5- Sup't of schools for each county (known as districts) b) Art. 9, sec. 4(a) Each county is a school district. School board consists of 5 or more members serving for 4 yrs. b) Art. 9, sec. 5-Sup't of schools-in each district. Elected for 4 yr. term, employed by district school board.	No relevant provisions
Georgia	b) Art. VIII, sec. I Chp. 2-64 sec. 2-6401. Adequate education to be provided for by state, free. Separation of white and colored races (never tested in court but 1956 Act implementing this section held unconstitutional)	a) Art. VIII, Sec. III chp. 2-66 sec. 2-6601. State school sup't-executive officer of the state, elected at same time as governor, compensation fixed by law. a) Art. VIII, Sec. II Chp. 2-65,sec. 2-6501. State Bd. of Ed.-	a) Art. VIII, Sec. IV, Chp. 2-67 sec. 2-6701. Bd. of Regents for univ. system of Georgia-1 member of each congressional district and 5 members of the public at large appointed by governor for a 7 yr. term.

State	General Provisions	Elementary and Secondary Education	Higher Education
Georgia cont'd	b) Art. VIII, Sec. VII Chp. 2-70 Sec. 2 7001. Independent school systems pre-existing (before 1877) established and maintained by municipalities.	1 member of each congressional district, appointed by governor with advice and consent of Senate. Governor is member. Members to serve for 7 yrs. b) Art. VIII, Sec. V, Chp. 2-68 sec. 2-6801. County system of public schools. Cty. Bd. of Educ.-members selected by grand jury, 5 yr. term. b) Art. VIII, Sec. VI, Chp. 2-69 sec. 6901. County school sup't-executive officer of county, bd. of ed. member, elected with other county officers for a 4 yr. term, qualifications and salary fixed by law.	
Hawaii	b) Art. IX, sec. 1-State provide for statewide public school system, state university, public library and other educational institutions held desirable. No segregation or use of public funds in private or sectarian education.	a) Art. IX, sec. 2-Bd. of Ed. elected, part of membership from geographic subdivisions. a) Art IX, sec. 3-Bd. of Ed. power to formulate policy, exercise control over public school system through sup't of ed-executive officer appointed by Board and acting as its secretary.	b) Art. IX, sec. 4-U. of Hawaii established as a body corporate. b) Art. IX, sec. 5-U. of Hawaii Bd. of Regents appointed by governor with Senate approval. Power and control over U. through its executive officer President of U. appointed by Bd. of Regents.
Idaho	b) Art. 9, sec. 9-legislature may require school attendance ages 6-18 unless educated by other means. b) Art. 9, sec. 1-legislature establish and maintain general, uniform and thorough system of public, free common schools. b) Art. 10, sec. 1-educational institutions shall be established and supported by the state by law.	a) Art. 9, sec. 2-State Bd. of Ed.-membership, powers, and duties prescribed by law. Members appointed by governor (Art. 4, sec. 6). a) Art. 9, sec. 2-State sup't of pub. inst. is ex officio member. Art 4, sec. 1-Executive dep't includes sup't of pub. inst. elected for 4 yr. term. Salaried at $1500/yr. (Art. 4, sec. 19) Legislature may diminish or increase compensation (Art. 4, sec. 27). a) Art. 3, sec. 19-legislature may not pass local laws creating or prescribing duties and powers of officers in school districts.	b) Univ. of Idaho-location confirmed, regents have power of general supervision. Appointed by governor, Art. 4, sec. 6.

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State	General Provisions	Elmentary and Secondary Education	Higher Education
Illinois (1970 Const.)	a) Art. I, sec. 18-No discrimination on basis of sex in school districts. Art. X, sec. 1-fundamental goal is educational development of all persons to the limits of their capacities. State provide for efficient system of high qualities in educational institutions and services. Free through secondary levels, state has primary responsibility for financing. b) Art X, sec. 3-no public funds for sectarian purposes.	a) Art. X, sec. 2(a) St. Bd. of Ed. elected on regional basis, establish goals, determine policies, provide for financing and other powers and duties as provided by law. Art X., sec. 2(b) State Bd. of Ed. appoints a chief state educational officer (office of Sup't of Public Inst. abolished by Trans. Sched, sec. 7)	No relevant provisions
Indiana	a) Art.8, Sec. 1-duty of Gen. Assembly to encourage and provide uniform system of free common schools.	a) Art. 8, Sec. 8-Sup't of Pub. Inst. method of selection, tenure, duties and compensation prescribed by law.	No relevant provisions
Iowa	b) Art. IX, sec. 2d, Sec. 3. Gen. Assembly encourage promotion of intellectual, scientific, moral, and agricultural improvement. Art IX, 1st sec. 12-Bd. of Ed. provides for education through a system of common schools.	a) Art. IX, 1st Sec. 1-Bd. of Ed. supervise common schools and other educational institutions. Consists of Lt. Gov. and 1 member from each judicial district in the state. Members must be 25 yrs. of age and state resident one year (Art. IX 1st sec. 2) elected to 4 yr. term. (Art. IX, 1st sec. 3). Sec'y of Bd. is appointed by the Board (Art IX 1st sec 6) all powers of Bd. subject to alteration, amendment, or repeal by Gen. Assembly (Art. IX 1st sec. 8) Governor is ex-officio member of Bd. (Art. IX, 1st sec. 9)	b) Art. XI, sec. 8-State university fixed permanently at Iowa City, county of Johnson. b) Art. IX, 1st sec. 11-no branches to state university.
Kansas	a) Art. 2 sec. 23-The legislature, in providing for the formation and regulation of schools, shall make no distinction between the rights of males and females. b) Art. 6, sec. 6(c) No religious sectarian control of any part of public educational funds.	a) Art. 6, sec. 2(a) State Bd. of Ed. provided for by legislature-general supervision of public schools, educational institutions and educational interests. a) Art 6, sec. 3(a) Ten members of state board of ed. elected-removal for cause (Art. 6, sec. 3(c))	a) Art. 6, sec. 2(b) state bd. of regents provided by legislature to control and supervise public institutions of higher education. a) Art. 6, sec. 2(c) any municipal university shall be operated,

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State	General Provisions	Elementary and Secondary Education	Higher Education
Kansas cont'd	b) Art. 6, sec. 1 legislature provide and maintain public school, educational institutions, and related activities by law.	a) Art. 6, sec. 4-Commissioner of Ed. appointed by state bd. of ed. and serves at its pleasure. a) Art. 6, sec. 6(b) Finance educational interests of the state, free public schools, required attendance. May establish supplemental fees or charges by law. b) Art. 6, sec. 5 Local public schools with locally elected boards are under general supervision of state bd. of ed.	supervised and controlled as provided for by law. a) Art. 6, sec. 3(b) State bd. of regents-9 members appointed by governor, confirmation by Senate, one member from each congressional district and 2 at large. Removal for good cause. (Art. 6, sec. 3(c)) a) Art 6, sec. 6(a) legislature may levy a tax for use and benefit of higher ed.
Louisiana	b) Art. IV, sec. 3 and Art. XII, sec. 3 - no money from public treasury for sectarian or private schools. b) Art. IV, sec 14-2/3 vote of legislature to establish a new educational or charitable institution. b) Art. XII, sec. 1-legislature provide for education of all school children of the state. b) Art. XII, sec. 1-may provide for financial assistance directly for attendance at private nonsectarian elementary and secondary schools in the state.	a) Art. IV, sec. 4-State Bd. of Ed.-11 members, selected from public service commission district for 6 yrs, 8 elected from congressional districts for 8 yrs. All serve without pay. a) Art. XII, sec. 5-St. Sup't of Public Inst. ex-officio sec'y of Bd. of Ed., salary between $5,000 and $7,500/yr. a) Art. XII, sec. 6 State Bd. of Ed. supervise and control all free public schools. a) Art. XII, sec. 3. Elementary schools teach fundamental branches of study only. a) Art. XII, sec. 12-general exercises in English only. b) Art. XII, sec. 10-Parish school bd.-election authorized by legislature, qualifications and duties set by St. Bd. of Ed. Need not be residents of parishes.	a) Art. XII, Sec. 7 (B) State Bd. of Ed. supervises all institution of higher education except for La. State U. a) Art. XII, sec. 7(C) La. Coordinating council for higher ed., established by legislature, 14 members, research for new public ed. institutions a) Art XII, sec. 2-elementary and secondary schools and higher education institutions coordinated to lead to standard of higher education established by La. State and Agricultural and Mechanical College. b) Art. XII, sec. 7 (A) Bd. of Supervisors of La. State U. governor ex officio member, and 14 members appointed by governor with consent of Senate, 14 yr. terms, at least 7 of 14 members having been students of university and graduates of it.

State	General Provisions	Elementary and Secondary Education	Higher Education
Louisiana cont'd			b) Art XII, sec. 25. Metropolitan branch of L.S.U. at New Orleans integral part of L.S.U. and Agricultural and Mechanical College under Bd. of Supervisors. b) Art. XII, sec. 26 - New Orleans branch of Southern University and Agricultural and Mechanical College is part of So. U. Agricultural and Mechanical College and is under control of the La. State Bd. of Ed. b) Art. XII, sec. 24 Tulane University of La. in New Orleans is recognized as created. b) Art. 12, sec. 9. Names state universities and educational institutions financed by the state by annual apportionments and additional funds for improvements.
Maine	a) Art. 8, sec. 1-general diffusion of the advantages of education is essential to the preservation of the rights and liberties of the people. b) Art. 8, sec. 1-Legislature authorized and shall require towns to make provision at their (town's) expense for support and maintenance of public schools.	No relevant provisions	a) Art. 8 sec. 2-legislature by proper enactment may authorize the credit of the state to be loaned to secure funds for loans to Maine students attending institution of higher education wherever situated.
Maryland	b) Art VIII, sec. 1. General assembly establish by law a system of free public schools throughout the state. Provide by taxation or otherwise for support.	No relevant provisions	No relevant provisions

State	General Provisions	Elementary and Secondary Education	Higher Education
Massachusetts	b) Chpt. V, sec. II (591) duty of legislature "to cherish the interests of literature and the sciences, and all seminaries of them; especially the univ. of Cambridge, public schools and grammar schools in the town . .." (By case law this provision is seen as basis of duty of legislature to maintain and establish school system.)	a) See Chp. V sec. II (sec. 91) No structure is provided.	b) Chp. V, Sec. I Art. III (sec. 90) overseers of Harvard College are: governor, lt. gov., council and senate of commonwealth, President of Harvard College and ministers of Congregational churches.
Michigan	a) Art. 8 sec. 1. Education shall be forever encouraged being necessary to good government. a) Art. 8 sec. 2. School district shall provide education without discrimination as to religion, creed, race, color or national origin. b) Art. 8 sec. 2. Legislature shall maintain and support system of free public elementary and secondary schools.	a) Art. 8 sec. 3 State Bd. of Ed. leadership and general supervision over all public education except higher education institutions granting baccalaureate degrees. 8 members, 8 yr. terms elected governor ex-officio member Sup't of Publ Inst appointed by state bd. of ed. Principal executive officer of state dep't of education.	a) Art. 8 sec. 3. Boards of institutions of higher ed-supervise, control and direct expenditures of that institution's funds. a) Art. 8 sec. 7 locally elected boards for supervision and control of state established and supported public community and junior colleges. State bd for public community and junior colleges-general supervision and advisors to state bd. of ed. b) Art. 8 sec. 5. Bd. of trustees, one for each of U. of Mich., Mich. State U., and Wayne State. Each board has 8 members, elected, 8 yr. terms, elect Pres. of Univ., powers of general supervision and direction. b) Art 8 sec. 4. Legislative appropriations for U. of Mich., Mich State U., Wayne State U., Eastern Mich. U., Mich. College of Science and Technology Central Mich. U., No. Mich. U., W. Mich. U., Ferris Institute and Grand Valley State College;

State	General Provisions	Elementary and Secondary Education	Higher Education
Minnesota	b) Art. VIII sec. 1. Duty of legislature to establish a general and uniform system of public schools. b) Art VIII sec. 3. Establish a public school in each township	No relevant provision	b) Univ. of Minnesota confirmed.
Missouri	a) Art. IX, sec. 1(a) Separate schools for white and colored children, except as provided for by law. b) Art. IX sec. 1(a) Gen. Assembly establish and maintain free schools up to age 21. b) Art. IX sec. 8 No appropriations in aid of any religious creed, church, or sectarian purpose. b) Art. IX sec. 3 (b) Free schools for 8 mos/year. If not sufficient public school fund, gen. assembly may provide deficiency.	a) Art. IV sec. 12-State Dept. of Educ. is an executive dep't. a) Art. IX sec 2(a) State Bd. of Ed. 8 lay members appointed by gov. with consent of Senate, no more than 4 from same political party. Serve for 8 yr. term, receive only actual expenses incurred and per diem set by law. Supervise public school instruction. a) Art IX sec. 2(b) Commissioner of Ed. Appointed by Board of Ed., its chief administrative officer, citizen and resident of the state, removal at Bd.'s discretion. Prescribe his duties and fix his compensation. b) Art. III, sec. 40. No gen. assembly law may (20) create new townships or affect boundaries of townships or school districts; or (21) create offices, prescribe powers and duties of officers in or regulating affairs of school districts.	a) Art IX sec. 9(a) Board of Curators governs state university. Nine members appointed by governor with consent of Senate. a) Art. IX Sec. 9(b) Gen. Assembly maintain state university and other educational institutions as it deems necessary
Mississippi	b) Art. 8 sec. 201. Gen. assembly establish system of free public schools for children ages 6-21. b) Art. 8 sec. 207. Separate schools white and colored children. b) Art. 8 sec. 208-No religious sect control of educational funds of the state. b) Art. 8 sec. 213 B-Legislature may abolish school system.	a) Art. 8 sec. 202. Sup't of Pub. Ed. Elected same as governor, 4 yr term, general supervision of common schools and state educational interests. Duties and compensation as set by law. a) Art 8, Sec. 203-Bd. of Ed.-Sec'y of State, governor, atty general, and Sup;t of public education. Manage and invest school funds.	a) Art. 8 sec. 213-A. Bd. of trustees of state institutions of higher learning. Governor appoints with senate consent, one person from each Congressional district, one member from each Supreme Court District, and 2 members at large. 12 yr terms. Power to contract with deans and elect heads of

State	General Provisions	Elementary and Secondary Education	Higher Education
Mississippi cont'd		b) Art 8 sec. 204 Sup't of ed in each county appointed by Bd. of Ed with consent of Senate, 4 yr. term. b) County schools. Art. 8 sec. 205-maintain 4 mos'scholastic year. Art 8 sec. 206-county common school fund consisting of poll tax proceeds.	institutions. b) Establishment of agricultural and Mechanical College of Miss. and Alcorn Agricultural and Mechanical College. b) Art. 8 sec 213-A. U. of Miss. Miss. State College, Miss. State College for Women, Miss. Southern College, Delta state Teachers College, Alcorn Agricultural and Mechanical College, and Miss. Negro Training School under management and control of Bd. of Trustees of state institutions of higher learning.
Montana	b) Art. XI, sec. 1. Duty of legislative assembly of Montana to establish and maintain a general, uniform, and thorough system of public, free, common schools. b) Art. XI sec. 6-Legislative assembly provide by taxation means to maintain common schools for at least 3 mos./year. b) Art. XI sec. 7. Schools free to children ages 6-21 yrs. b) Art. XI sec. 8. No religious control of public school funds b) Art. XI sec. 9. No religious or partisan test for admission to any public educational institution.	a) Art. XI sec. 11. State Bd. of Ed.- control and supervise state university and educational institutions. Eleven members, governor, state sup't of publ inst. and attry-general. Other 8 members appointed by governor, confirmation by Senate. a) Sup't of Pub. Inst. (Art VII-sec. 1) member of executive dep't, 4 yr. term. elected (Art. VII, sec. 2 35 yrs. of age, citizen of U.S. state resident for 2 yrs. (Art. VII, sec. 3); compensation of $2,500/yr. (Art. VII sec. 4) b) Art XVI, sec. 5. County sup't of schools, elected 4 yr. term.	a) Art. XI sec 11. General supervision of state university in state bd. of ed.
Nebraska	b) Art. VII sec. 6. Legislature shall provide for free instruction in common schools for persons ages 5-21 yrs. b) Art. VII sec. 11-No state aid for sectarian instruction. No religious test or qualification for admission to any state public school.	a) Art. VII sec. 15-State Bd. of Ed. 8 members elected from 6 districts for 6yr terms, no compensation but repayment of actual expenses. a) Art. VII, sec. 16-Commissioner of Ed. appointed by St. Bd. of Ed., powers and duties prescribed by law.	a) Art. VII sec. 13-Bd. of Ed. of State Normal Schools govern state normal schools. 7 members, 6 appointed by governor and Commissioner of Ed. No compensation except reimbursement of actual expenses, power and duties prescribed by law.

State	General Provisions	Elementary and Secondary Education	Higher Education
Nebraska cont'd			b) Art. VII sec. 10-U. of Nebraska-six regents, Bd. of Regents govern University. 6 yr terms, no compensation except reimbursement of expenses. Powers and duties prescribed by law. Each regent elected from one regent district, districts established by legislature.
Nevada	b) Art. 11 sec. 1. Legislature encourage promotion of intellectual, literary, scientific, mining, mechanical, agricultural and moral improvements and provide for sup't of public inst.. b) Art. 11 sec. 2. Legislature provide uniform system of public common schools. b) Art 11. sec. 4. Legislature provide for establishment of state university with dep'ts of agriculture, mechanic arts and mining. b) Art 11. sec. 5. Legislature may provide normal schools and grades from primary to university. b) Art 11, sec. 9. No sectarian instruction in public schools Art 11. sec. 10. No sectarian control of public funds.	a) No constitutional provision for statewide organization except that a Sup't of public inst. should be provided for. (Art 11, sec. 1)	b) Art. 11. sec. 6. Legislative apportionment of funds to support state university. b) Art. 11. sec. 7. Board of regents of state university elected as provided for by legislature. Art. 11 sec. 8. Board of Regents establish university departments.
New Hampshire	b) Pt. 2, Art. 83. duty of legislators to encourage public and private institutions for promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the county. No money raised by taxation used in religious or sectarian institutions.	No provision	No provisions
New Jersey	a) Art I sec. 5. No person shall be segregated in the public schools because of religious principles, race, color		

State	General Provisions	Elementary and Secondary Education	Higher Education
New Jersey cont'd	ancestry or national origin. b) Art 8 sec. 4. Para. 1. Legislature provide system of free schools for children ages 5-18 yrs. b) Art 8. sec. 4 Para. 3. Legislature may provide for transportation of children from any school .	No provision.	No provision
New Mexico	a) Art. XII sec. 10. Educational rights to children of Spanish descent, admission and attendance in public schools, never classed in separate schools. b) Art. XII sec. 1. Uniform system of free public school sufficient for education of, and open to all children of school age in the state shall be established and maintained. b) No state funds to support sectarian, denominational, or private school, college or university. b) Art. XII sec. 5. Compulsory school attendance as prescribed by law. b) Art. XXI sec. 4. Provision shall be made for the establishment and maintenance of a system of public schools open to all children of the state and free from sectarian control, classes conducted in English.	a) Art. XII sec. 6 (A) State Department of Public Education. St. Bd. of Ed. determines public school policy and vocational educational policy and controls, manages, and directs all public schools. Bd. appoints Sup't of Public Inst. who directs operation of the state dep't of public education. Art XII sec. 6 (B) Members of Bd. elected at general election, one from each of ten judicial districts, 6 yr. terms. Bd. members are residents of districts from which they are elected. (Art. XII sec. 6 (C))	a) Art. XII sec. 13. For each institution of higher learning-Bd. of Regents: 5 members electors of the state, no more than 3 of same political party, appointed by governor with consent of Senate, 6 yr. term. b) Art. XII sec. 11. Names all state educational institutions and confirms them as such.
New York	b) Art. V, sec. 4. The head of the dep't of education shall be the Regents of the Univ. of the State of New York. b) Art. XI, sec. 1. The legislature shall maintain and support a system of free common schools.	a) Art. V sec. 4. The Regents of the U. of the State of N.Y. shall appoint and remove at pleasure a commissioner of education to be the chief administrative officer of the Dep't of Ed.	b) Art. XI, sec. 2. The U. of the State of N.Y. is to be governed by not less than 9 regents.

State	General Provisions	Elementary and Secondary Education	Higher Education
New York cont'd	b) Art XI sec. 3. No state funds for aid or maintenance of institutions under religious denominational control but state may provide transportation for students at these schools.		
North Carolina	a) Art IX sec. 1. Education shall be forever encouraged. b) Art. IX sec. 2. Gen. Assembly provide for uniform system of free public schools maintained 9 mos/yr. b) Art IX, sec. 3. Gen. Assembly may assign to units of local government responsibility for financial support of free public schools. b) Art. IX sec. 3. Mandatory school attendance provided for by Gen. Assembly.	a) Art. IX sec. 4(1) State Bd. of Ed. consists of Lt. Gov., Gov., Treasurer, and 11 members appointed by governor with Senate confirmation. One member from each of 8 educational districts and 3 at large. Eight yr. terms. Board supervise and administer the free public school system and educational funds. a) Art IX sec. 4(2) Sup't of Pub. Inst. secretary and chief administrative officer of State Bd. of Ed.	a) Art IX sec. 8. Gen. Assembly maintain a public system of higher education, including U. of North Carolina. Gen. Assembly provide for trustees of every institution of higher education. a) Art. IX sec. 9. Gen. Assembly provide the benefits of higher education at state's expense, as far as possible.
North Dakota	b) Art. VIII sec. 147. Legislature provide for the establishment and maintenance of system of public schools open to all children of the state and free from sectarian control. b) Art. VIII sec. 148. Provide for a uniform system beginning with primary and extending through all grades up to and including normal and collegiate courses.	b) Art. VIII sec. 150. Sup't of schools for each county elected every two years. Qualifications, duties, powers, and compensation shall be fixed by law.	a) Art.VIII sec. 152. All colleges, universities and other educational institutions supported by land grants and public taxes are under the control of the state.
Oklahoma	b) Art.I sec. 5 and Art XIII sec. 1. Establish and maintain system of public schools open to all children; free from sectarian control; schools conducted in English; may be separate systems for white and colored children.	a) Art. XIII sec. 5. Bd. of Ed. supervise instruction. Sup't of Public Inst. shall be President of the Board.	b) Art. XIII sec. 8. Bd. of Regents of U. of Oklahoma. Members (7) appointed by governor with consent of Senate. 7 yr. terms. b) Art. VI Sec. 31A. Bd. of Regents for Okla. Agricultural and Mechanical Schools and Colleges.

State	General Provisions	Elementary and Secondary Education	Higher Education
Oklahoma cont'd	b) Art XIII sec. 4. Compulsory attendance ages 8-16 yrs. b) Art. XIII sec. 7. Teach elements of agriculture, horticulture, stock feeding, and domestic science in common schools.		9 members, 8 members appointed by governor with consent of senate, majority are farmers, ninth member being Pres. of St. Bd. of Agriculture. 8 yr. terms.
Oregon	b) Art. VIII sec. 3. The legislative assembly shall provide by law for the establishment of a uniform and general system of common schools.	a) Art. VIII sec. 1. Sup't of Pub. Inst. Election, qualifications, powers, and duties provided for by law.	No relevant constitutional provisions.
Pennsylvania	b) Art. 3 sec. 14. The Gen. Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth. b) Art. 3 sec. 14. No money for support of public schools is to be used to support any sectarian school.	b) Art. 3 sec. 20. Legislature may classify counties, cities, boroughs, school districts, and townships according to population and pass laws and regulations relating to each class.	a) Art. 3 sec. 29. Appropriations may be made for scholarship grants or loans to finance higher education to residents of Pa. enrolled in institutions of higher education, except schools of theology or seminaries. a) Art. 3 sec. 30. No appropriations for schools not under absolute control of Commonwealth, except normal schools, except by a vote of 2/3 legislators.
Rhode Island	b) Art. XII sec. 1. Gen. Assembly promote public schools, and to adopt all means which they deem necessary and proper to secure to the people the advantages and opportunities of education. Art XII sec. 4. General duty of Gen. Assembly to administer permanent school fund (Art. XII sec. 2) and donations to schools (Art.XII sec. 3)	No relevant provisions	No relevant provisions.
South Carolina	b) Art. XI sec. 3. Gen. Assembly provide for election or appointment of other school officers anddefine their qualifications, powers, duties, and compensation.	a) Art. XI sec. 1. State Sup't of Ed. elected, 2 yr. term, powers, duties, compensation defined by Gen. Assembly. (Art. IV sec. 24)	b) Art. XI sec. 8. Gen. Assembly may provide for the maintenance of named colleges and may create scholarships therein.

State	General Provisions	Elementary and Secondary Education	Higher Education
South Carolina cont'd	b) Art. XI sec. 6. Funds for school maintenance provided by poll tax and school district tax, levies approved by the Gen. Assembly. b) Art. XI sec. 7. Separate Schools-white and colored. b) Art. XI sec. 9. No state property or credit for sectarian institutions.	provides a 4 yr. term to the Sup't of Ed. b) Art. XI sec. 2. State Bd. of Ed. One member from each judicial circuit, elected by the legislative delegations of the counties. Terms, powers, and duties to be provided by law.	
South Dakota	b) Art. VIII sec. 1. Duty of legislature to maintain a general and uniform system of public schools, no tuition, open all. b) The school system is financed by the sale of (Art. VIII sec. 4) U.S. land grants to the state. Bds. of Appraisal including commissioner of school and public lands and the county sup't of schools select and designate lands for sale. b) Art. VII sec. 15. Legislature provide further income by general taxation and authorizing levies of taxes by school corporations on classified properties. b) Art. VIII sec. 16. No state lands or funds for sectarian purposes.	a) Art. IV sec. 12. Commissioner of school and public lands elected as provided for by legislature. State Sup't of Public Inst. elected on a nonpolitical ballot, 2 yr. term. a) Art. IV sec. 13. Powers and duties of both are to be prescribed by law.	No relevant provisions.
Tennessee	b) Art 11 sec. 12. Duty of legislature to "cherish literature and science." b) Art 11 sec. 12. State taxes from polls shall be apportioned to educational purposes. b) Art. 11 sec. 12. No state established or aided school may mix white and negro students.	No relevant provisions.	No relevant provisions.
Texas	b) Art. VII sec. 1. Duty of legislature to establish and make suitable provision for support and maintenance of an efficient system of free public schools.	b) Art. VII sec. 3a. School districts by counties, authorized to levy annual ad valorem tax to pay interest on state bonds.	b) Art. VII sec. 10. Legislature shall establish "The Univ. of Texas".

State	General Provisions	Elementary and Secondary Education	Higher Education
Texas cont'd	b) Art. VII sec. 3. 1/4 revenue of occupation taxes and poll taxes for benefit of free public schools. b) Art. VII sec. 7. Separate schools-white and colored. b) Art. VII sec. 16. Legislature establish terms of office for offices of public school system and state institutions of higher learning, not to exceed 6 yrs.	a) Art. VII sec. 8. State Bd. of Ed. serve and elected as provided by law but terms no longer than 6 yrs.	b) Art. VII sec. 13. Agricultural and Mechanical College of Texas is made a branch of the U. of Texas.
Utah	b) Art. X sec. 1 and Art. III, Para. 4. Legislature to provide for establishment and maintenance of a uniform system of public schools, open to all children of the state, free from sectarian control. b) Art X sec. 2. Public school system includes kindergarten schools, common schools (primary and secondary grades); high schools, agricultural college, a university, and such other schools as legislature may establish. Common schools-free b) Art. X sec. 12. No religious or partisan test for admission into a public educational institution. b) Art X sec. 13. No public aid to church schools.	a) Art. X sec. 8. State Bd. of Ed. general control and supervision of the public school system. - elected as provided by law - appoint Sup't of Pub. Inst. as its executive officer b) Art. X section 6. In cities of first and second class (as classified by law) the public school system shall be controlled by the Bd. of Ed. of that city, apart from the county control. a) Art VII, secs. 19 and 20. Duties and compensation of State Sup't of Public Inst. is provided for by law.	b) Art. X sec. 4. Location and establishment of University of Utah and the Agricultural College are confirmed.
Vermont	b) Ch. II sec. 64. A competent number of schools ought to be maintained in each town unless the Gen. Assembly permits other provisions for the convenient instruction of youth.	No relevant provision	No relevant provision
Virginia	b) Art. VIII sec. 1. Gen. Assembly shall provide a system of free public elementary and secondary school of high quality.	a) Art. VIII sec. 4. Bd. of Ed. 9 members appointed by governor, confirmed by Gen. Assembly, 4 yr terms.	a) Art. VIII sec. 11. State may grant loans to students attending nonprofit institution.

State	General Provisions	Elementary and Secondary Education	Higher Education
Virginia cont'd		Art. VIII, sec. 5. Board's duties: a) Establish school divisions and review adequacy of schools; b) Annual reports to Gov. and Gen. Assembly c) Certify lists of nominees for division sup't of schools for division bds. to choose from. d) Approve textbooks and instructional aids e) Effectuate state education policy. a) Art. VIII sec. 6. Sup't of Pub. Inst. qualified educator, appointed by gov., confirmation by Gen. Assembly or by selection and for term with such duties as established by law. b) Art. VIII, sec. 7. School Bd. Supervise each school division, members selection and term to be established by law.	of higher learning in Commonwealth where institution provides college or graduate degrees. May provide for a state agency to aid these institutions in borrowing money for construction of educational facilities
Washington	a) Art. IX sec. 1. Duty of state to make provision of education of all children in state without distinction of preference on account of race, color, caste, or sex. b) Art. IX, sec. 2. Legislature provide a general and uniform system of public schools. b) Art. IX sec. 3. Support common schools bycommon school funds, derived from many sources including taxes. b) Art. IX sec. 4. All schools maintained or supported wholly or in part by public funds shall be free from sectarian control or influence.	No provisions	No provisions
West Virginia	b) Art. XII sec. 1. Legislature shall provide for a general, thorough, efficient system of free schools.	a) Art. XII sec. 2. West Virginia Bd. of Ed. duties prescribed by law. Nine members appointed by	a) Art. XIII sec. 11. No further appropriations for any state normal school.

State	General Provisions	Elementary and Secondary Education	Higher Education
West Virginia cont'd	b) Art. XII sec. 3. No mixed white and colored schools.	governor with consent of senate, 9 yr. terms. No more than 5 members from same political party. Board selects state sup't of free schools, as provided by law, who serves at Bd's pleasure as chief school officer of state. Powers and duties prescribed by law. b) Art. XIII sec. 3. Legislature may provide for county superintendents and other necessary officers.	
Wisconsin	b) Art. X sec. 3. Legislature provide for establishment of school districts, uniform, free to children ages 4-20 yrs., no sectarian instruction, may release children during school hours for outside religious instruction.	a) Art. X sec. 1. State Sup't-supervise public instruction. Qualifications, powers, duties, compensation prescribed by law. Sup't elected, 4 yr. term.	a) Art. X sec. 6. Provision may be made for the establishment of a state university.
Wyoming	b) Art. 7 sec. 1. Legislature provide system of public instruction including free elementary schools, university, and other necessary institutions. b) Art. 7 sec. 10. No discrimination in schools on basis of race, sex, or color. b) Art 7 Sec. 12. No sectarian instruction in public schools.	a) Art. 7 Sec. 14. State sup't of public inst., powers and duties prescribed by law. General supervision of public schools.	b) Art. 7 sec. 15. University of Wyoming established. Art. 7 sec. 16. U. open to all students free Art. 7 sec. 17. Governed by board of trustees, not less than 7 members, appointed by governor with consent of senate, duties and powers prescribed by law.
Kentucky	b) Sec. 183 Gen. Assembly to provide an efficient system of common schools. b) No person shall be forced to send his child to any school to which he may be conscientously opposed. b) Separate schools-whites and colored (conceded unconstitutional per Willis v. Walker 136 F. Supp. 177)	a) Sec. 91. Sup't of Pub. Inst. elected at same time as governor; 4 yr. term, can't succeed himself in the next 4 yrs. (sec. 93); at least 30 yrs. old, resident of the state for 2 yrs. salaried (sec. 96) a) Sec. 189. No appropriation of educational funds to aid church, sectarian or denominational schools. b) Election of school trustees (Sec. 155) and other common school district elections are to be prescribed by Gen. Assembly.	b) Sec. 184. Establishes a tax for the benefit of the Agricultural and Mechanical College.

Ohio Constitutional Revision Commission
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History of Education in Ohio

A study of the historical development of education in Ohio reveals changing attitudes on the part of the state and the citizens in their desire and requirements for a system of education throughout the state. The emergence of an agency with the legislative authority and popular support to organize and administer education on a state-wide scale was made possible by the realization and acceptance by the state of its obligation to provide for such a system. Although the virtues of "religion, morality and knowledge" were extolled as early as 1787 by the Northwest Ordinance, which stated that "schools and the means of education shall forever be encouraged", over a century passed before the educational system was organized on a state-wide level. This memorandum traces the development of the administration of education in Ohio. To do this, it is necessary to mention the development of education in general, because it appears that only through the failure of local administration and control of common schools, did the need for a Board of Education and Superintendent of Public Instruction arise.

The responsibility to provide for a system of education appears to lie with the state, in part, because of Amendment X to the U.S. Constitution, "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." The federal constitution does not assume responsibility for education. The Ordinance of 1785 further clarified the idea that education is a state function. It reserved section 16 in each township "for the maintenance of public schools within the said township". The grant set aside a tract of land approximately equal to one square mile for each surveyed township of 36 square miles. In addition to the encouragement of schools and the means of education required by the Northwest Ordinance, the first Constitution of Ohio in 1802 added the provision that "the means of education should forever be encouraged by legislative provision, not inconsistent with the rights of conscience." (Article VIII, section 3). That article also stated in section 25:

> "That no law shall be passed to prevent the poor in the several counties and townships within this state from an equal participation in the schools, academies, colleges and universities within this state, which are endowed, in whole or in part, from the revenue arising from donations made by the United States, for the support of schools and colleges; and the doors of said schools, academies and universities, shall be open for the reception of scholars, students and teachers, of every grade, without any distinction or preference whatever, contrary to the intent for which said donations were made."

The mandate to the state to provide for education, allocation of school land, and the prohibition against discrimination regarding public schools having been provided for, the basic foundation for an educational system had been laid. Indeed, Ohio, as the first state to be admitted to the Union from the Northwest Territory, was the first state to receive a grant of section 16 for school purposes according to the provisions of the Ordinance of 1785. The land acquisition was made in the early 1790's before Ohio had become a state, in a purchase of land made by the Ohio Company. The first purchase made by this company resulted from negotiations with Congress by Reverend Menassah Cutler. In addition to reserving section 16 for school lands, Rev. Cutler insisted, as a part of his negotiation,

that section 29 be reserved for religious purposes and that two townships be set aside for the foundation of a university, now Ohio University in Athens. Although Congress was reluctant to grant the first precondition, it willingly granted the second, and the transfer was made. A second sale, the Symmes Purchase, also in the 1790's, reserved section 16 for school lands and section 29 for religious purposes. The State was eventually divided into a number of separate tracts such as the Western Reserve, the Ohio Company's Purchase, the Symmes Purchase, the Virginia Military Lands and the U.S. Military Lands. The administration of school and religious (ministerial) lands eventually gave rise to problems both constitutional and administrative in nature. Although mention of these problems must be made to explain the development of education in Ohio, an evaluation of these problems is found later in the memorandum. The people of Ohio, and perhaps even Congress, believed that if the land grants were properly managed, public schools could be supported without a tax in the citizens. Not too many years passed before the need for greater financial support was realized.

Early Legislation

The task of the legislature to provide for a system of education, let alone a system for the entire state, was a difficult one. In addition to the fact that priorities lay with felling trees, improving the land, and farming, early settlers came to the state with differing opinions about education. The availability of land in Ohio attracted people from New England as well as from the South. While the former were familiar with the school tax, the latter thought parents should be responsible for the education of their young. The educators were hardly the ones to act as spokesmen for educational ideals. "The teachers of the pioneer schools in southwestern Ohio were selected more on account of their unfitness to perform manual labor than by reason of their intellectual worth...The teacher was regarded as a kind of pensioner on the bounty of the people, whose presence was tolerated only because county infirmaries were not then in existence. The capacity of a teacher to teach was never a reason for employing him, but the fact that he could do nothing else." (1) Perhaps the variety in backgrounds and philosophies explain the fragmented approach by the legislature in the early years of Ohio to carry out its constitutional mandate to provide for education.

> "The encouragement of public education by legislative provision as specified in the constitution was interpreted by the Legislature to mean the passing of a large number of acts to meet the special needs or desires of particular districts, or, even in the case of school lands, the desires of certain individuals. The general laws passed at that time may be said to have pointed out methods of organization and control instead of devising any efficient system of supervision or of inflicting any penalties in order to bring about specific educational results. They were largely permissive in nature, often leaving the initiative to the discretion of the local communities..."(2)

The earliest legislation concerning school lands was passed in 1803 and concerned the leasing of lands granted for the support of the schools. Another concern of early legislation was the establishment of school districts. As early as 1806, the county commissioners were required, upon the application of at least twenty electors in an original surveyed township or fractional township, to fix the time and place for the election of three trustees and a treasurer to hold office for two years. The duties of the trustees were to divide the township into "proper divisions" for the purpose of establishing schools. Each division was to receive a dividend of the profits derived from their section reserved for school

purposes based on the number of inhabitants in the division. It should be noted that no provision had been made for county examiners or division directors. In 1821, the first general school act for Ohio was passed. The act authorized the trustees of any civil township to submit to a vote of the townspeople the question of organizing school districts. The legislation did not prove very effective, because of its permissive nature, and the act failed to provide a system of taxation. Subsequently, the studies of a legislatively appointed commission of five resulted in the Governor's appointment of a seven-man commission to "devise a system of law for the support and regulation of common schools." (3)

James J. Burns, the author of "Educational History of Ohio" notes that the legislation passed by the 1824-5 General Assembly is marked by "the number of times the permissive 'may' has withdrawn before the imperative 'shall'." The act of 1824 required the districting of each township for school purposes. Provision was made for the election of three directors in each school district, and a compulsory county tax of .5 mill on the dollar was levied for the use of common schools. If the trustees of any incorporated civil township failed to lay off school districts, the township received no share of the money collected for school purposes. If a district, once laid off, failed to employ a teacher for three consecutive years and "keep school", the auditor was required to divide its share of funds among the other districts which did employ teachers and hold school. One author notes, "There was much evasion as evidenced by the fact that the same law was re-enacted five times with more emphasis on enforcement between 1835 and 1853." (4). The General Assembly of 1824-5 also passed a law providing for the appointment of three examiners of common schools in each county by the court of common pleas to certify teachers and examine schools.

The decision by the state to employ its first tax for common schools was preceded by a discussion about the right of the state to sell lands in section 16 to gain additional revenue for schools. The system of land leases was proving to be very bad and the state wanted to get rid of the responsibility of the lands for good. But had it a right to sell the lands since they were granted by Congress? The answer was to be found in the affirmative on the following line of reasoning: When Congress placed the 6 mile reservation including Scioto Salt Springs in legislative control, it included a provision that the legislature shall never sell, nor lease the same for a period longer than ten years; but mention of the legislature is not made in the grant of section 16, hence the authority of the state to sell the lands. The sale of school lands was begun in 1827. In that year, a fund for the support of common schools was established. The state auditor was made superintendent of the funds which consisted of money made from the sale of lands donated by Congress for the support of schools; also donations and legacies that were made to the fund. The state pledged 6% interest on this debt, and since it was permanently borrowed and could not be made smaller, it was called the irreducible debt. The aggregate of money from the sale of section 16 in the several townships amounted to a large sum of money which the state government owed Ohio schools. "...(A)cross the back of the note is the broad endorsement of the Constitution: The principal of all funds arising from the sale or other disposition of lands or other property granted or entrusted to the state for educational or religious purposes shall forever be preserved inviolate and undiminished." (5) The sale of religious lands of the Ohio Company and Symmes Purchases was not authorized by Congress until 1833. The sale of the school lands did not produce the sizeable revenue that the state had expected, partially because much of the land had been sold well below its value. Hence it is not surprising that in 1829, the compulsory county tax levy was raised to .75 mill, to 1 mill in 1834, to 2 mill in 1828. It was reduced to 0.4 mill in 1847, however.

The 1821 legislation authorized the election of local school committees to direct the schools, and control remained local and fragmented until 1838, when a legislative bill established the office of State Superintendent of Common Schools. Samuel Lewis was elected to this office by joint resolution of both houses of the General Assembly and commissioned by the Governor. His duties were mostly clerical and subordinated to the office of Secretary of State. At the time Samuel Lewis held office, school districts had already been established, and his duties were primarily to collect statistics from these districts and submit them to the legislature with suggestions for improvements. The appointment of Lewis was for one year, but because of his success, he was reappointed for a five-year term, but resigned in 1840 due to ill health. In 1838, a state fund of $200,000 was operative, derived from various sources including a tax levy of .5 mill, statewide in its application, for the support of education. Also in the financial reservoir was a federal loan of $2,877,260.36, given to Ohio, the income of which was earmarked for school purposes. In 1850 the money passed from schools when it was pledged by the state for payment of debts incurred in building state canals and turnpikes. After the departure of Samuel Lewis from office, the office of State Superintendent of Common Schools was abolished in 1840, and the duties of the office were given to the Secretary of State, ex officio, from 1840-1854. The various histories say that the abolition of the office of Superintendent of Common Schools occurred because of opposition, but no explanation of who opposed, or why, could be found. Among the accomplishments of Mr. Lewis' administration was the Law of 1838. This was the first law to give a degree of organization and leadership to the system. It made the county auditor the county superintendent, thereby responsible to the state superintendent in all educational affairs. Similarly, the township clerk was made township superintendent and responsible to the county superintendent. Unfortunately, when the office of state superintendent was abolished in 1840, so were the offices of township and county superintendents. The Law of 1838 also created the "sub-district". The three directors who were elected by the township were permitted to divide their districts into sub-districts. Although the creation of sub-districts was at the discretion of the district directors, the appointment of directors of the sub-districts was at the discretion of the township trustees. Section XXXII of the 1838 law provided that the township trustees could pass an ordinance increasing the number of directors to provide one for each sub-district. The split in authority to create districts and appoint district directors resulted in a number of local authorities exceeding the number of district directors. Schools were under dual control of parties not necessarily having the same interests.

The administration of education by the Secretary of State was not satisfactory, although the legislature had granted him an additional $400 for clerical assistance when they made him ex officio superintendent of common schools, which assured continued record keeping.

One milestone for educational administration occurred during the 1840-1854 years, although not the result of efforts by the Secretary of State. In 1847, the Akron Law was passed, establishing the first free graded schools in Ohio. The law provided for the election of 6 directors of common schools, with vacancies to be filled by town council. This group was named the "Board of Education of the Town of Akron". The board was given entire control of common schools, and the town was made into one district. Six primary schools and one grammar school were established. The Board was given the power to make and enforce regulations, employ and pay teachers, select sites, and supervise the building of school houses according to its specifications. Its authority also included the appointment of persons to be school examiners. In 1849, the provisions of this act were extended

to all municipalities having at least 200 inhabitants.

Ohio Constitutional Convention 1850-1851

Since most general legislation adopted prior to 1850 was concerned with the local school district, representatives to the convention voiced concern for some legislation of state-wide application to unify the disjointed system. Several of the items that the Standing Committee on Education considered as possible constitutional provisions appear to be more legislative matters. The failure of the legislature to take the leadership at that time may have prompted the convention to consider some of these items to be incorporated into the fundamental law. One proposal considered by the Committee concerned the recall of money from the Surplus Revenue Fund which, by some complex fiscal process, was given to county auditors. Money had been recalled in 1850 for the purpose of paying back turnpike bonds, and the sponsor of the proposal felt that school debts were an equally worthy cause for money from the Surplus Revenue Fund, and that the access to the money should be guaranteed in the Constitution. Other proposals considered by the Committee included provisions: making it a constitutional duty of the Legislature to provide for the election of a Superintendent of Common Schools; securing common school funds from any control by religious groups; authorizing the election or appointment of assistant superintendents to effect a uniform system of common schools; making 6 months the minimum legal school year; providing for segregated schools, unless popular vote chose otherwise; creating a state school fund to provide revenue of $1,000,000. The Committee finally agreed to the following as the Education Article (Article VI) of the Ohio Constitution, which was ratified by the electorate in 1851:

> Section 1. The principal of all funds arising from the sale, or other disposition of lands, or other property, granted or entrusted to this state for educational and religious purposes, shall forever be preserved inviolate, and undiminished; and, the income arising therefrom, shall be faithfully applied to the specific objects of the original grants, or appropriations.
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> Section 2. The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of the state.

Ohio Legislation - Phase II

At the same time that the constitutional convention was considering the education article, the General Assembly passed an act recreating the office of state superintendant. The law did not become operative because the General Assembly failed to appoint the persons required by the law. The provisions of the act included the creation of a State Board of Public Instruction of 5 members to be appointed by the General Assembly with terms from 1 to 5 years. After their terms expired, 1 member would have been appointed each year for 5 years. Each member of the Board during the last year of his term would have served as the State Superintendent of Common Schools and exercised the duties of that office. The duties were limited primarily to the collection of statistics and preparation of reports. During the other 4 years of office, each member would have served as district superintendent. The act provided for the Board to divide the

state into 4 districts. The failure of the General Assembly to appoint the original five-man board resulted in the passage of an act providing for the "reorganization, supervision, and maintenance of common schools".(6) Under this act, referred to as the Law of 1853, the office of state superintendent was re-established under the title of State Commissioner of Common Schools, and the office holder was elected for a term of three years. The provisions of this act remained in effect for about 50 years, until by a constitutional amendment, the legislature was mandated to provide for the organization of public schools, and for the organization and exercise of power by district boards of education in Section 3 of Article VI. Another constitutional amendment to the article, section 4, provided for an appointed superintendent of public instruction to replace the commissioner of common schools.

In 1853 a law was enacted providing that the school district be coterminous with the civil township, each under a single board of education, with the sub-districts under the control of three local directors. This was a significant change over earlier laws concerning school districts which had allowed for the formation of several districts within a township, and for the formation of numerous "sub-districts" within the several districts. The 1853 law created the identity of the township and the school district, and what had formerly been districts under the old law, became sub-districts under the new law. The law stated that the power of township boards of education would not be extended to incorporated cities or villages within the townships, and that such municipalities would continue to be governed by the Akron Law of 1847 and amendments to the law made in 1849. In addition, the creation of subdistricts was taken out of the hands of the township trustees and placed in the control of the township (district) board of education. Opposition to the law rendered it quite ineffective, and the opposition was lodged in a sizeable number of local directors who had been appointed under the former law and could not be incorporated into the system mandated in 1853. (In 1875, local directors outnumbered district school board members by 18,000). In 1873, a new law was passed recognising city districts, village districts, township districts, and special districts. In 1892, the Workman Law attempted to reduce the number of people directing the sub-districts and directly involve the smaller group in the township board of education. The law abolished the office of local director of the sub-district, and instead provided for the election of one director from each sub-district for a three-year term, with the added provision that the sub-district director would be a member of the township board of education. In 1898, the Workman Law was amended to provide for the election of two subdirectors from the sub-districts. The subdirectors and directors of each district constituted the board of sub-directors, and the sub-directors were given the authority to elect teachers to the respective sub-districts subject to the confirmation of the majority of the township board of education.

During the reorganization of school district leadership, the administrative power of the state commissioner began to increase. An 1873 law required the codification of school laws relating to the commissioner of common schools. Local boards of education were required to report to the state commissioner on demand. The commissioner was required to make an annual report to the Governor and the General Assembly. An 1893 law gave to the Commissioner the duty to require the attendance of all children between eight and sixteen in the schools.

Another factor which indirectly augmented the power of the state commissioner was the rising interest in school consolidation. Although recommendations for consolidation were made as early as 1872, the first attempt was made in 1892 by the Kingshill township board of education, which transported children to a village

school. The favorable reports about the Kingshill school perhaps influenced the General Assembly to provide for its expanded use. In 1892 and 1900, the General Assembly legalized payments for transportation from the school district fund. An 1898 act provided that the schools of any rural district of the state might be centralized by a vote of the people and transportation provided.

Several other areas of education should be noted before turning to the significant changes made by the 1912 constitutional amendments and the depression. They are: state control and supervision of teachers' colleges (normal schools) and certification; and high schools.

The first convention for the instruction of teachers was held in 1845, and there was a strong feeling among teachers that some sort of uniform training was desirable. The number of schools offering such training increased to 41 in 1854, but decreased to only 20 in 1863. The practice had been to hold the training sessions either in the summer or vacation months, and the sessions were about a week in duration. The state did not assume responsibility for supporting or controlling these schools. Although the state had some say in the examinations to certify teachers, it did little to aid teachers in attaining the minimal level of education to pass the exams. The first attempt to pass legislation whereby the state would assume responsibility for the training of teachers by setting up and controlling normal schools occurred in 1900 and was defeated.

Teacher certification was not a very vital issue in the 1800's. Although some authority to certify teachers may have resided with school examiners or committees as a result of laws passed in 1821 and 1825, this authority resided with county boards, not with the state. The Law of 1825, for example, provided for the appointment of three examiners in each county by the common pleas court. The Law of 1853 provided for the appointment of the examiners by the probate court. The repeatedly evident trend of sacrificing state interest to local power is noted in the Commissioner of Common Schools' annual report in 1889. He says that suggestions to give a uniform exam to teachers throughout the state would make the chief function of the county boards "that of a mere marking machine." Hence, local boards retained their authority to grant certification until after the turn of the century.

The existence of high schools was made possible, in principle, by the Akron Law of 1847 which established a graded school system. Prior to that, all schools were elementary schools and were organized in accordance with local interests. In 1853 a law was passed granting authority to boards of education in cities, townships, villages and special school districts to establish and maintain high schools.

Prior to 1853, opportunities in higher education were provided by academies, of which there were 501 second level academies, and 126 institutions of higher education. In 1853, there were 45 high schools, increasing in number to 450 in 1875 and 863 in 1900. The high schools were directed to a large extent by college entrance requirements prior to 1902, and the course of study was not uniform throughout the state.

> "One of the important agencies for establishment of standards for the program of studies has been the colleges through their entrance requirements. They were especially important previous to 1902 in the absence of any accrediting agencies for high schools...The program of high school inspection by the Ohio State University was more extensive than any other higher institution in the state. It inspected schools by personal inspection in 1888." (7)

Although the high school had been recognized by the law since 1853, the establishment of secondary schools was slow in growth until about 1880 when there were more than 450 high schools in operation, supported by public taxation. The period between 1880 and 1903 was characterized by the recognition of the need for some centralized agency to have control over public high schools and by the establishment of closer ties between the high schools and colleges. In 1902 an act was passed to provide for centralization of township schools and to provide high schools for the same. The local boards of education had the opportunity to submit the question of centralization to the electors, or the electors could compel the submission to the voters by a petition signed by 1/4 of the electors of the township. If the question passed, a school board of five members would establish the high school and provide transportation to it. The Brumbaugh Law of 1902 defined what a high school was, and offered definitions for elementary schools and colleges. High schools were divided into three grades: 4 year; 3 year; and 2 year. The Commissioner of Common Schools was required to determine the grade of each high school and issue to the board of education a certificate. Certification of schools was taken advantage of prior to 1914 primarily by smaller school districts, who felt that it gave them some authority to have such a certificate on their school walls. The city districts refrained from getting certified and remained apart from the state system of education in this regard until after 1914.

Before turning to the School Code of 1904, which proved to be a very major step toward a state-side educational system, some mention should be made of the fact that with the increased demand for centralization, the powers of the Commissioner of Common Schools expanded, and with that expansion came the increasing acknowledgement of a State Department of Education. One author notes:

> "In fact, the law of 1898 establishing the day schools for the instruction of the deaf is the first reference made by law in Ohio to a department of education. Although the State Department of Education was not officially defined until the enactment of Section 3301.13 R.C. in 1956, it has always been considered to be the administrative unit and organization chosen by the superintendent to assist him in his duties and responsibilities in connection with public education in the state." (8)

The School Code of 1904 was enacted "to provide for the organization of the common schools of the state of Ohio". The Code provided for four classes of school districts: (1) city school districts with a population over 5000; (2) village school districts; (3) township school districts - civil townships independent of cities or villages; (4) special school districts - school districts not included in the other classification with a total valuation of not less than $100,000. The Code provided for boards of education for the districts. Cities could have not more than 7 nor less than 2 elected to four year terms, the other three types of districts having 5 elected members with four year terms. Each board had complete power to govern schools within its district, and districts could be transferred by mutual consent of the boards or by petition of one-half of the electors of the districts involved. The law required boards to fix rates of taxation necessary for school levy, to present bond issues to electors, and issue bonds, administer property, etc. The law made changes in the board of examiners and types of certification given to teachers. The city board of examiners was appointed by the board of education and the county board was appointed by the probate court. The board of examiners was required to administer uniform examinations resulting in threee types of certificates: elementary, high school and special.

The passage of this law in 1904 put the emphasis on centralization and consolidation rather than township control. Such a switch in emphasis characterizes the changing ideas that emerged favoring a state controlled system of education.

The state furthered its control by the passage of a law in 1906 knows as the State Aid System for Weak School Districts. Under its provisions, the state commissioner of common schools was responsible for administering the fund according to law and with the approval of the State Auditor. The state also set standards which had to be met before schools could receive any financial aid. The program was slow to catch on because many local school districts feared that acceptance of state aid would open the door to state control. This was not an entirely unwarranted fear, since the state maintained, as part of its condition for granting funds, that salaries had to be at a certain level. It is not surprising that political pressure was brought to bear on the state commissioner, who was an elected official, by some legislators who sought aid for their districts. Perhaps this political pressure influenced the delegates to the 1912 constitutional convention in their decision to make the commissioner appointed rather than elected. In 1906, the General Assembly provided for the biennial election of the Commissioner of Common Schools, thereby reducing his term by one year, and doubling his salary to $4000.

Constitutional Convention - 1912

The importance of state control of education was the subject of debate in the 1912 constitutional convention. Those persons representing local districts and sub-districts fought for retention of power by those units. Others thought that the department of education was second in importance only to the Governor's office, and spoke in favor of state control. It was this latter group that promoted the idea that the head of such a vital department must be provided for in the Constitution. Although the delegates generally agreed that an appointed head would be less of a political animal than an elected person, there was some indecision as to whether or not the term of office of superintendent should expire at the same time as the term of the Governor who appointed him. The representatives of local boards of education demanded that members of those boards be elected by persons from the district to be governed. The referendum vote provided by section 3 was originally proposed by the committee studying home rule for municipalities, however, the proposal was referred to the education committee since some school districts embraced areas larger than municipal corporations. The convention adopted two amendments to Article VI:

> Section 3. Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds; provided that each school district embraced wholly or in part within any city shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education, and provision shall be made by law for the exercise of this power by such school districts.
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> Section 4. A superintendent of public instruction to replace the state commissioner of common schools, shall be included as one of the officers of the executive department to be appointed by the governor, for the term of four years, with the powers and duties now exercised by the state commissioner of common schools until otherwise provided by law, and with such other powers as may be provided by law.

The referendum vote provided in section 3 of Article VI apparently has not been used in the last decade although it was considered in Berea and Cuyahoga Falls within the last few years.

The change in title from commissioner of common schools to superintendent of public instruction was discussed in the Debates. The delegates thought that the new title better exemplified the powers of such a leader over all public schools, and not just elementary schools. A major change was the provision for an appointed superintendent of public instruction to replace the commissioner who was an elected official.

The adoption of the two constitutional amendments in 1912 opened the door for state control and consolidation. One movement which gained momentum at that time was the need for more attention to the rural school system. The type of instruction offered at rural schools was not conducive to education on rural matters and failed to educate the students on the opportunities in rural life. Aware of this, Governor Cox requested that a study be made of the schools of the state, and mentioned that in other states, funds were occasionally withheld, if the schools failed to comply with minimum state standards. was led by the State School Survey Commission in 1913 whose activities resulted in the New Rural School Code. The Code created a county school district, a county board of education, and a county superintendent with proper educational qualifications. Certification requirements were made more strict, and the county board was given unqualified authority and was commanded by law to survey existing school conditions and "arrange the schools according to topography and population in order that they may be most easily accessible to pupils. The county board of education was enpowered simply 'by resolution at any regular meeting or special meeting to change school district lines and transfer territory from one rural or village school district to another'." (9) The unlimited power of the county board to change district lines was modified by the legislature the following year. The county board was required to notify the local boards concerned in the redistricting of proposed changes. Failure of the local boards to protest within thirty days rendered the action of the county board effective.

The passing of the Rural School Code of 1914 was perhaps seen as a solution to the problems that plagued Ohio schools during the early part of the twentieth century when the schools were under local control and there was no adequate centralizing state agency. The county school district was under the control of a board of education of five members, elected by the presidents of the various villages and rural boards of education. The powers of the county school board included arranging schools in the district to maximize efficiency, and prescribing minimum courses of study for village and rural schools with the advice of the county superintendent. The county superintendent was elected by the county board of education, and his duties were prescribed by law, most of them advisory in nature. The county superintendents were instrumental in the expanding scope of power of the Superintendent of Public Instruction. The system of 88 county superintendents provided a clearer network of responsibility and feedback for the Superintendent than did the previous maze of locally controlled units.

In 1917, the State Board of Education was created by Senate Bill No. 139 in accordance with an act of Congress providing for national aid for vocational education. The created board consisted of the superintendent of public instruction and 6 appointed members (not more than three from the same political party). Two had 2-year terms, two with terms of 4 years and two with terms of six years.

The board had full power to formulate plans for the promotion of education in agriculture, commercial, industrial, trade, and home economic subjects. The superintendent of public instruction was vested with power to administer the fund.

The development of the State Department of Education during the early decades of the twentieth century resulted from two major facts: The Reorganization Bill of 1921; and the Depression. In 1921, an act was passed naming the head of the Department of Education "State Superintendent of Public Instruction and Director of Education". His salary was set at $6,500 and his duties were: (1) those previously delegated to the superintendent of public instruction; (2) executive officer and chairman of the state board of vocational education; (3) chairman of the state library board; (4) member of the board of trustees for the Ohio Archaelogical and Historical Society. The Director was empowered to regulate, in ways not inconsistent with the law, the government of his department. Under the 1921 legislation, the Department of Education specifically received the power to recommend standards for primary and secondary education, as well as standards for professional schools and colleges and examinations. The State Department of Education was made the administering agency of state aid with large discretionary authority. This power was of vital importance during the depression, because most school districts couldn't afford to keep their schools open unless they received additional funding. The 1920's were marked by increased legislation to provide money to keep the schools going. In 1921, the legislature provided for an educational equalization fund to become operative in 1925, but the sources of revenue proved inadequate and many schools were incurring large debts. The Director of Education was directed, in 1923, to fix a tentative salary schedule, expense schedule and transportation schedule for participants in the state's educational equalization fund. The deficit for school districts increased throughout the early 1930's and in 1933 it was about 22.5 million dollars.

The expansion of the department of education continued with the formation of many agencies. In 1927, the state schools for the blind and deaf were transferred from the Public Welfare Department to the Department of Education. The department was authorized to regulate the renewal of teacher's certificates issued by local examiners. Additional power was granted by legislation regarding the annual reports from school districts. Although such procedures were defined by law, a penalty was now due for failure to make the annual report. The penalty was either a $300 fine or withholding of state funds.

The need for a more equitable distribution of funds was recognized, and in 1931, the Ohio Educational Association adopted a resolution to fund a survey of the schools in order to better understand the problems of financing public education. In 1932, the Governor requested B.O. Skinner, the Director of Education, to appoint a commission to study the financial problems of the state schools. The commission's report said that "in its program for public education, Ohio had placed responsibility on the local districts and forced the property tax to bear nearly all the tax burden, which amounted to 97 per cent of the cost of education. Only about 4 per cent was paid from the state treasury." (10) The commission recommended a plan, called the Mort Plan, which was rejected. Basically, the plan provided for the state to guarantee each school a foundation up to a certain level for each pupil, and then the local district could use its own discretion as to how much it wanted to tax itself to augment the subsidy. In 1935, the School Foundation Program Law was adopted, which was basically the same as the defeated Mort Plan. The law provided for reorganization by the county board,

a provision similar to the Rural School Code of 1914. The major difference was that the county board was required to file its plan for reorganization with the Superintendent of Public Instruction on a certain date, and the Superintendent was empowered to act if the county board failed to act or the members failed to agree on the plan.

Also in 1935, the examination and certification of teachers was removed from local examining boards and placed in the Department of Education, by legislation abolishing local boards of examiners.

No major changes in department structure or powers occurred during the following two decades. The continued financing of education by the Foundation Act gradually appeared to be inadequate, and the number of school aged children was increasing at a rapid rate, rendering present facilities inadequate. These conditions led the legislature, in 1953, to provide for an 11-member Ohio School Survey Committee to make a comprehensive survey of the state's public school system. The committee was organized in 1953, and its findings indicate that: only two-thirds of the school districts operated high schools; there were not enough teachers; many of the school buildings were unsafe or inadequate to house the projected increase in student enrollment; and the current distribution of state financial aid to school districts discouraged the consolidation of small, inefficient schools. The shortages of money and space were illustrated by many examples, and the study also noted that boards of education had no legal means available to raise the funds. The study recommended a complete overhaul and proposed a foundation program which would provide a competent teacher for every 30 pupils, additional needed personnel, and based administrative, operational, and maintenance services on the number of classroom units. In 1955, the Ohio General Assembly adopted a new foundation law based on the recommendations of the Ohio Survey Commission.

The Commission recommended that there be an elected State Board of Education composed of citizens having staggered terms of 6 years. The creation of a State Board of Education had been proposed as early as 1850. Periodic attempts to establish a state board between 1850 and 1939 were unsuccessful, as none of the bills passed both houses of the Legislature. In 1939, upon recommendation of the Governor, the Legislature proposed an amendment to the constitution which read: "There shall be a state board of education to be constituted by law, whose members shall serve without compensation. There shall be a director of education, who shall be appointed by the state board of education. The respective powers and duties of the board and of the director shall be prescribed by law." The amendment was defeated in the 1939 election. In 1953, the Legislature proposed an amendment to the Constitution, which was adopted in that year.

> Article VI, Section 4. There shall be a state board of education which shall be selected in such manner and for such terms as shall be provided by law. There shall be a superintendent of public instruction who shall be appointed by the state board of education. The respective powers and duties of the board and of the superintendent shall be prescribed by law.

Creation of the State Board of Education - 1956

Legislation regarding the board of education and the superintendent of public instruction was enacted by the Legislature in 1955. The sponsors of the amendment

recommended a board of nine members, elected from the nine judicial districts. The Legislature agreed to a 23-member board, elected from each of the congressional districts as they existed in 1955. The terms of office were to be determined by lot at the initial organizational meeting of the board, and ranged from 2 to 6 years in duration. Sections 3301.01 to 3301.07, inclusive, of the Ohio Revised Code deal with the State Board of Education.

A major power of the state board of education, granted by the 1953 amendment to the Ohio Constitution, was the appointment of the superintendent of public instruction. Since 1912, the superintendent of public instruction had been appointed by the Governor.

The powers of the Board, as described by Section 3301.07 R.C. include supervision of the system of education, formulation of policy and evaluation of plans pertaining to public schools and adult education, administration and supervision of distribution of all state and federal funds for education, preparation of minimum standards for all elementary and high schools, provision of advisory services to school districts, and to report and recommend annually to the Governor and the Legislature on the status and needs of Ohio schools.

The statutes which provide for the powers and duties of the Superintendent of Public Instruction are found in Sections 3301.08 to 3301.13, inclusive, of the Revised Code. The Superintendent of Public Instruction is appointed by the State Board of Education, and his salary and terms of office are determined by the Board. The duties of the Superintendent of Public Instruction include: serving as executive and administrative head of the State Board of Education; executing the educational policies and directives of the Board; directing the work of all employees of the State Board of Education; providing technical and professional assistance to school districts regarding all aspects of education; prescribing forms for financial and other reports from school districts, officers and employees as necessary; conducting studies and research projects for the improvement of public schools, preparing an annual report to the State Board on the activities of the state department and the needs and problems of public education; supervising all agencies over which the Board has administrative control, including schools for the education of handicapped persons.

The early tasks of the State Board of Education were to adopt policies, as the Superintendent of Public Instruction had previously been the policy making official as well as the executive officer for the policies.

School and Ministerial Lands

The school and ministerial lands were held by the state in trust in accordance with land grants made by Congress in the 18th century. According to the provisions of the Ordinance of 1785, section 16 of each surveyed township was to be reserved for school lands. Ministerial lands are two grants of section 29 in the surveyed townships set aside for the "perpetuation of religious purposes". The only two contracts which included this stipulation were the First Ohio Company's Purchase and the Symmes Purchase, both made in the 1790's and describing lands in Southern Ohio. Land for religious purposes was also set aside in the Second Ohio Company's Purchase, but this provision was made by resolution of the trustees of the land and not by Congress. Hence, regarding the second purchase, Congress was not saddled with the same responsibility for the land as it was for the first two purchases. Other attempts were made to reserve ministerial lands but none were granted. In 1811, Congress granted the application of the Baptist Society

of Salem, Mississippi, which included conditions similar to the Ohio grants regarding religious lands. The grant was vetoed by the President because:

> "It comprised a principle and a precedent for the appropriation of funds of the United States for the use and support of religious societies contrary to the article of the Constitution which declares that Congress shall make no law respecting a religious establishment." (11)

Revenue from the lands set aside for school and ministerial purposes was derived from leases. Two factors resulted in the revenue from such lands being so meager that in 1825, one Ohioan observed, "The funds arising from school lands will not be sufficient to educate properly one child in ten." (12) In order to invite settlers to come to Ohio in the early years of its statehood, the government was offering land in fee simple at such a low price, that it was more profitable for the settler to buy the land outright and improve it for himself, than to lease the land, and improve it for the township. Secondly, there was much conflicting legislation passed about how the land ought to be leased. The meager revenue derived from leases was due, in part, to long term and perpetual leases, which prevented the revaluation of the land for 99 years or longer. As property values increased, rents remained unchanged.

In 1824, the Legislature requested Congress to resolve the question of whether the state had the right to sell the school lands. According to the state's reasoning, the Legislature had the right to sell the lands in its sovereign capacity. Upon the failure of Congress to reply, the General Assembly put its theory into practice and, in 1827, sent the assessor of one of the counties in which an original surveyed township was situated to obtain a vote of the white male inhabitants of a certain age, for or against the sale of the township's school land. The assessor reappraised the value of the land to be sold on the basis of improvements, and stipulated that it was not to be sold for less than the appraised price. Lease-holders were permitted to surrender their leases, and receive the deed in fee simple upon paying the former assessment price. Samuel Lewis, the first Superintendent of Common Schools noted that some lands worth fifty dollars an acre were sold to the lessee at six dollars.

Besides adopting legislation for the sale of section 16, in 1827 two other acts were passed concerning the sale of school lands: to enable the inhabitants of the United States Military District and the Virginia Military District to vote for or against the sale of school lands, and to authorize the lessee in the U.S. Military Lands to purchase the lands they now leased. As both sales were approved by the voters, the legislature then prescribed the mode of sale and the transactions were completed.

The fund for the support of common schools was established in 1827. The Auditor of State was made superintendent of the fund which consisted of moneys paid into the treasury from the sale of land for the support of schools donated by Congress, and some donations and legacies made into the fund. This money was pledged for payment at the interest of 6% and was known as the "irreducible debt."

The sale of ministerial lands, which was also viewed as desirable due to poor management of the lands, could not be accomplished without Congressional approval. In 1833, Congress granted the authorization to the state legislature "to sell and convey in fee simple", the lands in section 29 of the two purchases.

The law also required the investment of money from the sale of the land "in some productive fund" the proceeds to be applied annually to the support of religion within the respective townships. The law also stated that the lands could not be sold without the consent of the lessee and inhabitants of the townships involved. In 1834, the Ohio Legislature passed an act for the sale of the first lands, and the Symmes lands were sold several years later.

When the responsibility for the lands was transferred to the Legislature, the law specified the procedure for administration and distribution of ministerial funds by three locally elected trustees. The religious societies would file with the trustees a sworn account of members at least 15 years old living in the originally surveyed township, and the funds were distributed proportionally with regard to membership.

The next major legislation concerning school and ministerial lands occurred in 1917 with the passage of the Garver Act. According to the terms of the act, the tasks and responsibilities for the administration of the land and distribution of the funds were turned over to the Auditor of State. Receipts from the state's management of school lands were paid into the School Lands Trust Fund, of which the annual interest was divided among various boards of education. Proceeds from the ministerial lands were paid into the Ministerial Lands Trust Fund. Hence, funds in the "irreducible debt" represent funds received from the sale of school and ministerial lands prior to 1917, as well as money received from the sale of land set aside for state universities and from gifts, bequests and endowments to Ohio, Ohio State and Miami Universities. Legislation concerning these lands was in accordance with the constitutional provision of the 1851 Constitution:

> Article VI, Section 1. The principal of all funds, arising from the sale, or other disposition of lands, or other property, granted or entrusted to this state for educational and religious purposes, shall forever be preserved inviolate, and undiminished; and, the income arising therefrom, shall be faithfully applied to the specific objects of the original grants, or appropriations.

Many of the settlers who braved the Indians in the early days of Ohio were rewarded with 99 year leases with a fixed rental on their land. This lease agreement still applies to several parcels in Marietta and Cincinnati. In 1917, when the Auditor of State became administrator of the school and ministerial lands, the Auditor invested money derived from the lands, and paid out the interest, all at state expense. Revenue derived from the use of ministerial lands was divided among the religious denominations based on the number of members living in the townships.

In 1968, the Supreme Court of the United States handed down several decisions on the constitutionality of such church-state relationships, and the Auditor of State ceased making annual payments to religious societies. That year, the Auditor of State requested Congress to allow the state to dispose of school and ministerial lands, and pay the proceeds entirely to the school districts, thereby eliminating the ministerial land program.

The Ohio Constitution was amended in 1968 to read:

> Article VI, Section 1. The principal of all funds, arising from the sale, or other disposition of lands, or other property, granted or entrusted to this State for educational and religious purposes shall be used or dis-

posed of in such manner as the General Assembly shall prescribe by law.

The constitutional amendment allowed the legislature to pass laws regarding the use and sale of educational and ministerial lands. In 1969, the 108th General Assembly enacted a law directing the Auditor of State to sell, or otherwise dispose of, all school and ministerial lands. The proceeds, along with the entire irreducible debt fund were to be paid to the school districts. Statutory provisions for the administration and sale of this land, and payment of proceeds are dealt with in Chapter 501 of the Revised Code. Through some complex legislative provisions, on order to get rid of the irreducible debt, it was put into the sinking fund. Several months later, the School District Depository Fund was created, into which all proceeds from the sale or lease of school and ministerial lands goes. All school districts received at least $2,000 even though there were no school or ministerial lands in their districts. If the lands or funds were in excess of $50,000, the State was authorized to either invest the funds or administer the lands, with interest, rents and lease fees paid annually to the school districts involved.

Essentially, the 1968 constitutional amendment and related legislation enabled the General Assembly to distribute the principal as well as the interest of the funds to the schools. The ministerial fund was transferred to the school fund, and the irreducible debt was abolished.

Section 501.04 of the Revised Code stated that the "auditor of the state, as the state supervisor of lands appropriated by congress for the support of schools and ministerial purposes, shall sell or dispose of such lands as provided in this section." In 1973, Amended Substitute House Bill 11 amended the language of the section and added,

....shall sell or dispose of such lands as provided in this section UPON REQUEST OF THE SCHOOL BOARD OF THE DISTRICT FOR WHOSE BENEFIT THE LANDS ARE ADMINISTERED, EXCEPT THAT THE AUDITOR MAY REFUSE TO SELL THE LANDS UPON HIS DETERMINATION THAT THE SALE IS NOT IN THE BEST INTERESTS OF THE DISTRICT...

The amended language specifies that the school board must request the sale of the land, and gives the Auditor veto power over the school board's request. The veto guards against the sale of school lands, when such sale is in the interest of private persons but not in the interest of the inhabitants of the school districts.

Section 501.09 of the Revised Code was, among other sections, amended by Sub. H.B. 11. The original section provided for the sale of ministerial lands, and noted that "the appraisal of the property shall not take into consideration the value added to the property by other improvements in the area." An employee of the Auditor's office described the inadequacy of this law in that it cost the state more money to hire the two appraisers to survey the land than they could get from the sale of the land, as the land had to be sold according to its 18th century value. The amendment to Section 501.09 practically assures the state that it will rid itself of ministerial lands, without going to the expense of appraising it.

Section 501.09. THE LESSEE OF LAND APPROPRIATED FOR MINISTERIAL PURPOSES WHICH LAND IS LEASED FOR NINETY-NINE YEARS, RENEWABLE FOREVER, OR THE LESSEE OF LAND THE LEASE OF WHICH HAS BEEN RENEWED FOR A LIKE TERM MAY PURCHASE THE FEE SIMPLE TITLE TO THE LAND FOR AN AMOUNT EQUAL TO THE RENT

FOR ONE YEAR. THE RECEIPT OF ALL RENTS DUE AND AN AMOUNT EQUAL TO THE RENT FOR ONE YEAR FROM A LESSEE IS DEEMED AN OFFER TO PURCHASE THE LAND, WHICH OFFER THE AUDITOR OF STATE SHALL ACCEPT.

If the lessee refuses to buy the land, as soon as he sends in his next year's rent, it is "deemed an offer to purchase" and "which offer the Auditor of State shall accept", and the lessee has, perhaps unwittingly, bought the land.

Although by the provisions of R.C. 501.09, the state is soon to be rid of all its ministerial lands, a large amount of school land is still held by the state. A publication put out by the Auditor of State's office, "Ohio Land Grants", notes that as of January 1, 1971, revenue producing school lands were located in 15 townships within 13 counties, including 3,016.79 acres of agricultural lands. Mr. Ralph Sweeney, of the Land Office, notes that many school districts and farmers are holding on to their lands in the hopes that the value will increase. Section 501.04 of the Revised Code states: the auditor of state is authorized to renew or lease anew such lands for periods not to exceed two years.

FOOTNOTES

1- Burns, James J., An Educational History of Ohio, Historical Publishing Company, Columbus, Ohio, 1905. (p. 21).

2- Pearson, Jim B., and Fuller, Edgar, Editors, Education in the States: Historical Development and Outlook, National Education Association of the United States, Washington, D.C., 1969. (p. 949).

3- Atwater, Caleb. A History of the State of Ohio, Glazen and Shepard, 1838. (p. 254).

4- Geer, Ralph H., History of Education in Ohio from 1900 to 1938, Thesis, M.A., Ohio State University, 1938. (p. 14).

5- Op. cit., Burns. (p. 46).

6- Op. cit., Pearson and Fuller. (p. 953).

7- Goetting, Martin L., "The Development of Standards for Ohio High Schools to 1932." Abstract of Doctors' Dissertations, No. 10, Columbus, Ohio.

8- Op. cit., Pearson and Fuller. (p. 954).

9- Op. cit., Geer. (pp. 67-68).

10-Op. cit., Pearson and Fuller. (p. 955).

11-Peters, William E., Ohio Lands and Their History, privately published in Athens, Ohio, 1918, 1919, 1930.

Ohio Constitutional Revision Commission
Bill of Rights and Education Committee
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Research Study No. 31

State Aid to Nonpublic Schools:
The Religious Issue

This study sets forth the basic constitutional issues involved in a consideration of state aid to nonpublic schools, most of which have religious affiliation, primarily Catholic. It does not present any information or arguments related to the basic public policy question as to whether such aid is either necessary or desirable.

Laws which authorize public financial assistance to religiously-affiliated institutions, whether such assistance is in the form of direct institutional grants, grants or reimbursements for expenditures to individuals, such as parents, children, or teachers, grants for particular purposes, such as books, supplies, facilities, programs, provision of services, such as transportation, or tax exemptions or tax credits, are challenged in both state and federal courts on both state and federal constitutional grounds.

Guidelines have developed as a result of each decision. Looking first at the decisions of the Ohio Supreme Court, such decisions have been primarily concerned with to what extent and how the state constitutional provisions affect or invalidate state legislative schemes of aid to nonpublic schools and students and their families.

The Ohio constitutional provisions of most immediate concern in this area are Article I, section 7 which states: " . . . No person shall be compelled to attend, exact, 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; . . ." Other constitutional provisions dealing more specifically with education state: ". . . No religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state," Article VI, section 2, and Article VI, section 1--the "General Assembly shall prescribe by law" for the use or disposal of funds for educational and religious purposes. The most common challenge, therefore, of the General Assembly's schemes for the disposition of funds is that such disposition would place the funds in the exclusive control of some sect.

It was on the basis of this latter provision that Ohio Revised Code section 3317.06 (H) was attacked as unconstitutional in Protestants and Other Americans United for Separation of Church and State v. Essex 28 Ohio St. 2d 79, 57 Ohio Op. 2d 263, 275 N.E. 2d 603 (1971). The statute authorized the State Board of Education to distribute moneys to school districts to provide services and materials to pupils attending nonpublic schools for guidance, testing, and counseling programs. The Ohio Supreme Court held that such a law was not a restriction on the establishment of a religion or a prohibition on the free exercise of religion and did not provide any religious or other sect with an exclusive right to, or control of, any part of school funds of the state. The Court rested this decision on the bases that first, the primary purpose and effect of such enactment was not the advancement or inhibition of religion and secondly, the personnel hired out of these funds were hired by the state, under its supervision, and employed for a particular and limited purpose.

The federal constitution provides in the first amendment: "Congress shall make no law respecting the establishment of religion . . ." This clause is referred to as the establishment clause. The federal decisions in this area have evolved a three-prong test as to the validity of a given statute in light of the First Amendment establishment clause. This test is stated by Chief Justice Berger in the majority opinion in Lemon v. Kurtzman, 403 U. S. 602 (1971) as: to be a valid substitute

(1) it must have a secular legislative purpose: (2) its main effect must neither advance nor inhibit religion, citing Board of Education v. Allen 392 U.S. 236 (1968); and (3) it must not foster an excessive entanglement between government and religion, citing Walz v. Tax Commission 397 U.S. 664 (1970).

To determine the issue of excessive entanglement between government and religion, the court examines the character and purposes of the institutions benefitted, the nature of the aid, provided by the state, and the resulting relationship between the government and religious authority. It was on this basis that the court in Lemon invalidated the Pennsylvania and Rhode Island statutes, providing for salary supplements to nonpublic school teachers.

Present forms of aid to private schools and students attending private schools in Ohio

Under the 1967 version of Ohio Revised Code section 3317.06 (H), aid was granted in the form of educational funds from local school districts to "services and materials to pupils attending nonpublic schools within the school district for: guidance, testing and counseling programs. . . audio visual aids; speech and hearing services; remedial programs, educational television services; programs for the improvement of the educational and cultural status of disadvantaged pupils . . .; and for programs of nonreligious instruction other than basic classroom instruction. Such services, materials or programs shall be provided for pupils attending nonpublic schools on the same basis as such services, materials and programs are provided for pupils in the public schools of the district." This section withstood constitutional challenge under the First Amendment of the United States Constitution and Article VI, section 2 of the Ohio Constitution in P. O. A. U. v. Essex 28 Ohio St. 2d 79, 57 Ohio Op. 2d 263, 275 N.E. 2d 603 (1971) but was legislatively repealed in 1971.

State aid, but for the Wolman v. Essex decision described below, would be in the form of grants to parents, Ohio Revised Code section 3317.062, and to provide services and materials to pupils, following the same guidelines as in former O.R.C. 3317.06 (H). These payments for services and reimbursements of costs would be under the supervision of the state Department of Education. In Wolman v. Essex 342 F. Supp. 379 (1972) the federal district court held that that portion of O. R. C. authorizing grants to reimburse parents for a portion of the tuition paid for a nonpublic school education violates the establishment clause of the First Amendment by failing to provide sufficient mechanisms to insure that these public moneys will not ultimately be used for religious purposes.

State aid to nonpublic educational institutions or their pupils is of two types: (1) aid to elementary and secondary schools; and (2) aid involving institutions of higher education. Aid to elementary and secondary schools may be of four types: (1) pupil transportation; (2) other services and materials; (3) tax exemptions; and (4) driver education programs. The payment of transportation expenses or the providing for transportation is provided for under O.R.C. 3327.01. This section was challenged and upheld in Honohan v. Holt under the First Amendment and Ohio Constitution Article I, section 7,17 O. Misc. 57, 460 OP. 2d 79 (1968). These expenses may be paid or transportation provided or pupils may be given vouchers for other forms of transportation, 72 A. G. 43.

Under the Wolman v. Essex, supra, opinion the court recognized the severability of those forms of aid that did not violate the Constitution, as textbooks, from

those forms that were violative, as parental grants. Under the court's analysis, aid granted in the form of the providing and maintaining services which are specifically enumerated and nonviolative, may still be granted, as provided for under O. R. C. 3327.02 (D) and which specifically consist of: guidance, testing and counseling programs; programs for the deaf, blind, emotionally disturbed, crippled and physically handicapped children; audio-visual aids; speech and hearing services; remedial reading programs; educational television services; programs for the improvement of the educational and cultural status of disadvantaged pupils. These forms of aid do not appear to be invalid as first, under Wolman, they provide sufficient mechanisms to ensure that these moneys are to be used for nonreligious purposes and secondly, under Lemon v. Kurtzman and Tilton v. Richardson these forms of aid can be characterized as religiously neutral services and materials, and are provided through the public schools to the nonpublic school students, without payment to the nonpublic schools themselves.

Ohio Constitution Article XII, section 2 deals with the levying of property taxes and authorizes the General Assembly to exempt from taxation ". . . institutions used exclusively for charitable purposes," among other things. O. R. C. section 5709.12 states that real property and tangible personalty belonging to institutions and used exclusively for charitable purposes is exempt from taxation. And O. R. C. section 5709.121 states that if such property is used not for profit and in furtherance of the institution's charitable or educational purpose then it qualifies as tax exempt. This exemption was held not invalid under the First Amendment establishment clause in Walz v. Tax Commission 397 U. S. 664 (1970).

Finally, the driver's education program required under O. R. C. section 3301.17 is valid under Board of Education v. Allen 392 U. S. 238 (1968) as these classes are held in public school facilities or state facilities, involve "secular, neutral, or nonideological services, facilities or materials," and there is not payment made to parochial schools nor are any of their faculty members used.

Ohio also has several programs of aid to college students as well as institutions of higher learning, including church-related schools. These programs include institutional grants on behalf of disadvantaged students, O. R. C. section 3333.12, aid to nonprofit medical schools, O.R.C. section 3333.10, educational facility grants, O. R. C. sections 3377.01 through 3377.16 and student loans, O. R. C. 3351.05 through 3351.14.

The situation in other states

Constitutions of other states prohibit aid to religious institutions or aid that in any way benefits them in a variety of ways. Some states prohibit sectarian instruction in publicly controlled schools, as in Nebraska Constitutional Article VII, section 11, Nevada Constitution Article 11, section 9, South Dakota Constitution Article VIII, section 16, Wisconsin Constitution Article X, section 3, and Wyoming Constitution Article VII, section 2.

The second approach is to prohibit direct and indirect aid to any church, sect, or denomination of religion for use in schools as in Louisiana Constitution Article 4, section 8, Kansas Constitution Article 6, section 8 which extends this prohibition to the university level, Delaware Constitution (Proposed) Article 7, section 7.03, Montana Constitution Article XI, section 8 which extends this prohibition to seminaries, Missouri Constitution Article 9, section 8, Mississippi Constitution Article 8, section 208, Nebraska Constitution Article VII, section 11, New Hampshire Constitution Pt. 2 Article 83, New York Constitution Article XI, section 3, South Dakota Constitution Article VIII, section 16, New Mexico

Constitution Article XII, section 3, Utah Constitution Article X, section 13, and Pennsylvania Constitution Article 3, section 29.

Pennsylvania also takes a third approach to this problem and strictly prohibits scholarships for study in theological seminaries or schools of theology, Constitution Article 3, section 29.

A fourth constitutional approach prohibits transporting students of nonpublic schools as in Wisconsin Constitution Article X, section 3.

Washington Constitution Article 9, section 4 states that the public schools shall be free from all sectarian control.

Some courts have narrowly interpreted these broad prohibitions as in New Hampshire where the constitution states: "No money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination." In an advisory opinion, the justices of New Hampshire stated in 109. N.H. 578, 258 A. 2d 343 (1969), that under this provision the transportation of school children is prohibited when such program is in the discretion of the local school board, but the loan or sale of textbooks owned by the state to pupils in nonpublic schools is constitutional. A $50 tax exemption on residential real property to parents with children in nonpublic schools is not constitutional. In a statement of direction, the justices stated that any state support of secular education is constitutional if "sufficient safeguards are provided to prevent more than incidental or indirect benefit to a religious sect or denomination."

In other states prohibiting direct or indirect aid, the court, as in Chance v. Missi. State Textbook Rating and Purchasing Board 200 So. 706, held that free textbooks to school children regardless of school, was constitutional. A similar plan in Louisiana was upheld in Cochran v. La. State Board of Education 50 Sup. Ct. 335, 281 U. S. 370, 74 L. Ed. 913 (1930). This kind of peripheral aid, given to all students regardless of school attended, is generally constitutional under most state provisions and under the federal constitution.

Finally, South Carolina Constitution Article 11, section 9 prohibits the use of the property or credit of the state for the benefit of a sectarian institution. The court in Hartness v. Patterson 255 So. Car. 503, 179 S.E. 2d 907 (1971) said that aid need not be direct to be unconstitutional, the degree of aid is not material, and that court would not distinguish between functions. Thus, under these guidelines textbooks and bussing would definitely be invalid.

Some states, regardless of a broad constitutional prohibition have found sufficient leeway within constitutional provisions to provide some aid which would otherwise seem invalid. Even under New York's broad prohibition, transportation of school children is valid.

Other states specifically provide for aid in the form of General Assembly loans to students attending nonprofit institutions of higher education, Virginia Constitution Article VIII, section 11, or bussing to nonpublic, nonprofit elementary and high schools, Delaware Constitution Article 10, section 5, and New Jersey Constitution Article 8, section 4 Par. 3.

An interesting approach to the desegregation problem was taken in Louisiana Constitution Article XII, section 1 which provided for direct state aid to children attending private nonsectarian elementary and secondary schools which was held violative of the federal constitution on equal protection grounds as an attempt to keep schools segregated, Orleans Parish School Board v. Bust 242 F. 2d 156 (CA) mandamus denied 76 Sup. Ct. 854, cert. den. 77 Sup. Ct. 1380.

Conclusion

The present constitutional provisions in State and federal constitutions that must be focused on are: in Ohio, Articles VI and I, section 7 and the federal constitution's First and Fourteenth Amendment. On the federal level, the Fourteenth Amendment, equal protection and due process, makes the anti-establishment clause of the First Amendment applicable to the states. If the federal constitution were to be amended vis-a-vis aid to private parochial schools, there would be three options as to the applicability of such amendment to the states, first, the amendment may not apply to the states; secondly, the amendment may specifically apply to the states; and thirdly, even if the amendment, on its face, does not apply to the states, it may be made applicable by the fourteenth amendment and a decision of the court.

As to the state constitution, as the law, presently stands, even if there were a change in the direction of removing or liberalizing the prohibition such amendment might be overshadowed by an attack on a law authorized by such amendment on the grounds of a federal challenge. Thus, any state amendment, if it is to be viable, must also be within the scope of permissible action under the federal constitution, as expounded by federal decisions.

Advocates of state aid to parochial schools consider that the obstacle to such aid is not the state constitution but the federal constitution. They have not pressed for a state constitutional amendment.

Opponents of state aid to nonpublic schools would tighten restrictions on such aid in the form of a stricter provision, although they do not appear to be actively engaged in pressing for change.

Ohio Constitutional Revision Commission
Education and Bill of Rights Committee
April 1, 1974

Research Study No. 33

Educational Governance in Ohio: Elementary and Secondary Education

Introduction

Research Study No. 30 reviewed the history of education in Ohio, tracing the growth of educational policy-formation and education administration from matters of purely local concern to matters of statewide concern. The organization of the state education function has, in parallel fashion, changed from a simple organization reflecting a mere record-keeping function to a complex structure reflecting both the importance of education in the lives of Ohioans today, and therefore in the governmental process, and the increasing role of the state in education.

The ability of the state to meet the educational needs of the citizens and to comply with the constitutional mandate to "secure a thorough and efficient system of common schools throughout the State" may depend, in part, upon the structure created for the governance of education.

Educational government is comprised of a complex network of relationships between various educational associations, state education agencies, executive officers, the legislature, and citizens groups. One group may be a strong policy making force at one time and much weaker at another time. The formal structure of educational governance makes some difference for educational policy making, and certain relationships among groups are probable, given one framework or another. An evaluation of educational governance must take into account such factors as the working relationships among various groups and the political situation as well as the formal structure, whether constitutional or statutory.

Some elements of the education structure are in the Ohio Constitution; hence it is relevant for the Constitutional Revision Commission to review structural questions in order to determine whether any changes should be made in the constitutional provisions regarding education. Beginning with a survey of the popular frameworks for educational governance in the states (and territories) the study will proceed to the system of educational governance in Ohio.

1. State Boards of Education

Fifty states and six territorial possessions are discussed in State Departments of Education, State Boards of Education, and Chief State School Officers,[1] published by the U. S. Department of Health, Education and Welfare, and containing data current to September, 1972. Of the 56 jurisdictions, all have a state board of education for elementary secondary education with the exception of Wisconsin. Forty-six of the state boards of education also serve as state boards of vocational education. Nine states have a separate board for vocational education. State boards of vocational education are responsible for vocational rehabilitation in 35 states. In 21 states, vocational rehabilitation is administered by a separate agency.

Members of state boards of education are selected by three basic methods: (1) election by the people or by representatives of the people (legislators, legislative delegations, members of boards of directors of school districts); (2) appointment by the governor; (3) membership ex officio (i.e. by virtue of office or position held).

State board of education members are elected by popular vote in 13 states; 8 states use a partisan ballot. In four states, board members are elected by representatives of the people.

In 35 states, board members are appointed by the governor. The governor appoints all members in 16 of these states; in the remaining 19, some ex-officio members are designated by law in addition to members appointed by the governor. In 29 of these 35 states, in which the governor appoints a majority of the members of the state board of education, confirmation of his appointment is required by some other group, either the legislature or a special commission.

Selection of board members ex officio has declined considerably from the turn of the century. As of September, 1972, 27 of 55 state boards of education had ex-officio members. Among these, the chief state school officer was the ex-officio member in 22 states, the chief executive officer in higher education was ex-officio member in 7 states, and the governor, in five states. In some states, elected officials such as the attorney general or lieutenant governor served in ex-officio capacity. Only 2 states selected board members ex-officio as their chief means of selection.

Of the three methods of selection, two have gained widespread acceptance--election by the people or by their representatives, and appointment by the governor. Both methods are credited with good and bad aspects in the Health, Education and Welfare document described above. Board members elected by partisan ballot may favor the point of view that supported their election. Even in a nonpartisan election, some candidates may favor special interest groups sponsoring their candidacy. Relatively few persons not backed by a political part of special interest group are willing to pay expenses for a statewide campaign for an office with little or no compensation. (In Ohio and several other states, board members are elected by districts, but campaign costs are still sizeable.) There is a danger of politically ambitious persons becoming candidates to promote their own interests. Finally, perhaps, there is a difficulty in properly informing the voters about various candidates. The method of electing members of the board of education might be criticized on the grounds that electors might not be qualified to judge the educational expertise of the candidates.

Regarding the appointment of the state board of education members by the governor, the HEW study observed that the major disadvantage of this method compared to election is that the people are prevented from expressing their will. Some advantages are inherent in this manner of selection:

> "The Governor can constitute the board without cost to state government. With the power to appoint, the Governor is given the opportunity to select persons whose judgment and ability he respects. Since the State board must work closely with the Governor in his capacity as chief executive officer of the State, a board whose members are appointed by the Governor is in a better position to press for needed educational improvements and support through the executive branch of government than a board constituted by other means."[2]

The justification for including ex-officio members on the state board of education is attributed primarily to two considerations: to coordinate educational functions with other state governmental functions; and to promote harmonious relationships in the administration of education. It should be noted that while the number of ex-

officio members on state boards declined steadily until 1962, they have increased in number since that year. Hence, the number of ex-officio members in 1972 was the same as in 1940.

Within the states and territories surveyed, there was a variation in the terms of board members and salaries offered. The maximum number of years in the term of a board member is 15 years, in New York, and the minimum was 2 years, in the Virgin Islands. The most common terms of office are 4 years, used in 16 states, and 6 year terms in 15 states. Some states provide for overlapping terms to provide continuity in the state board, and in states where the board is appointed by the Governor, consensus seems to favor terms of office for board members at least long as the Governor's term.

The number of members of state boards of education varies from 5 in Colorado to 24 in Texas, (not including ex-officio members). The majority of states have between 6 and 11 members.

II. Chief State School Officer

Every state has established by constitutional or statutory provision a position referred to as the chief state school officer. The title of the office varies among the states. In most states the chief state school officer serves as the administrative head of the state department of education as well as the administrative officer of the state for executing laws and rules relevant to education as dictated by the state constitution, statutes and policies of the state board of education. In addition, he often functions as the executive officer of the state board of education. The study prepared by the Department of Health, Education and Welfare notes that the importance of the job of state school officer results from the importance of competent state leadership in education being recognized, and states that the challenging responsibility facing chief state school officers in every state

> "is to provide insightful and effective leadership in planning and conducting continuous studies that provide the basis and rationale for proposing goals, policies, and priorities for the improvement of education--or at least of elementary and secondary education in the State."[3]

As the needs of statewide education changes, the chief state school officer became less of a record-keeping officer and more of a leader in policy and planning decisions. The study also notes that the office of chief state school officer was considered political in the past. Various methods of selecting the chief state school officer presently in use are, perhaps, designed to alter the political nature of the office.

The three methods of selecting chief state school officers in use since 1920 are (1) election by the people; (2) appointment by the state board of education; and (3) appointment by the Governor.

Election by popular vote, usually on a partisan ballot, was the most popular method of selecting the chief state school officer prior to 1900. Thirty-five states elected this officer by popular vote between 1900 and 1972, but the number declined toward the end of this period in 19 states. In 13 of these states, the officer was elected on a partisan ballot.

> "Although students of government and State educational administration have been in agreement for over half a century that it is undesirable to

> select the chief State school officer by popular vote, the practice has persisted. One reason for the continuance of various forms of election is the fact that the office of the chief state school officer generally has constitutional status. Difficulties in amending many State constitutions have served to perpetuate the elective method. In addition, the notion that the person elected to the office represents the will of a majority of the voters and is responsive to them has prevailed over the years."[4]

Most of the favorable opinion regarding election of the chief state school officer is founded on the view that such a mode of election assures that the person elected will maintain the support of his party in making changes in education, and that he can exert considerable pressure over the Governor and other elected officials without being at their mercy. In addition, since the selection is limited to candidates from within the state, some assurance is given that the person elected will be somewhat familiar with state problems.

Most criticism of this method of selecting chief state school officers focuses on the potentially harmful influence of party politics on state educational policy. As of September, 1972, 6 of the 19 states in which the chief state school officer is elected provided for a nonpartisan election to discourage political interference on educational matters. It has been observed that most of the arguments used to defend the elective method are not borne out by evidence supporting the establishment of that office as an elective one.

> "Official reports and accounts of contemporaries would indicate that constitutional provisions for the popularly elected chief state school officer resulted more from a strong public sentiment to insure the establishment and continuance of the office than any preconceived notions or plans affirming the wisdom of such action from a working standpoint. Significantly, constitutional provisions for the chief state school officer elected by popular vote generally direct the state legislature to prescribe this official's power and duties."[5]

Popular election is a costly procedure thought to discourage many qualified persons from seeking the office.

The method of appointment of the chief state school officer by the state board of education has been used more widely with the passage of time. In 1896, three states used this method; as of 1972, the number of states increased to 28. During this period, three states: Alaska, Massachusetts and Rhode Island, changed from appointment by the state board of education to selection by the Governor, but all subsequently returned to the board-appointed method.

Arguments in support of the board-appointed chief state school officer include the idea that such persons are more likely to have a nonpartisan position in relation to education, and that the public will regard them more as educators and less as politicians. Some feel that a policy making body should have the power to choose its executive officer and hold him responsible for recommendations concerning policy alternatives and policy implementation. Many argue that the board is better able to select a competent, qualified person, not necessarily a resident of the state, to hold the office.

Some of the possible disadvantages of a board-appointed method are that an

incompetent board could select an equally incompetent chief state school officer, and such selection is thought to weaken executive control over education or that it is too far removed from the accepted political processes of the state.

> "It is obviously highly desirable that State law establishing the structure for the central education agency in a given State make express provisions for a workable separation of powers--the State board as the legislative policy-making component and the chief State school officer as the executive-administrative component--at the state level. Noting that New York was the first State to establish a central education authority under law that provided a distinct separation of powers at the administrative level, Will has observed that laws in many other States have not always provided for this separation."[6]

The survey indicates that 18 states and other jurisdictions had a chief state school officer appointed by the Governor at some time from January 1900 to September, 1972. At the end of this time, 9 states and jurisdictions continued to use this method. Excepting the Virgin Islands, whose members are elected on an at-large basis, the Governor of each of the other eight appoints state board members in addition to the chief state school officer. One state, Maine, changed from gubernatorial appointment to board-appointed, and changed back to appointment by the Governor.

Arguments in favor of this method of selection assume that the Governor can appoint and give full support to a competent leader. General control by the Governor tends to coordinate statewide planning and allocation of funds. A chief state school officer appointed for a longer term than that of the Governor and removable only for cause is relatively free from political pressures. If the chief state school officer is appointed for a term longer than that of the Governor, however, many of the advantages of gubernatorial appointment are dissipated, since the working relationship between a new Governor and a chief state school officer appointed by the previous administration might not be a good one.

Critics of gubernatorial appointment contend that it makes the chief state school officer politically dependent on the Governor. As a result, he may benefit from the Governor's influence in education, or suffer from the Governor's negative attitude toward it. If the legislature had a hostile attitude toward the Governor's program, the education system might suffer. Some argue that the state board of education may become a weak advisory body resulting from the loss of influence.

The term of office for the chief state school officer is fixed by law in 32 of the 56 states and jurisdictions surveyed. The terms range from one year, in Delaware, to 5 years in Alaska and New Jersey. Of the remaining 29 states, three provide for a 2-year term, one for a 3-year term, and 3 for terms coterminus with those of their Governors, and the remainder for four-year terms. All of the chief state school officers elected by popular vote have fixed terms: 2 have two-year terms, and 17 have four-year terms. Of the 13 other chief state school officers having legally fixed terms, 8 are appointed by the state board of education and 5 are appointed by the Governor.

The HEW study reports that most students of educational administration feel that it is good practice to make provisions in the law for a fixed term for the chief state school officer.

> "Regardless of the method employed to select a chief state school officer, he should have some security while in office to exercise his powers and conduct his duties without fear of dismissal at the unlimited discretion of a superior agency or officer. He should not be placed in the position of serving at the pleasure of the Governor or the state board of education. Where the state Governor can dismiss the chief state school officer without showing cause, the educational affairs of the state cannot be removed from partisan politics. Where the State board of education can dismiss the chief state school officer without showing cause, the board or individual members of the board may be encouraged at times to intrude upon the professional sphere of administrative control. Dismissal without cause under any conditions is incompatible with democratic ideas."[7]

The salary of chief state school officers varies among the states.

III. Educational Governance in Ohio - Constitutional Provisions

> Article VI, section 4. There shall be a state board of education which shall be selected in such manner and for such terms as shall be provided by law. There shall be a superintendent of public instruction, who shall be appointed by the state board of education. The respective powers and duties of the board and of the superintendent shall be prescribed by law.

The constitutional mandate to the legislature to draft laws specifying the powers and duties of the state board of education and superintendent of public instruction was carried out, initially, by the 101st General Assembly in 1955, and are found in Title 33 of the Ohio Revised Code.

IV. Educational Governance in Ohio - Statutory Provisions

The Board

Section 3301.01 creates the state board of education to be comprised of one member elected from each congressional district. At present there are 23 congressional districts and 23 state board members. Section 3301.02 specifies the terms of office for board members. Members have six-year terms with approximately one-third of the members being elected every two years. Section 3301.03.01 requires each member of the state board of education to be a qualified elector residing in the territory composing the district for which he is elected. The section prohibits any member to hold any other public position of trust or profit or to become employed by any institution of education. Section 3301.04 specifies procedures for organizational and regular meetings of the state board of education and requires them to hold regular meetings once every three months and attend any special meetings which might be called. Quorums, public meetings, record-keeping and filling of vacancies are considered in R. C. 3301.05 and 3301.06. The Governor is empowered to fill a vacancy until the next general election at which members to the state board are regularly elected.

Many of the powers of the state board of education are set forth in R. C. 3301.07. The board is empowered to exercise under the acts of the legislature general supervision of the system of public education in the state of Ohio. It is granted broad and comprehensive powers to exercise policy formation, planning and evaluative

functions for the schools of the state and for adult education in accordance with the law; to exercise leadership in improvement of Ohio's public education; and to administer the educational policies of the state relating to public schools and public school matters of the state. Specific powers are granted to the state board of education: to administer and supervise the allocation and distribution of all state and federal funds for public school education; to prescribe minimum standards for elementary and high schools to require a general education of high quality; to report annually to the governor and members of the General Assembly; to prepare the budget for schools, agencies in education, and the state board. Other specific powers are granted to coordinate the state educational system by reporting requirements, classification, standards and courses of study, etc. The state board of education retains discretionary power in several areas including the formulation of plans for the promotion of vocational education in areas for which funds are provided by the federal government including agriculture, business and home economics. It is empowered to grant certification to teachers and establish and maintain classes for the blind and deaf.

The Superintendent of Public Instruction

A fundamental power of the state board of education, for the purposes of this study, is contained in Section 3301.08:

> "The state board of education shall appoint the superintendent of public instruction who shall serve at the pleasure of the board. The board shall fix the compensation for the position of superintendent of public instruction which shall not exceed the compensation fixed for the chancellor of the Ohio board of regents."

The duties of the superintendent of public instruction are described in Sections 3301.09 to 3301.12, inclusive, of the Revised Code. He is secretary to the state board of education and a member of the Board of Trustees of the Ohio Archaeological and Historical Society. The superintendent of public instruction is the executive and administrative officer of the state board of education in its administration of all educational matters and functions placed under its control. "He shall execute, under the direction of the state board of education, the educational policies, orders, directives, and administrative functions of the board, and shall direct, under rules and regulations adopted by the board, the work of all persons employed in the state department of education." (R. C. 3301.11) Section 3301.12 authorized the superintendent of public instruction to provide technical and professional assistance and advice to school districts regarding education; to conduct research studies for the improvement of education, prescribe and prepare financial reports and other reports from school districts, officers and employees; and supervise all agencies over which the board exercises administrative control, including schools for the education of handicapped persons. As secretary, the superintendent has no vote on matters acted upon by the board, but he may be called upon to express opinions or make recommendations to the board.

The department of education is created in Section 3301.13 consisting of the state board of education, the superintendent of public instruction, and a staff of professional, clerical, and other employees. The department "shall be the administrative unit and organization through which the policies, directives, and powers of the state board of education and duties of the superintendent of public instruction are administered by such superintendent as executive officer of the board." The department is organized as provided by law or by order of the state board of education.

V. Evaluation of Educational Governance in Ohio

The Educational Governance Project

The Educational Governance Project, operating at Ohio State University, began its work in January, 1972. The project, funded by the U. S. Office of Education, is conducting a national inquiry to expand the knowledge of how states determine public school policy, and to develop alternative models for educational governance to be considered by policy makers and other persons. The Director of the project is Dr. Roald F. Campbell, Fawcett Professor of Educational Administration, Ohio State University. A three-member Policy Board, of which Dr. Essex, Superintendent of Public Instruction, is a member, and an Advisory Committee of 11 representatives of organizations with an interest in educational policy-making are directing the project. The project is to be completed in June, 1974. As of the end of 1973, the project has gathered and reviewed statistical information, completed field work in the case study states, and they are currently completing individual state reports and conducting a survey of preferences regarding governance alternatives. The remaining tasks are to complete a comparative analysis, explicate alternative models of state governance, hold regional conferences to discuss models and prepare their final report. (A complete description of the Educational Governance Project, dated September, 1973, provided the data for the above description.)

The Educational Governance project has set forth an evaluation of the educational structure similar to that represented in Ohio in a report entitled "Possible Alternative Models for State Governance of Elementary and Secondary Education". The model of which Ohio retains some of the basic features is called the Local School District Model.

The key relationships in the structural features are a state board of education elected in a nonpartisan election and a chief state school officer selected by the state board of education. The report ascribes special governmental status to the state educational agency which is governed by the state board of education. The state board of education has considerable policy-making authority. The state board of education evaluated in this model is a small board (5-7 members) composed largely of business, professional and civic leaders. Their term of office is 4 years, overlapping, and they serve part-time, compensated only for expenses and meetings. Staff resources are made available to them by the state department of education. The model describes the chief state school officer's policy-making authority as limited constitutional or statutory authority, and he is directly responsible to the state board of education. He is appointed by the state board of education for a 4-year term and his qualification for office is that he be a professional educator.

The report describes some possible outcomes of the model. The claimed advantages (values) of such a structure are:

"1. Insulation from partisan politics.
2. Representation of "the public", not special interests.
3. Special emphasis on education and assurance of its state-level advocacy.
4. Utilization of professional expertise.
5. Continuity in educational policy.
6. Efficiency in decision-making."[8]

The probable impact of the framework on policy-making functions, as described in the study are:

1 - Policy initiation - in state school finance, by the chief state school officer, the Governor, State Board of Education and legislative leaders. In other educational policies, by the chief state school officer and State Board of Education.

2 - "Locus of Accommodation" - regarding state school financing, the Governor's office and legislature, The chief state school officer and the State Board of Education are loci of accommodation for other educational policies. Presumably "locus of accommodation" could be interpreted as "who one goes to to get things done".

3 - Authoritative enactment - the legislature and the Governor have the authority to enact on matters of state school finance. The legislature, State Board of Education and the Governor have this authority on matters dealing with other educational policies.

The probable impact on relative influence of policy factors is gauged in relation to six other models. The Local School District Model was used as the standard for determining the strength and weakness of the State Board of Education and chief state school officer in the other models. The structure is thought to weaken the Governor and the legislature in relation to other models some of which provide a state board of education and chief state school officer or one of the two to be appointed by the Governor, or appointed by the Governor and confirmed by the legislature. The model is seen as giving strength to educator organizations and weakening noneducator organizations. This appraisal is in relation to some boards of education which are composed of educators or in which educator groups recommend persons for membership on the State Board of Education.

The model differs somewhat from the structure of educational governance in Ohio. As opposed to the small membership described in the model, Ohio's is the second largest board of education in the nation, with 23 members who serve 6-year overlapping terms rather than 4-year overlapping terms as described in the model. There is no constitutional or statutory requirement that the Superintendent of Public Instruction be a professional educator. The only qualification for office is that he not have an interest in any book-selling or book-publishing firm and that he have the qualifications of an elector. In contrast to the model, the Superintendent of Public Instruction does not have a fixed term of office. He serves at the pleasure of the state board of education. This arrangement has been criticized, above, by Will, in State Education: Structure and Organization, as being "incompatible with democratic ideals." It should be noted that the criterion of compensation attractive enough to high quality people appears to have been met in Ohio. As of 1972, Ohio ranked third in the 56 jurisdictions surveyed regarding the salary of the chief state school officer and second with respect to compensation of members of the board of education.

A more extensive evaluation of educational governance in Ohio appears in Education and State Politics. The publication presents the results of a survey of 12 states and presents profiles compiled from responses to questionnaires through the summer of 1967. The project was sponsored by the Education Commission of the States and the American Council on Education. The authors, three experienced students of education and political science, set forth a comparative description of the political relationships between primary-secondary and higher education in the 12 states, trying to dispel the popular "myth" that the two types of education are distinct and separate kinds. The report describes the formal structure of government of elementary secondary education in Ohio as having "implications for the politics of educational relationships in Ohio. It bears the seeds of its own weaknesses and strengths. Ohio's

is the largest of all state boards. It is made responsible by law for supervision of the administration of a substantial array of state requirements and programs, and it is also expected to develop policy within the educational sphere."

The report continues:

> "The present pattern of operations appears to be much what one expects today in lay board-professional administrator relationships. The board is part time and inexpert; the business is either very routine or technically complex; and the superintendent is 'on top of things' by virtue of his competence and full time attention to duties,"[9]

The authors of the report noted that the present superintendent has been in office for slightly more than a year at the time the report was written, and that roles and relationships in the Department of Education appeared to be in a state of flux. "One gathers the impression, however, that the department has not been a vigorous force for educational change, and it seems not to have had particularly great influence with the legislature or the executive branch of state government."[10]

The report acknowledges the importance of private associations in educational politics in the state. Ohio Education Association is regarded as the most important. The others are the School Administrators Association and the affiliates of the American Federation of Teachers.

> "Of these, the OEA is undoubtedly the most important, though it seemingly has not held the power of some of its counterparts in other states. It has represented the central elements of the education profession and exercised the initiative and influence in education that has commonly been accorded them. The OEA was among the groups that promoted establishment of the Board of Education, its goals presumably being to enhance professional control of the policy-making process on the state level, and vitiate the influence of politics on the schools. The OEA and the department have differed over some fairly basic matters of policy. The association is reportedly very powerful with the legislature."[11]

The rising aggressiveness of the teaching profession is reported as having motivated the Ohio Education Association to take a more "contentious attitude," with regard to its bargaining and political activities. "All in all, no organization-public, semi-public, or private seems to be in a position to speak for elementary-secondary education in Ohio today."[12]

A matter dealt with extensively in the publication was the governance of vocational and technical education in the 12 states. The arrangement in Ohio is that vocational education is administered by the Department of Education and technical education is under the aegis of the Ohio Board of Regents. The authors are not in accord with the strict division between elementary-secondary and higher education and note that attempts to define the two areas: vocational and technical, in order to make a proper assignment of duties is open-ended and vague.

The report concludes that since there is no really prominent spokesman for the needs of elementary-secondary education in Ohio, the needs are not pressed with as much force "as one might expect" and that such needs tend to be handled in a partial and piecemeal fashion.

Emphasis should be given to the fact that the data used for the study in Education and State Politics was current through the summer of 1967.

Conclusion

This memorandum has described various structures of educational governance and reported some of the observations that have been made about structures for governance by several sources. The educational governance framework in Ohio has been presented, with related descriptions of political implications, and relationships among active forces in educational policy-making. If these relationships and the administration of education in Ohio are found to be unsatisfactory, then a decision must be made as to whether the structure of educational governance is at fault. Some changes in the structure to achieve the desired goals must then be found.

FOOTNOTES

1. U. S. Dept. of Health, Education and Welfare/office of education, State Depts of Ed. State Bds of Ed, & CSSO. U.S. Government Printing Office, Washington, D. C. 1973.

2. Op. Cit., State Departments of Education, State Boards of Education and Chief State School Officers, p. 65.

3. Kenneth H. Hansen and Edgar L. Morphet, "State Organization for Education: Some Emerging Alternatives," in Edgar L. Morphet and David L. Jesser, eds., Emerging State Responsibilities for Education. Denver, Colorado: Improving State Leadership in Education, 1970, pp. 49-50.

4. Op. Cit., State Departments of Education, State Boards of Education, and Chief State School Officers, p. 79.

5. Will, Robert F., State Education; Structure and Organization , U. S. Department of Health, Education, and Welfare, Office of Education, OE-23030, Misc. No. 46. Washington, D. C.: U. S. Government Pirnting Office. (pp. 21-22).

6. Op. Cit., State Departments of Education, State Boards of Education, and Chief State School Officers, p. 85.

7. Op. Cit., Will, p. 26.

8. Possible Alternative Models for State Governance of Elementary and Secondary Education, Educational Governance Project, p. 7.

9. Usdan, Michael D., Minar, David W., Hurwitz, Jr., Emanuel, Education and State Politics, Teacher College Press, Columbia University, 1969. (p. 133).

10. Ibid.

11. Op. Cit., Usdan, Minar and Hurwitz, (p. 134).

12. Ibid.

Ohio Constitutional Revision Commission
Education and Bill of Rights Committee
May 3, 1974

Research Study No. 35

Financing Elementary and Secondary Education

Introduction

A constitutional convention currently underway in Texas was preceded by a Constitutional Revision Commission which studied the entire Texas Constitution and prepared, for use by the convention, a proposed new Constitution. A recent article by the Director of Research for the Commission summarized the concern of the Commission about school finance as follows:

> Education. Most of the present concern over public education in Texas is centered around finding methods of providing equitable support for local school districts. The commission did not attempt to devise a formula to correct these problems, but it recommended a general policy in the first section of the education article. That section provides that it is the duty of the legislature to provide ". . . equal educational opportunity for each person in this state." The implementation of that policy is left to legislative enactment with a further admonition that the quality of education should not be based on wealth other than the wealth of the state as a whole. The wording reflects the 1971 opinion of the federal district court in San Antonio in its decision which found the method of financing public education in Texas to be a violation of the Fourteenth Amendment Equal Protection Clause. Although the United States Supreme Court later reversed the lower court opinion, it made specific reference to apparent inequities in the state system of public aid to education and cited the responsibility of the state for correcting them. (San Antonio Independent School District v. Rodriguez, 93 S. Ct. 1278 (1973))

The search for equal educational opportunity without regard to the wealth of a child's parents or the wealth of the school district is being conducted in almost every state. Although no court has so far found the Ohio school finance system to be unconstitutional the search is nevertheless being conducted in Ohio by various interested groups, since the local property tax is a major factor in school finance in Ohio and inequities in the taxable wealth of school districts exist in Ohio as in other states.

Background

On March 21, 1973, the United States Supreme Court handed down a decision in the case of San Antonio Independent School District et al v. Rodriguez et al. (cited above) which ended months of speculation that the school financing system of Texas and, by comparison and implication, of many other states as well, would be found to be in violation of the Equal Protection Clause of the 14th Amendment. The court did not so hold.

Most states, including Ohio, finance elementary and secondary education from two sources: local property tax and state funds, generally not derived from a property tax, funnelled through a "foundation" program designed to provide some "equalization" by guaranteeing a minimum amount per pupil for expenditure by the

school district. Federal funds are important, also, and are available in both categorical grants and through revenue sharing, but the bulk of school financing is still being provided by state and local funds. (In 1970-71, in Ohio, 66% of the total school expenditures came from local sources, 29% from the state and 5% federal The proportion of state funds has increased somewhat since then.)

The Supreme Courts of several states, prior to the Rodriguez decision, had held that a school financing system which depends for a major part of its funds on local real property tax effort which, in turn, may be inherently unequal because of the great disparities among school districts in tax burdens or in per pupil wealth available for taxation, violated either state or federal constitutional provisions, or both. In some instances, state or federal "equal protection" clauses were cited, and in these cases the courts held that education was such a fundamental right that states were obliged, under "equal protection" to offer equal educational opportunity to all. None of the decisions spelled out exactly how the states should achieve this goal.

The leading decision prior to Rodriguez was a decision of the California Supreme Court, Serrano v. Priest, decided August 31, 1971 (5 Cal. 3d 584, 487 P. 2d 1241). Although the Rodriguez decision has settled for the time being the question of violation of the federal Constitution, in Serrano and in other state decisions, provisions of state constitutions were also held controlling, and for this reason, several states have altered their provisions for financing schools, either by re-ordering their foundation programs, greatly increasing the amount of state money distributed to school districts, altering their tax or assessment laws, or by adapting other devices designed to assure more equal educational opportunity for all pupils. A major legislative study of the school foundation program is currently underway in Ohio, and the results of this study may lead to recommendations and changes in the Ohio system of financing elementary and secondary education.

Although the Rodriguez decision has removed speculation that the federal Constitution was being violated by the state's school financing method, it should be noted that at least one of the other state court decisions was based on state constitutional provisions almost identical to those found in the Ohio Constitution. In Robinson v. Cahill, (118 N.J. Super. 223, 287 A. 2d 187, 1972) the New Jersey Superior Court found the New Jersey school financing system unconstitutional on the basis of state constitutional provisions requiring "equal protection of the laws" and mandating the legislature to provide "for the maintenance and support of a thorough and efficient system of free public schools."

Ohio Constitutional Provisions

Article I, section 2 of the Ohio Constitution provides in part: "All political power is inherent in the people. Government is instituted for their equal protection and benefit . . ."

Article VI, section 2 provides:

> The General Assembly shall make such provisions, by taxation, or otherwise,. . . as will secure a thorough and efficient system of common schools throughout the State . . ."

Article V, section 3 provides in part:

> Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds . . ."

Proposals for Change

This memorandum does not attempt to analyze the various elements which various courts have held to be present in a school finance system which denied equal educational opportunity to some students. It may be unequal expenditures, unequal tax burdens, unequal taxable wealth, or some other factor. Nor is a detailed analysis undertaken of the "equal protection" theory nor of the various theoretical proposals which have been suggested to overcome inequality. These analyses are all available in other documents. Rather, the various specific suggestions for changes which have been proposed, in Ohio or elsewhere, will be discussed in the context of whether or not that particular solution to the problem (assuming the existence of a problem, which is also documented for Ohio in other sources) would encounter constitutional objections should the legislature desire to implement that solution.

Following the Serrano decision, but before the Supreme Court acted in the Rodriguez case, the Advisory Commission on Intergovernmental Relations was asked by the President to study whether federal financial aid was necessary to assist states in their educational finance problems and in offering property tax relief. The conclusion of the Commission was that such federal assistance was neither necessary nor desirable. The Commission concluded that "the reduction of fiscal disparities among school districts within a State is a State responsibility."[1] The Commission's report contains the following statement and suggestions for state action:

> The States have plenary powers in the education field and they also have an overriding self-interest in adequate provision of this single most costly State-local function. States have at least four options in responding to any court decision invalidating a school finance system that relies too heavily on the local school property tax. They can reorganize their school districts to make each local district more in the image of the State as a whole. They can mandate a uniform property tax rate the proceeds of which could be used to equalize financial capacity among districts. They could enact State property or non-property taxes the proceeds of which could be used to equalize local fiscal capacity. They could finance schools from non-property tax sources as does Hawaii. The States alone have the capacity to take any or all of these options should the need arise as a result of court action. Thus, Federal intervention is not a prerequisite to State solution of the intrastate school finance disparities issue.

A Legislative Service Commission study, also post-Serrano but pre-Rodriguez,

entitled "Serrano v. Priest, Equal Protection of the Laws, and Ohio Public School Finance" discusses in some detail the court decisions, the Ohio school finance system viewed from the "equal protection" test point of view, legislative alternatives, and proposals in several other states. Legislative alternatives suggested in Ohio were: statewide assumption of school financing, state and local sharing of school financing consistent with equal protection, and school district reorganization.

Dr. Martin Essex, Superintendent of Public Instruction, in an appearance before the committee in February of this year, made several proposals for changes in Ohio law relating to the problem of equal educational opportunity. Numerous other persons and groups have proposed ways to overcome inequality in school finance. Various proposals are listed together with some comment about whether any constitutional obstacles can be found which would impede the legislature should it wish to enact legislation adopting that proposal.

1. State assumption of all elementary and secondary education costs. Since the Constitution already mandates the General Assembly to provide a system of schools and to make provisions therefor by taxation or otherwise, there would not appear to be any constitutional obstacle to the state taking over all the financial burden of providing for schools. Whether this is a practical or politically feasible proposal is, of course, another matter.

The state is bound by the requirements of Section 2 of Article XII of the Ohio Constitution to the effect that taxes on real property must be uniform and cannot exceed one per cent of the true value of the property without a vote of the people. If the state, in assuming the entire burden of financing elementary and secondary education, chose to do so by means of a statewide property tax, it would undoubtedly require approval by the electorate since it seems unlikely that such a tax would not exceed one per cent even if all local school district taxes currently in effect were to be repealed. However, analysis of real property taxes would have to be undertaken before any conclusion could be reached.

The Constitution could, of course, be altered so that a statewide property tax for education is exempt from the provisions of Section 2 of Article XII. This, too, would require a vote of the people.

Should the state choose to finance education completely from state funds but use a source of revenue other than the property tax, there do not appear to be any constitutional obstacles.

Hawaii is the only state, so far, in which the state pays 100% of the costs of operating the elementary and secondary schools. In Hawaii, the state not only pays the entire costs, the system itself is a state system and is operated by the state. In several other states, however, the percentage of total school costs paid by the state has increased considerably in the last few years (in Minnesota, to 60% ; in Utah, to 72%; in North Dakota, to 70%) but no other state has a system like that of Hawaii.

2. School District Reorganization

Dr. Essex suggested to the committee "An amendment to provide for reorganization and elimination of small inefficient school districts." His suggestion was based on two considerations: small school districts, serving too few pupils are "economically inefficient and educationally inadequate" and school district reorganization "tends to reduce inequities in taxable resources."

School districts could, undoubtedly, be reorganized so that all are approximately equal in terms of taxable wealth, or taxable wealth per pupil, or whatever standard is established. However, in examining the Constitution, no obstacle can be found to legislatively-mandated reorganization. Indeed, the Ohio Supreme Court has upheld the right of the state to draw school district boundaries; it seems clear that the legislature can provide for consolidation or any other territorial modification of school districts (State ex rel. Core v. Greene, 160 Ohio St. 175, 1953).

A constitutional provision could be drafted mandating the legislature to provide for school district reorganization according to whatever standards seem appropriate, which standards could be spelled out in the Constitution. The problem with such an approach is that, at some point in the future, other standards might be desired, or the entire concept of school districts might appear to be obsolete, and the Constitution would then have to be changed again.

3. State taxation of public utility property for statewide distribution

Dr. Essex proposed that part of the problem of inequality might be solved by levying a statewide tax on public utility property for statewide distribution. He notes that the additional wealth generated by the construction of "vast electrical power generating plants" tends to be concentrated in small school districts, whereas the plants themselves serve many consumers outside the school districts, sometimes substantial distances away from the energy source.

Property taxes are subject to Section 2 of Article XII of the Constitution, which requires that real property taxes be uniform (interpreted to mean uniformity both in assessment and in rate) and that no property taxes be levied over one per cent of true value without a vote of the people. Personal property has been exempted from the uniformity requirement, and is classified for taxation purposes. Taxation is also subject to the "equal protection" provision of the Constitution, and cannot be arbitrarily or unreasonably classified.

Dr. Essex did not specify whether he was referring to a statewide tax on the personal or real property of utilities. In either event, a state tax might have to be submitted to the voters because of the 1% provision. In addition, if the state tax were levied on the real property of utilities, it seems fairly clear that this separate treatment of one type of real property would violate the uniformity provision unless all local school district taxes, which it would presumably replace, were uniform. It might be possible to attain what would be, in effect, a state tax on utility property for school purposes by continuing to have such property subject to local rates and either collected locally or collected by the state but, in either event, distributed by the state among all school districts.

4. Dr. Essex also proposed an amendment to equalize assessments "with annual adjustments in valuation . . . rather than after the sexennial time for counties scheduled for reassessment in 1975, 1976, and 1977".

The Supreme Court, in the various Park Investment cases, has held that uniformity means that all real estate be assessed at the same percentage of true value--statewide uniformity as well as uniformity with respect to all classes of property. However, the legislature has enacted legislation permitting counties to achieve uniformity (now set at 35% of true value) over a six year period. There is, therefore, no constitutional obstacle to the achievement of uniformity. It might be possible, as Dr. Essex suggests, to draft a constitutional provision that would speed up the

process, but many approaches could be taken to this problem. Among them would be creation of a state assessor's office to accomplish assessment on a statewide basis. If there is interest in pursuing this approach, the laws and constitutions of other states could be examined to locate a similar provision. Again, however, there is no reason why the legislature could not adopt this approach if it chooses to do so.

5. A concept known as "power equalizing" has been advanced as meeting both the equal protection test and still retaining "local choice" in the form of a decision on the tax to be levied. It does not require changing school district boundaries. It is based on the concept that the expenditure per pupil would be determined by the state; property-rich school districts, applying their local tax rates to their assessments, would tend to raise more money per pupil than the state-established expenditure and would thus pay a certain amount into the state; property-poor school districts would not be able to raise enough locally and would receive money from the state. One obvious problem with this plan is whether the rich districts would continue to levy the taxes which would produce excesses--even though such levies might be substantially smaller than those needed by poor districts. This would seem to be a practical, not a constitutional problem. A specific, earmarked tax levy for schools could, of course, be written into the Constitution; this, however, would appear to be contrary to the best constitutional opinions which generally oppose earmarked taxes. Otherwise, a proposal such as this one cannot be examined for constitutionality without knowing more of the details--much would depend on how it is drafted.

8. Finally, Governor Gilligan, in addressing one of the Commission's committees on March 29, 1972, mentioned the problems of school finance equalization. He stated: "I would recommend this commission consider the insertion of language which would compel the state to equalize financial resources for the education of each child in the primary and secondary public school system . . ." He made no specific recommendations, and indicated only that the Constitution should contain general language for providing "equal educational opportunity" to children.

Ohio Constitutional Revision Commission
Education and Bill of Rights Committee
May 9, 1974

Research Study No. 34

Educational Governance in Ohio
Public Higher Education

The governance of higher education has become an issue of increasing importance during the last few decades. Colleges and universities have been growing at a rapid rate, and in spite of a recent decline in student enrollment, institutions of higher education have expanded and become more specialized, demanding sizeable amounts of money, land, and other resources. Higher education competes with many other institutions for operating expenses, and public colleges and universities have been under increasing pressure to "stream-line" their operations in order to prevent unnecessary duplication of university functions, and in order to maximize the productivity of a limited amount of resources. Many students of educational administration hold the opinion that the development of public higher education should be regulated by some state-wide agency to insure maximum efficiency of the system as a whole.

On the other hand, institutional autonomy is a matter of great concern in the governance of higher education. In addition to the vital interest of academic freedom, there is the matter of each institution being free to develop itself, its own goals and purposes. In the face of demands for greater state-wide coordination of public institutions of higher education, and demands being made on these institutions by private and public industry, state and federal government, to train manpower for highly specialized industries, many feel that institutional autonomy is being threatened. In the words of a former president of the State University of New York:

> "With the tendency of the times toward more and more interest in public higher education by the people and their duly elected and appointed representatives, and a corresponding tendency to introduce political considerations into the process of educational planning;... with increasing pressures from business, industry, social agencies, or federal and state governments to shape the activities and curricula of the universities to their needs in research, training, and education and to give such needs the very highest priority; with the increase in abrasive challenges and charges inevitably hurled by both sides in any disagreement over the missions of universities - with all these factors and others, constitutional guarantees of university independence af action appear not only desirable but essential." (1)

In many constitutional conventions over the past two decades, university governance has received much attention. in "The Influence of State Constitutional Conventions on the Future of Higher Education", university governance concerns at four constitutional conventions: Hawaii. Maryland, New York, and Michigan, are described. Among the specific questions asked are:

> "Should the constitution contain provision on the method of selecting the governing board? If so, what kind? Should some degree of autonomy be granted to segments of the higher educational system? If so, how much and to what institutions? Should the constitution provide for a state-wide coordinating board? If so, how much power should it have?" (2)

The article considers the inclusion of both state-wide and institutional governing boards in the constitution.

II. Types of Governing Agencies and Evaluation

An extensive evaluation of various models of higher educational governance is presented in Statewide Coordination of Higher Education by Robert O. Berdahl. Information contained in the study is based on field research gathered in 1966-1967, and analysis covers changes up to 1969.

Models are divided into four types. The first type describes states which have neither a statutory coordinating agency nor a voluntary agency performing a significant statewide coordinating function. Two states: Delaware and Vermont, are included in this category, although Legal Basés of Higher Education in the Fifty States (3) describes Delaware as having a voluntary organization known as the Council of Presidents.

The second type is one in which voluntary coordination is performed by institutions themselves, "operating with some degree of formality". It includes Indiana and Nebraska.

In the third type are those states which have a statewide coordinating board created by statute but not superseding institutions or segmental governing boards. The category is divided into sub-types based on board composition: (a) boards composed in the majority of institutional members and having essentially advisory powers; (b) composed entirely or in the majority by public members and having essentially advisory powers; (c) composed entirely or in the majority by public members and having regulatory powers in areas without having governing responsibility for institutions under its jurisdiction. Twenty-seven states have such coordinating boards. Ohio is of the third type of coordinating board.

The fourth type of governing agency is the governing board, which may be a single board governing only the senior public institution in the state, or a consolidated governing board for multiple institutions, with no local or segmental governing bodies. Nineteen states fall into this category.

Governance of higher education has evolved in a pattern described by Emogene Pliner, who divides this evolution into four periods: (4)

"1. Complete autonomy of institutions lasting from colonial days to the late 19th century;
2. Creation of single statewide governing boards beginning in the late 19th century, reaching a peak in the first two decades of this century, and currently undergoing a slight revival;
3. Creation of voluntary arrangements gaining impetus in the 1940s and 1950s; and
4. Creation of statewide coordinating boards beginning in the 1950s and still continuing."

The following analysis of the various models for higher educational governance is based on Mr. Berdahl's study, which was based on data through 1969.

The consolidated governing board, functioning as the governing agency for multiple institutions, with no local or segmental governing bodies, is favored by some who claim that only the combined powers of coordination and governance

can effectively implement planning policy.

> "Defenders (and in our field work, we found this group to include most persons working under governing board systems) could point out that, in contrast to the rather hectic history of coordinating patterns in states with other systems, no state having adopted the consolidated governing board system has ever abandoned it. On the other hand, whether because of rejection in principle of the consolidated governing model or merely because of the political power of hostile institutional boards which would have been superseded by consolidation, only relatively small states (New Hampshire in 1963, Maine in 1968, and Utah and West Virginia in 1969) have adopted this model during the past twenty-five years." (5)

Critics of this type of governing board claim that the consolidated governning board results in overcentralization. They question whether such a board can effectively handle more than a few institutions if they are of different types (i.e. two-year, four-year). According to Berdahl, critics contend that the boards subjugate the top priority item of planning to pressing administrative problems.

Some educators favor the model of voluntary cooperation. The study revealed university presidents who feared that statutory boards would be too far removed from complexities and subtleties of individual institutions. In his criticism of voluntary coordination, Lanier Cox observes that "its success is entirely dependent upon individual willingness to cooperate and the extent of that willingness has been directly related to the absence of competing interests." (6) Lyman Glenny concluded:

> "that voluntary coordination tends to preserve the status quo and to lean to domination by the largest or oldest institution, gives inadequate representation to the public interest in policy making, and is ineffectual in coordinating large systems of institutions." (7)

Among the stated advantages of the coordinating board, in contrast to the consolidated governing board, existing institutional boards are permitted to continue operations. Coordinating boards permit the recruitment of independent staff to examine and re-examine the status quo, "as voluntary systems rarely do". (8)

Some problems presented by the coordinating model result from its standing midway between institutions and state government, making it subject to criticism from both sides.

> "If its actions seem to identify it more closely with institutions (as is sometimes the case with a board having only advisory powers, particularly if a majority of its members represent institutions), legislators who expect "instant coordination" are likely to become impatient and critical...Alternatively, it a board's actions seem to place it in the state government camp (as tends to be the case with a board having regulatory powers, particularly if it consists entirely of public members), universities and colleges complain bitterly that another layer of state bureaucracy has been thrust upon them. In Ohio, for example, we heard from a few quarters allegations that the coordinating board allowed the governor's office to intervene in higher education to an extent that would have been impossible before the board was created." (9)

In spite of the popularity of coordinating boards, one author has warned of the dangers of misplaced control:

> "It has been found that an effective system of coordination can do much to relieve pressure for greater State control, but at its worst, a tightly coordinated system can destroy the quality and originality of State colleges and universities. While public institutions of higher education have succeeded in a highly uncoordinated environment in some States, the organizational and operational autonomy has caused varying degrees of rivalry for power and funds in others. States themselves have tended to agree that too much institutional autonomy in the absence of coordination presents as many problems as too little." (10)

Many states have moved from individual boards of trustees to the creation of central state educational authorities to supervise planning, coordination, and budgetary review over separate institutional governing boards. The number of coordinating agencies (including coordinating boards, voluntary associations, and governing boards) tripled between 1950 and 1965. As of September, 1971, there were 48 states with legally created state egencies for higher education;: 28 coordinating agencies and 20 governing boards. In 16 states, the constitution provides for the establishment of coordinating agencies or institutional governing boards by either a specific delineation of power or by authorizing the legislature to establish such agencies or boards. In 5 states, the constitution delineates the powers of a statewide governing board.

The consideration of institutional autonomy remains a key issue in the selection of a coordinating agency. Proponents of institutional autonomy favor a coordinating body that is only advisory in nature - limited to representing higher education to the governor, legislature and institutional governing boards; and to disseminating information and conducting and reporting research and planning studies, as well as facilitating liaisons among institutions.

Ohio

The Ohio Constitution contains no provision for a state coordinating or governing board for higher education. In fact, the Constitution is virtually silent on the matter of public higher education. The only references deal with capital improvements programs (Article VIII, Section 2e and others) and guaranteeing loans to residents attending institutions of higher education (Article VI, Section 5).

Public higher education in Ohio has changed dramatically in the past decade. During the 1960's, Ohio's system of public higher education grew from six to eleven universities with over thirty branches and academic centers; witnessed the creation of a Board of Regents with certain statewide powers; saw an increase in the budget for higher education from $47,000,000 to $500,580,100 (for the 1969-1791 biennium); and felt increasing pressures for greater state centralization under the Board of Regents. The changes described indicate that public higher education is becoming an increasingly important segment of our society. It is meaningful to ask about constitutional status for higher education, in Ohio as in other states.

Presently, public higher education is coordinated by the Board of Regents, created by the legislature in 1963. Chapter 3333. of the Ohio Revised Code creates the Board of Regents and sets forth its powers and duties. The board consists of nine members appointed by the governor with the advice and consent of the senate.

The members must be residents of Ohio who possess an interest in and knowledge of higher education, and who are not trustees, employees, or officers of any public or private college or university while serving on the Board of Regents. In addition to the nine members, there are two ex-officio members: the chairman of the education committee of the senate and the chairman of the education committee of the house of representatives, both non-voting members. Board members, appointed for nine-year terms and serving without compensation, are reimbursed for expenses and are prohibited from serving as trustee, officer, or employee of any technical college as well as other institutions of education specified in Section 3333.01. The Board of Regents is empowered to appoint a chancellor to serve at its pleasure with duties to be prescribed by the board. The board shall fix the compensation for the chancellor and for all necessary employees and staff. The chancellor is the administrative officer of the board responsible for appointing employees and staff, subject to approval of the board, who serve under the direction and control of the chancellor. "The chancellor shall be a person qualified by training and experience to understand the problems and needs of the state in the field of higher education and to devise programs, plans, and methods of solving the problems and meeting the needs." (Sec. 3333.03 R.C.) Neither the chancellor nor his staff may be employed by or be a trustee of or officer of any public or private university or college while serving on the Board of Regents.

The powers and duties of the Board or Regents are set forth in Sec. 3333.04 and are briefly described below.

1. To make studies of state policy toward higher education and formulate a master plan for higher education.

2. To report annually to the governor and general assembly on the master plan and findings from its studies.

3. To approve or disapprove the establishment of new branches or academic centers of state colleges and universities, and to approve or disapprove the establishment of state technical colleges or other institutions of higher education.

4. To make recommendations regarding the nature of programs, research and public services which should be offered by state institutions of higher education and make recommendations of higher education programs which could be eliminated because they constitute unnecessary duplication or for other sufficient causes.

5. To make recommendations to the governor and general assembly concerning capital improvements and establishment of new programs for institutions of higher education.

6. To review appropriation requests of public community colleges and state colleges and universities and to submit to the department of finance and to the chairman of the finance committees of the house of representatives and the senate its recommendations regarding biennial appropriations for higher education.

7. To appoint advisory committees of college or university personnel or persons associated with public and private secondary schools.

8. To approve or disapprove all new degrees and new degree programs at all

state colleges, universities, and other state assisted institutions of higher education.

9. The Board of Regents is granted authority over community colleges in Sec. 3333.05 R.C. The Board is empowered to approve or disapprove the proposed plan for a community college, and the occasions on which the board shall approve an official plan from a community college are outlined in that section.

The Board of Regents is required to prepare a state plan as well as other items necessary to participate in federal acts relative to construction of facilities of higher education.

Section 3333.07 states that colleges, universities, and other institutions of higher education which receive state assistance but are not supported primarily by the state must submit an accounting of state funds to the board; that no state institution of higher education shall establish a new branch or academic center without the approval of the board, nor establish a new degree or new degree programs without the board's approval. Sec. 3333.14 sets forth that, as of 1971, all public post-high school technical education programs shall be operated by technical colleges, university branches, state colleges, state-affiliated universities and state universities.

The coordinating body in Ohio has been described by one author as:

"A regulatory board, one which has the legal responsibility for organizing, regulating, or otherwise bringing together certain policies or functions in areas such as planning, budgeting, and programming, but which does not have authority to govern institutions. These boards are composed entirely or in the majority by public representatives." (11)

Statutory provision is made for institutional governing boards for Ohio University, Miami University, Ohio State University, Bowling Green State University, Kent State University, Central State University, University of Akron, University of Toledo, Wright State University and Youngstown State University, and the Medical College of Ohio at Toledo. The Univ. of Cincinnati is a state affiliated, municipally sponsored institution. Of its 13 trustees, 5 are appointed by the mayor and approved by city council; 4 are appointed by the governor, 2 are non-voting faculty; and 2 are non-voting students. Technical colleges and community colleges are created pursuant to law and are subject to regulation by the Board of Regents as authorized by law.

<u>The Creation of the Board of Regents: Historical Background</u>

The first effort at coöperation among existing state universities in Ohio resulted in the formation of a voluntary cooperative group known as the Inter-University Council, (I.U.C.) This agency was formed in 1939, consisting of 5 state universities. Central State University joined the Council in the year of the college's creation, 1951. For over 20 years, the I.U.C. was the key agency in the universities' relationship with state government.

Joseph Tucker suggests that:

"(t)he major motivating force in the formation of the I.U.C. was the potan-

tially harmful consequences that the existing laissez-faire approach in higher education might produce." (12)

M. M. Chambers suggests another reason for the creation of the I.U.C.

> "Mr. Davey (Governor of Ohio) came from Kent and was very much interested in developing Kent State University. The other institutions felt that this interest was being evidenced at their expense. The result was an official agreement in 1939 to create the Inter-University Council." (13)

Prior to the "alliance" in 1939, each school developed, submitted, and lobbied for its own programs and appropriations, with little regard for other institutions. The I.U.C. was able to present a more unified front on behalf of the member institutions as well as to regulate the activities of its membership. For example, Ohio State University, submitted a memorandum at the organizational meeting of the I.U.C., suggesting that it was the logical place for all Ph.D and professional work, and that other institutions should forego these programs. For some years, Ohio State University retained exclusive rights in these areas.

> "Even though the presidents had joined together, the I.U.C. was from the beginning an organization based on an uneasy truce. The presidents realized that a cooperative effort in financial aid and other matters was to their self interest. What Banfield calls the "maintenance and enhancement needs of large formal organizations", however, would lead ultimately to the failure of this voluntary organization." (14)

Seeds of dissention were sown, however, on the matter of dividing appropriated money among members of the Council. All agreed that Ohio State University should get the largest share of the money, and the remainder would be divided among the rest of the Council's membership on the basis of enrollment. Shortly after the formation of the I.U.C., they were notified that the Governor intended to recommend an increase of one million dollars for the operation and maintenance appropriations of the five universities, and the Council drew up a proposal for the division of the anticipated appropriation giving Ohio State University 60% and the other institutions 40%. One of the questions plaguing the council was on what basis to divide the anticipated appropriations for higher education. At that time, no cost analysis existed for the schools, and the preceding biennium's appropriations were used as a starting point, "and each institution's percentage of the upcoming biennial appropriations was adjusted slightly upward or downward." (15) The institutions agreed to share in the reductions, should the appropriations requested not materialize, at the same rate as in the allocation of funds requested.

> "If agreeing on a joint appropriations request became the cornerstone of the voluntary organization, the sharing of reductions on the same basis was the keystone. Failure to agree on either of these two points signaled the impending demise of the I.U.C. " (16)

Council members bargained among themselves as well as with the governor and the director of finance. In addition to acting on behalf of the membership as a whole, trustees of individual universities attempted to promote the general interests of their own universities when the opportunities arose. Business managers of the universities also played an active part in lobbying for their institutions.

Financial concerns were but one continuing problem for the council. Another

recurring issue was the creation of additional institutions, particularly two-year campuses. Joseph Tucker views the actions of the Council in this regard as highlighting the weaknesses of the Council as a planning agency, and illustrative of what the universities did in an area in which they were fairly autonomous.

The I.U.C. Minutes note that private colleges were concerned over the competition an expansion of the state system of higher education through branch campuses would create. State universities were also aware that there was a strong public demand for branch campuses. The president of the Ohio University suggested that the state universities should take the leadership in organizing branch campuses, but other university presidents did not agree with him.

> "Expressing a concern for the reaction of the private colleges, which would be amusing today, the majority of the council felt that "the private colleges in Ohio would be increasingly hostile to the state universities if the latter go into the 'branch-college' business." It was therefore resolved that"It be the sense of the Inter-University Council of Ohio that the establishment of "branch colleges" by the state universities be discouraged - and that this expression of joint judgment be communicated to the Boards of Trustees of the five state universities and their presidents." "(17)

The I.U.C. was also strongly opposed to the development of state- supported community colleges. The American Council on Education encouraged such a development, and the I.U.C. criticized the Council for espousing such a policy when the continued support of existing institutions of higher education was threatened by the increasing overburdening of public revenues. The I.U.C. informally changed its position on community colleges after World War II and the surging enrollments in institutions of higher education.

Several persons have been critical of the development of community colleges and branch campuses in Ohio under the direction of the I.U.C. as well as of the Board of Regents. One report on branch campuses states that, "an all too common suspicion, adequately justified, is that the branches are run for the convenience of the home campuses rather than to meet the real needs of the community and clientele in which they exist." (18)

The attitude of the I.U.C. regarding the formation of community colleges and branch campuses, "illustrates how the council could not rise above the immediate self interest of the several institutions comprising it." (19)

According to Tucker, the development of the Ph.D program among the membership of the I.U.C. is indicative of another area in which institutional autonomy may have taken precedence over a concern for higher education in the state as a whole. When Ohio University entered the Ph.D program in 1959, renouncing an earlier agreement giving Ohio State University sole jurisdiction in the doctorate field, other universities followed its lead, and the expansion of the doctorate program in Ohio was not well planned. One university president explained that he entered the field in self-defense. A 1963 Legislative Service Commission study cited the desire to act independently and preserve institutional autonomy as the cause of the inefficient planning.

One author was particularly critical of the I.U.C.

> "This study has come to the conclusion that the (Ohio) legislature's

> informal delegation of power to representatives of the existing institutions to make state-wide decisions does not promote the general welfare. In theory the voluntary agencies are not responsible for decisions on the important state-wide educational affairs, but in fact they do reach agreements on allocations of programs, graduate work, research emphasis, and functions. Institutions in the voluntary systems have often established sub-units of their own when new institutions would have been more appropriate and would have brought increased diversity. The fact that these decisions, which strike at the very core of educational policy, are not widely publicized to the legislature or to the citizenry makes them no less significant for the public interest." (20)

In summary, although the idea of inter-university cooperation had merit, the implementation of educational goals in the I.U.C. framework was inadequate. Lack of responsibility, improper delegation of power, and institutions acting all too often on their own behalf were the major problems of this voluntary cooperative.

The establishment of the Board of Regents in 1963 attempted to solve some of the problems plaguing higher education under the I.U.C. The Board was assigned specific duties and responsibilities by statute, and was required to report to the governor and the general assembly. The statutes creating the Board of Regents make a broad attempt to prevent the kind of self-serving actions that characterized the I.U.C. by prohibiting persons holding an interest in an institution of higher education from serving as a member of the Board. The Board retains many advisory and study powers as well as several crucial policy making powers such as the power to approve or disapprove the establishment of new branches, community colleges, and technical institutes, and the power to approve or disapprove new degrees and new degree programs.

Many institutions of higher education were critical of the Board of Regents when it was created, primarily due to their desire for maximum institutional autonomy. Some criticized the Board for not being agressive enough in pressing for and publicizing the needs of higher education. John Millett, the first Chancellor of the Board of Regents, stated that the Board was no lobbyist for higher education, but a supervisory and coordinating body to make recommendations to the legislature and to the governor on matters having statewide interest for higher education.

A former chief executive officer of the regents commented on the relationship between Millett and former Governor Rhodes saying that:

> "the chancellor "has used the political muscle of the governor to aid higher education" even though the governor was not basically sympathetic. This same source was not uncritical of the chancellor's tendency to be so quick to please the governor. There were a few occasions, he indicated, when the chancellor might have been well advised to oppose the chief executive." (21)

University presidents of the I.U.C. also maintained a close relationship with the governor's office. Former Chancellor Millett observed that:

> "The administrator begins his approach to organizational questions with this political perspective. He seeks to determine the political forces which may oppose change and those which may support change. He arrives

at an estimate of the relative balance of power in these forces, including his own prestige, and then determines whether to proceed and how far to proceed." (22)

He viewed the influence of higher education as a function of its political power in that "it depends in large measure upon the state's political leadership reinforced by interested individuals mong the political elite. It has been my experience that the key person in the development of higher educational policy in the state is the governor." (23)

Summary

It appears certain that some institutional autonomy must be sacrificed in order for a state-wide coordinating board to function. "Institutional autonomy" however, may be a concept with only a relative definition. Lyman A. Glenny suggests that most questions of institutional autonomy are confused with "two conceptual variants - academic freedom and administrative independence". Recent evidence indicates that opposition to state-wide coordination is not based on academic freedom concerns. Glenny concludes that societal interests must prevail over institutional interests and notes that most state legislatures seem to have recognized this fact as evidenced by the increasing number of state-wide coordinating boards being created.

Constitutional status for state universities would further institutional autonomy. Joseph Tucker quotes M. M. Chambers in describing the crucial freedoms involved in constitutional status for state universities. Of course, whether all or only some of these freedoms are granted by constitutional language depends on the content of the language of each constitution which recognizes state universities. These freedoms are not granted by constitutional status alone.

1. The university governing board has custody and control of the university funds and none must be deposited in the state treasury.

2. The board is not required to accept the state treasurer as its ex officio treasurer, or to depend on the attorney general for legal services, or to have its financial affairs audited by the state auditor (for the essential post-audit it may employ a private accounting firm) or pre-audited by ny state auditor.

3. The legislature does not make "line-item" appropriations to the board, but instead makes "lump-sum" appropriations and leaves the allocations to specific items of university operating expenditures to the descretion of the board.

4. No employees of the university are subject to the regulations of the state civil service system for classified state employees.

5. The university is not require to make purchases through a state purchasing office.

6. No state editor or state printer or other similar functionary has any voice whatever in determining what the university shall print and publish.

7. The university governing board has sole authority to fix the fees to

be charged for tuition and other services, and the salaries and wages and perquisites of all university employees, including president, faculty members and all others." (24)

It has been noted that even among universities enjoying constitutional status, not all of these freedoms are exercised. In Michigan, the legislature has "penetrated" the constitutional protection by specifying conditions on appropriations for Michigan universities such as mandating minimum hours of classroom contact and specifying limits on out of state enrollment.

Constitutional status for institutions of higher education is not thought to provide a significant grant of academic freedom and may make the job of a coordinating board such as the Board of Regents a much more difficult task.

Another issue which has been discussed in the area of constitutional revision is providing for a state board of higher education in the constitution. Proponents of a strong central state board with constitutional powers to coordinate all of higher education contend that institutions would no longer have to compete in the state legislature for money, duplication would be reduced, and such a board would be able to institute a long-range planning system for the entire state higher educational system. Opponents of such a provision claim that only a locational shift in competition would result, moving from the legislature to the state board. Former Chancellor Millett observed the political aspects involved in higher education and in the efficacy of the board. Perhaps constitutional status for a state board of higher education would reduce the dependency of such a board on political considerations, especially if members of the board were elected, or appointed by someone other than the governor. This is an area which permits speculation about goals and political realities.

A third issue often discussed is the composition of university governing boards if such boards are granted constitutional status. Over half the constitutions that include higher education provisions provide for the method of selecting the governing boards, and these overwhelmingly favor appointment by the governor. In the remaining states, the legislature is given the power to determine how the board will be selected, or has assumed that power in the absence of specific constitutional directives. The same problems that occur in "elective vs. appointive" officers in other branches of government occur here - viz. is the citizen knowledgeable enough to select qualified persons to perform extremely vital policy-making functions?

Many have argued that including a provision in the constitution for the governance of higher education would serve to recognize higher education as a state function and would, to some extent, reduce the pressures from the state legislature, citizens and administrative officials. A fundamental question is whether constitutional status for institutions of higher education or for a governing or coordinating board serves the public interest to a greater degree than legislative control. Would such provisions be in the interest of academic freedom? In the interest of institutional autonomy? In the interest of the state? Constitutional status for higher education should not be considered merely to offer recognition to that governmental function, but to promote the educational welfare of Ohio citizens by some very specific margin.

FOOTNOTES

1. Samuel B. Gould, "The University and the State: Fears and Realities," in W. John Minter (ed.) Campus and Capitol: Higher Education and the State (Boulder: Western Interstate Commission for Higher Education, 1966) p. 13

2. Samuel J. Gove and Susan Welch, "The Influence of State Constitutional Conventions on the Future of Higher Education," Educational Record 50 (Spring, 1969) p. 206

3. Robert L. Williams, Legal Bases of Boards of Higher Education in Fifty States, Midwestern Office, Council of State Governments, 1971. p. 32

4. Emogene Pliner, Coordination and Planning (Baton Rouge: Public Affairs Research Council of Louisiana, 1966)

5. Robert O. Berdahl, Statewide Coordination of Higher Education (American Council on Education, 1971) p. 30

6. Cited by A.J. Brumbaugh, State-wide Planning and Coordination of Higher Education (Atlanta: Southern Regional Education Board, 1963) p. 31

7. op. cit., Berdahl, p. 31

8. op. cit., Berdahl, p. 32

9. op. cit., Berdahl, p. 32

10. U.S. Department of Health, Education and Welfare, Office of Education, State Departments of Education, State Boards of Education, and Chief State School Officers, (U.S. Government Printing Office, Washington, D.C. 1973) p. 115

11. James G. Paltridge, "Organizational Forms which Characterize Statewide Coordination of Higher Education" (MS, Berkeley, Center for Research and Development in Higher Education, University of California, 1965).

12. Joseph B. Tucker, Politics of Higher Education, appearing in Political Behavior and Public Issues in Ohio, Kent State University Press, 1972. p. 235

13. M. M. Chambers, Voluntary Statewide Coordination in Public Higher Education, Ann Arbor: The University of Michigan Press, 1961. p. 33

14. op. cit., Tucker, p. 236

15. op. cit., Tucker, p. 237. No discussion of how these adjustments were made was present.

16. op. cit., Tucker, p. 236

17. op. cit., Tucker, p. 239. Mr. Tucker quotes from I.U.C. Minutes of March 12, 1940.

18. Paul Dressel, "A Report on Four Branch Campuses, " prepared for the Ohio Board of Regents, June 20, 1970. p. 4

19. op. cit., Tucker, p. 242

20. Lyman A. Glenny, Autonomy of Public Colleges (New York: McGraw-Hill Book Company, 1959). p. 254

21. op. cit., Tucker, pp. 250-251

22. John D. Millett, Organization for the Public Service (Princeton: D. Van Nostrand Company, 1966) p. 143

23. "Role of the Ohio Board of Regents and of the Several Institutions of Higher Learning in the Coordination and Management of the Educational Enterprise" (Confidential Memorandum prepared by a special committee of the I.U.C.) pp. 14-16. As quoted in Tucker, op. cit., pp. 254-255

24. M. M. Chambers, Higher Education in the Fifty States, (Danville: The Interstate Printers and Publishers, 1970) pp. 50-51

Ohio Constitutional Revision Commission
Education and Bill of Rights Committee
June 27, 1974

Research Study No. 37

Goals of Education

High quality education providing equal educational opportunity for all students has been recognized by many as a social and economic imperative. The goal of public education has changed dramatically since the years when training a select few in the Bible and the "three 'R's" was sufficient training for self-reliant adulthood. Several of the newer state constitutions include a statement of the importance of education and the goals of an educational system. This memorandum will examine that constitutional language and will discuss some of the court decisions concerning the kind of educational system a state must provide if a system of education is provided for in the constitution or by statutory law.

An earlier memorandum concerning the history of public education in Ohio noted that the federal Constitution is silent on education and the power to provide a system of public education is reserved to the states. The memo described how the authority of local school boards to determine school policy evolved. In spite of the states' authority to provide a system of education, the federal Constitution, by Court interpretation, is being read today to require non-discriminatory application of educational systems. The following discussion briefly describes the development of this concept.

In 1896, Plessy v. Ferguson, 163 U.S. 537, was decided by the Supreme Court of the United States. A Negro, Plessy, brought action to forstall criminal prosecution for violation of a Louisiana statute requiring Negroes to ride apart from whites in separate but equal railway cars. Plessy charged the statute requiring racial segregation unconstitutional and the Supreme Court upheld the statute against constitutional challenge. The Court's reasoning in the case was taken as a policy statement that in all areas, so long as facilities were equal, state-imposed segregation was inoffensive to the Constitution.

The first application of the Plessy doctrine to education was in 1899 in Cumming vs. Board of Education, 175 U.S. 528, 20 S. Ct., 197, in which a Georgia county maintained a high school for whites but not for Negroes on the grounds that it could not afford to maintain both. The U.S. Supreme Court said that the benefits and burdens of public taxation must be shared by all citizens without discriminating against a class because of their race. However, since the Negro high school was discontinued "temporarily" because of economic problems, the court did not enjoin further expenditures on the white school until equal rights were restored.

In Berea College v. Kentucky, 221 U.S. 45 (1905), the Supreme Court upheld the validity of a statute providing that no educational institution could teach both white and Negro students at the same time. The Plessy doctrine was not applied - the case proceeded on the grounds that the state had absolute authority to control corporations which it chartered.

In Buchanan v. Warley, 245 U.S. 60 (1917), a weakening in the Plessy philosophy appeared when the Court was presented with a zoning ordinance which, in effect, segregated an entire city by race. The Court affirmed the Plessy doctrine of separate but equal in education and transportation but refused to carry the doctrine into the area of housing.

Ten years later, the Supreme Court heard its first case involving actual

segregation in public education. In Gong Lum v. Rice, 275 U.S. 78, the Chinese plaintiff conceded the Plessy doctrine and insisted that Chinese children be properly placed in white as opposed to colored schools. The Court held that the state had authority to place Chinese in the same category as Negroes. The case arose in Mississippi.

The first instance of the Supreme Court striking down a state statute providing for segregation in education occurred in 1938 in Missouri ex rel. Gaines v. Canada, 59 S. Ct., 356. Missouri maintained a law school for whites only and offered to pay the tuition of any Missouri Negro at a law school in an adjacent state. The Court rejected the state's reasoning that it complied with the Plessy doctrine by paying tuition at equal law schools. "Although Chief Justice Hughes seemed to base his decision entirely on the principle that a state was not providing equal education by requiring resort to another state's facilities, he did advert to the possibility that "equality" under the separate but equal doctrine might mean more than simple parity in physical facilities." (1)

In 1950, two companion cases were heard by the U.S. Supreme Court in which the Plessy doctrine was analyzed in terms of intangible values as well as simple physical facilities. In Sweatt v. Painter, 339 U.S. 629, 70 S. Ct., 848, the Court's examination went beyond the actual facilities of a Texas Negro law school to find that school inferior to Texas Law School in "those qualities which are incapable of objective measurement", including influence of alumni, prestige, standing in community, etc. The Court recognized that the two races were on unequal footing since segregation in education denied to Negroes access to the dominant racial groups which included most of the lawyers, judges, and jurors with whom a lawyer invariably deals. On the same day as the Sweatt decision the Court resolved McLaurin v. Oklahoma State Regents, 70 S. Ct., 851. In that instance a Negro admitted to an Oklahoma graduate school was required to conform to certain regulations. "Thus he was required to sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library, but not to use the desks in the regular reading room; and to sit at a designated table and to eat a different time from the other students in the school cafeteria."(2) The Court said the restrictions "impair and inhibit his ability to study, to engage in discussions, and exchange views with other students and, in general to learn his profession....There is a vast difference - a Constitutional difference - between restrictions imposed by the State which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the State presents no such bar." (3)

The case of Brown vs. Board of Education of Topeka, 347 U.S. 483 (1954), stands as a landmark in school segregation litigation. In that case, a Kansas statute permitting cities to maintain separate schools for Negro and white students was found unconstitutional in that racial discrimination in public education is contrary to the "equal protection" clause of the 14th Amendment to the U. S. Constitution. The Court unanimously agreed with the plaintiff's contention that segregated schools were inherently unequal. "Education is perhaps the most important function of state and local governments...In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of education. Such an opportunity, where the State has undertaken to provide it, is a right which must be made available to all on equal terms." (4)

The decision in Brown vs. Board of Education that laws permitting school racial segregation violated the equal protection clause of the 14th Amendment clearly invalidated de jure segregation. For several years, the controlling cases in

determining whether de facto segregation was unconstitutional were three U.S. Courts of Appeals cases which upheld the contention that school authorities had no constitutional obligation to correct racial imbalance resulting from de facto segregation. These cases and the controlling principles established are discussed at length in The Federal Courts and Racial Imbalance by Stephen F. Roach (5). In 1967, Judge J. Skelly Wright, in the landmark case of Hobson v. Hansen, D.C.D.C 269 F. Supp. 401, ordered the desegregation of the 90% black de facto segregated Washington D.C. school system. This was a blow to local authority and states' rights in educational policy making, and a departure from earlier federal court decisions on de facto segregation which held that the problem requires a political, and not a judicial, solution.

In addition to the numerous cases involving discrimination against Negroes, there have recently been several cases concerning other groups of persons claiming that they are being deprived of an equal education by state law. One group of persons traditionally excluded from the regular public school system are persons with handicaps. Two court decisions in this decade have affirmed the rights of these persons to an education equal to that of "normal" students in the state. In 1971, P.A.R.C. v. Commonwealth of Pennsylvania, 343 F. Supp. 279, was heard by the Federal District Court for the Eastern District of Pennsylvania. In that state, mentally retarded students of compulsory school age were excluded from the system of public education on the grounds that they are untrainable and uneducable. The court held that the state's claim had no rational basis in fact. The court decision required free public education suited to their needs for all retarded children on the basis of the 14th Amendment equal protection clause requiring equal educational opportunity for all students. To insure that due process is observed in removing a mentally retarded person from the public school system, the court required each school to grant a hearing before any child is classified as retarded or transferred to any class outside of the normal educational program.

In Mills v. D.C. Board of Education, 348 F. Supp. 866 (1972), the principle established in P.A.R.C. was extended to all children labelled mentally retarded, emotionally distunbed, behavioral problems, or hyperactive. In that case, economic difficulties were cited as a source of inequity in the educational programs, and the court held that such inequities, whether resulting from insufficient funding or administrative inefficiency, could not be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.

Other minority groups have been heard by the judicial system on claims that because of various cultural handicaps or characteristics, the school system was denying them equal educational opportunity. The Civil Rights Digest, December, 1971, lists several practices which limit Chicanos' educational progress, including their placement in Educable Mentally Retarded (EMR) classes because tests are based on English language skills. A 1970 HEW memorandum forbade such practices. A number of suits have been filed to end this practice. Diana v. California Board of Education was settled out of court when the state accepted bi-lingual and bi-cultural testing standards (discussed in issue of Civil Rights Digest noted above). In Serna v. Portales Municipal Schools, U.S. District Court, N.M., 41 U.S.L.W. 2304 (Nov. 11, 1972), the court found that the schools ignored the needs of Spanish speaking students. In that instance, the concentration of Spanish-speaking students resulted from de facto segregation, and the Spanish and white schools were physically equal. The court affirmed these facts, but held that the education being offered Spanish-speaking persons in the "equal" school was a denial of the equal protection clause of the 14th Amendment. In direct contrast to the Serna v. Portales decision stands Lau v. Nichols, Court of Appeals, 9th Circuit, 41 U.S.L.W. 2389

(Jan 5, 1973) which held that San Francisco school districts' failure to provide all non-English speaking Chinese students with special compensatory instruction in the English language did not violate the 14th Amendment. The court's reasoning, to which a dissenting opinion was filed, directly contrasts with a wide-spread view that equal educational opportunity is not possible unless compensatory education and pre-school education are provided for disadvantaged children. The court said:

> "Each student brings to his educational career different advantages and disadvantages caused in part by social, economic, and cultural background differences, created and continued completely apart from any contribution by the school system. Even if these impediments can be overcome, it still does not amount to a denial, by the board, of educational opportunities within the meaning of the Fourteenth Amendment should the school fail to give them special attention. Before it can be found unconstitutional to deny special remedial action to such deficiencies, a constitutional duty must be found to provide them. Although it is commendable and socially desirable for the school to provide remedial programs to disadvantaged students, there is no constitutional or statutory basis upon which such programs can be mandated."

A related case decided by the U.S. Supreme Court on June 10, 1974 concerns the rights of educationally deprived children in private schools to receive an education identical to that of educationally deprived children in the public schools. Title I of the Elementary and Secondary Education Act of 1965 requires educationally deprived children in public and private schools to receive a comparable education. The public school system in Missouri refused to assign publicly employed teachers to private schools for on-the-premises instruction. The parents of parochial school children brought a class action suit claiming that the refusal of the public school system violated Title I of the ESEA. The public schools claimed that to provide private schools with publicly employed teachers would have been in violation of the First Amendment. In Wheeler v. Barrera, 42 U.S.L.W. 4877, Case No. 73-62 (June 10, 1974), the Supreme Court held that Title I did not mandate on-the-premises instruction at private schools and does not require services in private schools to be identical in all respects to public schools, and therefore, the First Amendment question need not be decided.

To summarize the state's obligation in view of judicial review, this quote appeared in a 1973 Dickinson Law Review article: (6)

> "The Supreme Court of the United States has recognized that "education is perhaps the most important function of state and local governments...and (i)t is doubtful that any child may be reasonably expected to succeed in life if he is denied the opportunity of an education".[3] However since the right to a public education is not secured by the Constitution[4] and remains unrecognized as a fundamental interest,[5] it exists only insofar as it is granted by state legislatures. Yet once a state undertakes to provide public education, it must be equally available to all citizens since the right becomes subject to both the equal protection and due process guarantees of the 14th Amendment.[6]"

II. Language from selected constitutions

Ohio

The Ohio Constitution provides in Article I, section 7 that "Religion, morality and knowledge...being essential to good government, it shall be the duty of the General Assembly...to encourage schools and the means of instruction." In Article VI, section 2, the General Assembly is directed to "make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State;.."

Illinois

Article X, Section 1. GOAL - FREE SCHOOLS.

A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities.

The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law.

The State has the primary responsibility for financing the system of public education.

Louisiana

The new Louisiana Constitution was approved in May, 1974. The goal of education is stated in a preamble to the education article, Article VIII.

"The goal of the public educational system is to provide learning environments and experiences, at all stages of human development, that are humane, just, and designed to promote excellence in order that every individual may be afforded an equal opportunity to develop to his full potential."

Montana

The goals and duties of education are set forth in section 1 of Article X.

"(1) It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.

(2) The state recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity.

(3) The legislature shall provide a basic system of free quality public elementary and secondary schools. The legislature may provide such other educational institutions, public libraries, and educational programs as it deems desirable. It shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system."

Texas - Constitution proposed by Texas Constitutional Revision Commission

Article VII, Section 1. Equitable Support of Free Public Schools

(a) A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature to establish and make suitable provisions for the equitable support and maintenance

of an efficient system of free public schools and to provide equal educational opportunity for each person in this State.

(b) In distributing State resources in support of the free public schools, the Legislature shall ensure that the quality of education made available shall not be based on wealth other than the wealth of the State as a whole and that State supported educational programs shall recognize variations in the backgrounds, needs, and abilities of all students. In distributing State resources, the Legislature make take into account the variations in local tax burden to support other local government services.

Virginia

Article VIII, Section 1. The General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth, and shall seek to ensure that an educational program of high quality is established and continually maintained.

Section 2. Standards of quality for the several school divisions shall be determined and prescribed from time to time by the Board of Education, subject to revision only by the General Assembly.

Several concepts contained in the newer state constitutions differ from Ohio's constitutional language providing for "a thorough and efficient system of common schools". Ohio's language stating that religion, morality and knowledge are essential to maintain good government have been replaced in the newer constitutions by statements of the importance of education to the people, conveying the idea that the educational system should enable persons to develop to their full potential.

One of the problems the Illinois language of development "to the limits of their capacities" deals with is education of the handicapped. The purpose of this language was commented on by a member of the Education Committee of the Illinois Sixth Constitutional Convention as follows:

> "To the limits of their capacities" recognizes that individuals have different problems, that there are physically and emotionally handicapped, mentally handicapped, that there are adults who are deserving of the maximum educational development they can get -- not just academic education -- vocational education, training, everything conceivably which can fall under the rubric of education..." (7)

The language of other constitutions referring to development to their full potential also recognizes that people have different potentials for development, and implies that handicapped people are capable of development, however limited that may be. The belief that handicapped persons can benefit from the system of public education and that there is no justification for their exclusion, seems to be reflected in the newer language. A problem in interpreting "to the limits of their capacities" seems likely to occur. For those persons with limited capacities, it is relatively easy to tell when they have reached their limit, but for persons with average or above average mental and physical ability, it would be very difficult to measure the limit of their capacity, or to say with certainty that they could not significantly prosper by additional education.

Another apparent "modernization" is the absense of the word "schools" in some of the provisions, and the substitution of language such as "high quality

public educational institutions and services" and "learning environments and experiences". These phrases seem to reflect some of the changing ideas about the value of teaching in the 9-3 o'clock classroom situation. A study of the old Illinois Constitution notes that "common schools" was inserted to indicate that academic and collegiate education were not to be supported by public taxation. The new constitution provides that education through the secondary level shall be free and the legislature may provide for other free education, so the concept of common schools could be sacrificed without adding any financial burden to the people.

A term used to describe the educational system to be provided is "high quality". This is, perhaps, of substantial importance although somewhat vague. Court decisions have stated that equal educational opportunity must be provided to all persons who fall into the compulsory school age group, but the state could, possibly, provide an equally bad educational opportunity for all. The meaning of "high quality" education is subject to change and different interpretations, but at the very least, the State is required by the language to give adequate funding to schools to insure the minimum standard of high quality.

Another elusive concept is "equal educational opportunity". The wisdom of including that language in the proposed New York State Constitution was commented upon:

> "Equality of educational opportunity is itself an evolving concept. "Separate but equal" was once considered an adequate assurance of equality of opportunity, but is no longer so considered legally. The recent published survey by the Office of Education of the United States Department of Health, Education and Welfare, "Equality of Educational Opportunity", revealed that services, facilities, and materials in a public school account for less variation in achievement among students than the character or social class of the student body, and that a student body limited to impoverished, minority-group children tends to achieve very poorly. Equality of educational opportunity, the report said, may mean not just equal expenditures for all pupils but greater expenditures for underprivileged children. It may also mean more concern with school or classroom social and racial composition." (8)

In the findings of a more recent study, "Racial Isolation in the Public Schools" by the Federal Commission on Civil Rights, in 1967, it was asserted that racial isolation must be totally eliminated before equality of educational opportunity can be afforded minority races.

Since the concept of equal educational opportunity is subject to further evolution, an alternative to including it in a goal statement is to leave it to the legislature and appropriate educational authority to define the concept in the light of new knowledge. Judicial decisions have required that an educational system provide equal educational opportunity, hence, omitting it from the constitution would not appear to deprive citizens of an opportunity they would have if that language were included.

A problem in providing quality education is financial in nature. (See Research Study No. 35 for detailed discussion.) A school district's budget is dependent, in part, on property taxes and taxable wealth. In the 1974 primary election in Franklin County, only 1 of 6 requests for new school taxes were approved by the voters and 2 school levys were renewed, according to the Dispatch (May 8, 1974, p. 29, col. 1). If the constitution requires the legislature to provide quality education, and the state continues to rely on voter acceptance of additional taxes,

the legislature may be unable to carry out its constitutional mandate without a guarantee of additional money by the state. The new Montana constitution requires the legislature to fund and distribute the state's share of educational costs to school districts in "an equitable manner". This may allow the unequal taxable wealth of school districts to be balanced out by unequal allocation of funds to compensate for poverty and extreme wealth in school districts. A further consideretion is that wealthy school districts might not be using that money to provide "high quality" education, even though the money is available.

The language of the newer constitutions cited above, with the exception of Virginia, all provide for an education for all persons, rather than for persons of compulsory school age. Certainly, Ohio would want to approach very cautiously constitutional language that would commit the state to providing free educational services to all persons forever. One alternative would be to provide free elementary and secondary education with an option of providing additional free education as provided by law. The State Department of Education or Board of Regents could maintain institutions of higher education and vocational education, offering more advanced education than they now provide, at additional cost to the student, as is now the case. In addition, perhaps the state could contact with existing corporations to make use of industrial facilities at minimal cost to the student, thereby reducing the cost and duplication of schools buying instructional equipment, such as computers. A belief affirmed by the newer state constitutions is that it is in the interest of the state to provide its citizens with educational opportunities that will allow persons to develop to their fullest potential.

A final consideration for a statement of educational goals in the constitution is whether to include the word "fundamental" to describe the goal. A concern of the Illinois Constitutional Convention was to illustrate in the constitution the importance of education. The original proposal of the Education Committee was to state that education was "(t)he paramount goal of the people of the state". (9) The consensus at the Convention was that the word "paramount" was too strong, and "fundamental" was substituted for it. In the recent U.S. Supreme Court case of San Antonio Independent School District v. Rodriguez, 93 S.Ct. 1278 (1973) the Court held that education was not a fundamental right - not a constitutionally protected right. It is difficult to gauge the import of including "fundamental" in the constitution in reference to education. Fundamental goal and fundamental right do not appear to have the same meaning, and it would depend on the specific case brought before the courts as to what interpretation "fundamental" would be given.

Conclusion

In considering whether to include a statement of the goal of education in the Ohio Constitution, the committee should take into account certain standards that must be applied to a system of education as a result of judicial review. If the state provides an educational system, it must provide equal educational opportunity for all persons attending the system; the educational system may not discriminate on the basis of race, creed, or national origin; no person of compulsory school age may be excluded from the system of public education without due process.

By expanding on the present constitutional language of "a thorough and efficient system of common schools" several new concept could be added. A phrase denoting quality education might be included. Some statement of the importance of education, which may or may not use "fundamental" would offer constitutional

recognition of how vital education is; some educators claim this recognition is lacking in the present language. The constitution could specify who shall be educated by the system, and may state that all persons shall be educated to some degree of proficiency or self-reliance. A statement of the benefits which should be derived from the educational system, although it would be difficult to state, would offer some measuring device - some way of gauging whether people who graduate from the system are entitled to further (free) education. Finally, a statement about equitable funding for education could be included which would leave it up to the legislature to determine how such equality should be brought about.

FOOTNOTES

1. John Kaplan,"Plessy and Its Progeny", reprinted in Challenges to Education, Emanuel Hurwitz, Jr., and Charles A. Tesconi, Jr. Dodd, Mead & Company, Inc., 1972. (p. 94).

2. McLaurin v. Oklahoma State Regents, 70 S. Ct. 851 (1950). Reprinted in "Plessy and Its Progeny"(p. 95).

3. Op. cit., (p. 95).

4. Brown vs. Board of Education of Topeka, 347 U.S. 483 (1954)

5. Stephen P. Roach, "The Federal Courts and Racial Imbalance" reprinted in Challenges to Education. (pp. 95-103).

6. R. Stephen Shibla, Dickenson Law Review 77:577-84, September, 1973.

7. Sixth Illinois Constitutional Convention, "Record of Proceedings: Verbatim Transcripts", (p. 798).

8. State of New York, Temporary State Commission on the Constitutional Convention, "Education" Volume No. 6, 1967. (p. 34).

9. Sixth Illinois Constitutional Convention, "Record of Proceedings: Verbatim Transcripts". (p. 794).

APPENDIX "A"

The exclusion of mentally retarded persons of compulsory school age from the public educational system was examined in P.A.R.C. v. Commonwealth of Pennsylvania, 343 F. Supp. 279, in 1971. The Federal District Court held that due process must be observed in removing a mentally retarded persom from the public school system and required each school to grant a hearing before a child is classified as retarded and transferred to a class outside of the normal school program.

The exclusion of certain school age persons from the Ohio public school system is provided for in Sec. 3321.05 of the Ohio Revised Code. The section, set forth below, does not grant a hearing to a child who may be certified out of the public school system by reason of his having been "determined to be incapable of profiting substantially by further instruction" and this practice of exclusion may be unconstitutional under the due process clause of the 14th Amendment to the U.S. Constitution.

Sec. 3321.05 R.C. "A child of compulsory school age may be determined to be incapable of profiting substantially by further instruction.

The state board of education may prescribe standards and examinations or tests by which such capacity may be determined, and prescribe and approve the agencies or individuals by which they shall be applied or conducted; but the capacity of a child to benefit substantially by further instruction shall be determined with reference to that available to the particular child in the public schools of the district in which he resides, and no child shall be determined to be incapable of profiting substantially by further instruction if the superintendent of public instruction, pursuant to board standards, finds that it is feasible to provide for him in such district, or elsewhere in the public school system, special classes or schools, departments of special instruction or individual instruction through or by which he might profit substantially, according to his mental capacity as so determined. In prescribing, formulating, applying, and giving such standards, examinations or tests, the state board of education may call for assistance and advice upon any other department or bureau of the state, or upon any appropriate department of any university supported wholly or partly from state appropriations.

The result of each examination or tests made with the recommendation of the agency or individual conducting the same, shall be reported to the superintendent of public instruction, who, subject to board standards, may make the determination authorized in this section. If a child is determined to be incapable of profiting substantially by further instruction, such determination shall be certified by the superintendent of public instruction to the superintendent of schools of the district in which he resides, who shall place such child under the supervision of a visiting teacher or of an attendance officer, to be exercised as long as such child is of compulsory school age. The superintendent of public instruction shall keep a record of the names of all children so determined to be incapable of profiting substantially by further instruction and a like record of all such children residing in any school district shall be kept by the superintendent of schools of such district. Upon request of the parents, guardians, or persons having the care of such child whose residence has been changed to another school district the superintendent of schools shall forward a card showing the status of such child as so determined to the superintendent of schools of the district to which the child has been moved.

Any determination made under this section may be revoked by the state board of education for good cause shown.

A child determined to be incapable of profiting substantially by further instruction shall not hereafter be admitted to the public schools of the state while such determination remains in force."

A PROPOSED GOAL STATEMENT

ON EDUCATION

FOR THE OHIO CONSTITUTION

"The goal of the public education system shall be to provide for all persons in Ohio, regardless of wealth or place of residence within the state, equal opportunities for educational programs which will prepare them to the extent of their individual talents and abilities to live as self-reliant adults and to exercise the social, economic, and political rights and responsibilities of independent citizens in a democratic society."

William A. Harrison Jr.
Staff Director
Education Review Committee
Ohio General Assembly

September 25, 1974

Ohio Constitutional Revision Commission
Education and Bill of Rights Committee
October 1, 1975

EDUCATION

The Education and Bill of Rights Committee recommends the following action on Article VI of the Ohio Constitution:

Article VI

Section	Subject	Recommendation
Section 1	Funds for education and religious purposes	No change
Section 2	Common school fund to be raised; how controlled	No change
Section 3	Public school system	No change
Section 4	State board of education; superintendent of public instruction	No change
Section 5	Loans for higher education	No change

In the process of studying these constitutional provisions, the committee considered staff research memos and heard testimony on current education topics with constitutional relevance: ~~goals of education;~~ educational governance; aid to nonpublic schools; financing elementary and secondary education; and higher education. These will be discussed in the report, individually.

THE EDUCATION ARTICLE
Article VI

Section 1. The principal of all funds, arising from the sale, or other disposition of lands, or other property, granted or entrusted to this State for educational and religious purposes, shall be used or disposed of in such manner as the General Assembly shall prescribe by law.

Section 2. The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State; but, no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this State.

Section 3. Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds: provided, that each school district embraced wholly or in part within any city shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education, and provision shall be made by law for the exercise of this power by such school districts.

Section 4. There shall be a state board of education which shall be selected in such manner and for such terms as shall be provided by law. There shall be a superintendent of public instruction, who shall be appointed by the state board of education. The respective powers and duties of the board and of the superintendent shall be prescribed by law.

Section 5. To increase opportunities to the residents of this state for higher education, it is hereby determined to be in the public interest and a proper public purpose for the state to guarantee the repayment of loans made to residents of this state to assist them in meeting the expenses of attending an institution of higher education. Laws may be passed to carry into effect such purpose including the payment, when required, of any such guarantee from moneys available for such payment after first providing the moneys necessary to meet the requirements of any bonds or other obligations heretofore or hereafter authorized by any section of the Constitution. Such laws and guarantees shall not be subject to the limitations or requirements of Article VIII or of Section 11 of Article XII of the Constitution. Amended Substitute House Bill 618 enacted by the General Assembly on July 11, 1961, and Amended Senate Bill No. 284 enacted by the General Assembly on May 23, 1963, and all appropriations of moneys made for the purpose of such enactments, are hereby validated, ratified, confirmed, and approved in all respects, and they shall be in full force and effect from and after the effective date of this section, as laws of this state until amended or repealed by law.

Introduction: History of Education in Ohio

The state's responsibility to provide for an educational system is derived in part from Amendment X to the Federal Constitution, reserving certain powers to the states and to the people. The Federal Constitution does not place responsibility for education in the federal government. The Ordinance of 1785 emphasized the idea that education is a state function by reserving section 16 in each township "for the maintenance of public schools within said township." The virtues of "religion, morality and knowledge" were extolled by the Northwest Ordinance of 1787, which stated that "schools and the means of education shall forever be encouraged". Ohio was the first state to be admitted to the Union from the Northwest Territory, and was the first state to receive a grant of section 16 for school purposes according to the 1785 ordinance. In early land purchases from Congress sections were reserved for religious purposes and for the foundation of a university, now Ohio University in Athens, Ohio.

The 1802 Constitution contained two provisions related to education:

Article VIII, Section 3. "...But religion, morality and knowledge, being essentially necessary to good government and the happiness of mankind, schools and the means of instruction shall forever be encouraged by legislative provision, not inconsistent with the rights of conscience."

Article VIII, Section 25. "That no law shall be passed to prevent the poor in the several counties and townships within this state from an equal participation in the schools, academies, colleges and universities within this state, which are endowed, in whole or in part, from the revenue arising from donations made by the United States, for the support of schools and colleges; and the doors of the said schools, academies and universities, shall be open for the reception of scholars, students and teachers, of every grade, without any distinction or preference whatever, contrary to the intent for which said donations were made.

Early legislation concerning schools and school lands indicated a fragmented approach on the part of the legislature in carrying out its constitutional mandate, as

described in the following quote:

> "The encouragement of public education by legislative provision as specified in the constitution was interpreted by the Legislature to mean the passing of a large number of acts to meet the special needs or desires of particular districts, or, even in the case of school lands, the desires of certain individuals. The general laws passed at that time may be said to have pointed out methods of organization and control instead of devising any efficient system of supervision or of inflicting any penalties in order to bring about specific educational results. They were largely permissive in nature, often leaving the initiative to the discretion of the local communities..." (1)

Legislation concerning leasing of lands for support of schools was passed in 1803, and in 1806 provision was made for the division of townships into divisions for the purpose of establishing schools, by elected trustees. The first general school act was not passed until 1821. The act authorized the trustees of any civil township to submit to a vote of the townspeople the question of organizing school districts. The legislation did not prove very effective, because of its permissive nature, and the act failed to provide a system of taxation. Subsequently, the studies of a legislatively appointed commission resulted in the Governor's appointment of a seven-man commission to "devise a system of law for the support and regulation of common schools." (2)

The administration of the school system prior to the 1851 Constitutional Convention went through several phases. Control of schools was local and fragmented until 1838, when the office of State Superintendent of Common Schools was created. Samuel Lewis, elected by joint resolution of both houses and commissioned by the Governor, was the first to hold the office. His duties were mostly clerical and subordinated to the Secretary of State. In 1840, the office of Superintendent was abolished because of "opposition". An accomplishment of Mr. Lewis' administration was the Law of 1838, which gave a degree of organization and leadership to the school system with the creation of township and county superintendents and sub-districts. In 1840, the superintendents' positions were abolished. An unworkable situation arose from the creation of sub-districts at the discretion of district directors and the appointment of directors by township trustees. This split in authority resulted in schools being under dual control of parties not necessarily having the same interests.

From 1840-1854, the duties of school administration were given to the Secretary of State, ex officio. One milestone occurring during these years, but not a result of efforts by the Secretary of State, was the Akron Law, passed in 1847, establishing the first free graded schools in Ohio and providing for the election of 6 directors of common schools. In 1849, the provisions of this act were extended to all municipalities having at least 200 inhabitants.

Since most general legislation enacted prior to the 1850-1851 Constitutional Convention was concerned with the local school districts, convention delegates spoke in favor of devising a statewide system of education. Several items considered by the Standing Committee on Education appear to be more legislative than constitutional matters. The failure of the legislature to take the leadership may have prompted the convention to consider including some of these items in the fundamental law. One proposal would have recalled money from the Surplus Revenue Fund for educational finance. Other proposals included provisions making it a constitutional duty of the Legislature to provide for the election of a Superintendent of Common Schools; securing common schools from control by religious groups; authorizing the election or appointment of assistant superintendents to effect a uniform system of common schools; making 6 months the minimum legal school year; providing for segregated schools, unless popular vote chose otherwise; and creating a state school fund to provide revenue of $1,000,000. The Committee finally agreed to the following as the Education Article (Article VI) of the Ohio Constitution, and it was ratified by the electorate in 1851:

> Section 1. The principal of all funds arising from the sale, or other disposition of lands or other property, granted or entrusted to this state for educational and religious purposes, shall forever be preserved inviolate, and undiminished; and, the income arising therefrom, shall be faithfully applied to the specific objects of the original grants, or appropriations.
>
> Section 2. The general assembly shall make such provisions, by taxation or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the schools funds of the state.

At the time the Constitutional Convention was considering the education article,

the General Assembly passed an act recreating the office of state superintendent and creating a State Board of Public Instruction of 5 members to be appointed by the General Assembly. The duties were limited primarily to collection of statistics and preparation of reports, and to divide the state into 4 districts. The act was inoperative due to failure of the General Assembly to appoint the original five-man board. As a result, the Law of 1853 was passed providing for the "reorganization, supervision, and maintenance of common schools". The act re-established the office of state superintendent under the title State Commissioner of Common Schools, and the office-holder was elected for a term of three years. The provisions of this act remained in effect until 1912, when, by constitutional amendment, the legislature was mandated to provide for the organization of public schools, and to provide city school districts with the power to determine the number of members and organization of district school boards.

Between 1853 and 1912, there was a reorganization of school district leadership through several legislative enactments, and the administrative power of the state commissioner began to increase. An 1873 law required the codification of school laws relating to the commissioner of common schools. Local boards of education were required to report annually to the state commissioner on demand. The commissioner was required to report annually to the Governor and to the General Assembly. An 1893 law gave the commissioner the duty to require the attendance of all children between eight and sixteen in the schools. Another factor which indirectly augmented the power of the state commissioner was the rising interest in school consolidation which was first attempted in the Kingshill township board of education in 1892, where children were transported to a village school. The favorable results perhaps influenced the General Assembly to provide for its expanded use by acts which legalized payments for transportation from the school district fund in 1892 and 1900, and an 1898 act providing that the schools of any rural district of the state might be centralized by a vote of the people and transportation provided.

Several other developments in education which were made prior to the 1912 Con-

stitutional Convention include teacher certification and instruction of teachers. The first attempt to pass legislation whereby the state would assume responsibility for the training of teachers by setting up and controlling normal schools occurred in 1900 and was defeated in that year, leaving training and certification to local discretion. Another area of development was the introduction of the high school, made possible, in principle, by the Akron Law of 1847 which established the graded school system. Prior to that, all schools were elementary and were organized in accordance with local interests. In 1853, a law was passed granting authority to boards of education in cities, townships, villages and special school districts to establish and maintain high schools. Before that year, opportunities in higher education were provided by academies, of which there were 501 second level academies, and 126 institutions of higher education. The course of study in high schools was directed, to a large extent, by college entrance requirements, prior to 1902, and the course of study was not uniform. One author notes:

> "One of the important agencies for establishment of standards for the program of studies has been the colleges through their entrance requirements. They were especially important previous to 1902 in the absence of any accrediting agencies for high schools...The program of high school inspection by the Ohio State University was more **extensive** than any other higher institution in the state. It inspected schools by personal inspection in 1888." (3)

The Brumbaugh Law of 1902 defined what a high school was, and offered definitions for elementary schools and colleges. High schools were divided into three grades: 4 year; 3 year; and 2 year. The Commissioner of Common Schools was required to determine the grade of each high school and issue a certificate to the board of education. Certification of schools was taken advantage of prior to 1914 primarily by smaller school districts, which felt that it gave them some authority to have such a certificate on their school walls. The city districts refrained from getting certified and remained apart from the state system of education in this regard until after 1914. Another important development in the early 1900's was the adoption of the School Code of 1904, enacted "to provide for the organization of common schools of the state of Ohio." The Code provided for four classes of school districts: (1) city school dis-

tricts with a population of over 5000; (2) village school districts; (3) township school districts - civil townships independent of cities or villages; (4) special school districts - school districts not included in the other classification with a total valuation of not less than $100,000. The Code provided for boards of education for the districts and for governance of districts solely by the respective boards. The law required boards to fix rates of taxation necessary for school levy, to present bond issues to the electors, issue bonds, administer property, etc. The passage of this law in 1904 put the emphasis on centralization and consolidation rather than on township control. The state furthered its control by passage of a law in 1906 known as the State Aid System for Weak School Districts. Under its provisions, the state commissioner of common schools was responsible for administering the fund according to law and with the approval of the State Auditor. The state also set standards which had to be met before schools could receive any financial aid. The state maintained as part of its condition for granting funds, that salaries had to be at a certain level. It is not surprising that political pressure was brought to bear on the state commissioner, who was an elected official, by some legislators who sought aid for their districts. Perhaps this political pressure influenced delegates to the 1912 Constitutional Convention in their decision to make the commissioner appointed by the governor, rather than elected.

The importance of state control of education was the subject of debate in the 1912 Constitutional Convention. Persons representing local districts and sub-districts fought for retention of power by those units. Others thought that the department of education was second in importance only to the Governor's office, and spoke in favor of state control, promoting the idea that the head of such a vital department must be provided for in the Constitution. Although the delegates generally agreed that an appointed head would be less of a political being than an elected person, there was some indecision as to whether or not the term of office of superintendent should expire at the same time as the term of the governor who appointed him. The representatives of

local boards of education demanded that members of those boards be elected by persons from the district to be governed. The referendum vote provided by Section 3 was originally proposed by the committee studying home rule for municipalities; however, the proposal was referred to the education committee since some school districts embraced areas larger than municipal corporations. The convention adopted two amendments to Article VI:

> Section 3. Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds; provided that each school district embraced wholly or in part within any city shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education, and provision shall be made by law for the exercise of this power by such school districts.
>
> Section 4. A superintendent of public instruction to replace the state commissioner of common schools, shall be included as one of the officers of the executive department to be appointed by the governor, for the term of four years, with the powers and duties now exercised by the state commissioner of common schools until otherwise provided by law, and with such other powers as may be provided by law.

The adoption of the two constitutional amendments in 1912 opened the door for state control and consolidation. One movement which gained momentum at that time was the need for more attention to the rural school system. The type of instruction offered at rural schools was not conducive to education on rural matters and failed to educate the students on the opportunities in rural life. In 1913, the State School Survey Commission was formed at the Governor's request to study the schools in the state. The survey resulted in the passage of the New Rural School Code in 1914, which created a county school district, county boards of education, a county superintendent with proper educational qualifications and stricter certification requirements. The code resulted in a system of 88 county superintendents, elected by the county board of education, with powers and duties provided by law, and effected a clearer network of responsibility and feedback for the Superintendent of Public Instruction than did the previously existing maze of locally controlled units. The introduction of the county system made possible the handling of local concerns by the county in the interest of efficiency, but the administration and running of the schools on a state-wide basis remained the province of the Superintendent of Public Instruction.

In 1917, the State Board of Education was created by Senate Bill No. 139, in accordance with an act of Congress providing for national aid for vocational education. The board consisted of the superintendent of public instruction and six appointed members, not more than three from the same political party. Two had two-year terms, two had terms of four years and two had terms of six years. The board had full power to formulate plans for the promotion of education in agriculture, commercial, industrial, trade, and home economic subjects. The superintendent of public instruction was vested with power to administer the fund.

Two factors of major importance in the development of the State Department of Education were the Reorganization Bill of 1921 and the depression. The 1921 bill named the head of the Department of Education "State Superintendent of Public Instruction and Director of Education", and he was assigned the duties previously delegated to the superintendent of public instruction, as well as made executive officer and chairman of the state board of vocational education and chairman of the state library board. The Director was empowered to regulate the government of his department, in ways not inconsistent with the law. Under the 1921 legislation, the Department of Education specifically received the power to recommend standards for primary and secondary education, as well as standards for professional schools and colleges and examinations. The State Department of Education was made the administering agency of state aid with great discretionary authority. This power was of vital importance during the depression, because most school districts couldn't afford to keep their schools open unless they received additional funding. The 1920's were marked by increased legislation to provide money to keep schools going. In 1921, the legislature provided for an educational equalization fund to become operative in 1925, but the sources of revenue proved inadequate and many schools were incurring large debts. The director of education was directed, in 1923, to fix a tentative salary schedule, expense schedule and transportation schedule for participants in the state's educational equalization fund. The deficit for school districts increased throughout the early 1930's and in 1933 it was about 22.5 million dollars. In recogni-

nition of the mounting problems in school finance, the Ohio Educational Association, in 1931, adopted a resolution to fund a survey of the schools in order to better understand the problems of financing public education. In 1932, the Governor requested B.O. Skinner, then Director of Education, to appoint a commission to study the financial problems of state schools. The commission's report said that "in its program for public education, Ohio had placed responsibility on the local districts and forced the property tax to bear nearly all the tax burden, which amounted to 97 per cent of the cost of education. Only about 4 per cent was paid from the state treasury." (4) The commission recommended the Mort Plan, which was rejected. Basically, the plan provided for the state to guarantee each school a foundation up to a certain level for each pupil and then the local district could use its own discretion as to how much it wanted to tax itself to augment the subsidy. In 1935, the School Foundation Program Law was adopted, which was basically the same as the defeated Mort Plan. The major difference was that the county board was required to file a plan for reorganization with the Superintendent of Public Instruction by a certain date, and the Superintendent was empowered to act if the county board failed to act or members failed to agree on the plan.

Also in 1935, the examination and certification of teachers was removed from local examining boards and placed in the Department of Education, by legislation abolishing local boards of examiners.

No major changes in department structure or powers occurred during the following two decades. The continued financing of education by the Foundation Act gradually appeared to be inadequate, and the number of school aged children increased at a rapid rate. These conditions led the legislature, in 1953, to provide for a School Survey Committee to make a comprehensive study of the state's school system. In its report the committee recommended a complete overhaul and proposed a foundation program which would provide a competent teacher for every 30 pupils. The committee recommended that there be an elected State Board of Education composed of citizens having staggered terms of six years. The creation of a constitutionally authorized State Board of Education had

had been proposed unsuccessfully, periodically between 1850 and 1939. In 1939, upon recommendation of the Governor, the legislature proposed an amendment to the Constitution which read: "There shall be a state board of education to be constituted by law, whose members shall serve without compensation. There shall be a director of education, who shall be appointed by the state board of education. The respective powers and duties of the board and of the director shall be prescribed by law." The amendment was defeated in the 1939 election. In 1953 the legislature proposed an amendment to Section 4 of Article VI which was adopted in that year.

> Article VI, Section 4. There shall be a state board of education which shall be selected in such manner and for such terms as shall be provided by law. There shall be a superintendent of public instruction who shall be appointed by the state board of education. The respective powers and duties of the board and of the superintendent shall be prescribed by law.

Legislation regarding the board of education and the superintendent of public instruction was enacted by the legislature in 1955, recommending a board with one member from each congressional district. The terms of office were to be determined by lot at the initial organizational meeting of the board and ranged from two to six years in duration. Sections 3301.01 to 3301.07, inclusive, of the Ohio Revised Code deal with the State Board of Education. A major power of the board is the appointment of the superintendent of public instruction. Some of the other powers, as described by Section 3301.07, include supervision of the system of education, formulation of policy and evaluation of plans pertaining to public school and adult education, administration and supervision of distribution of all state and federal funds for education, preparation of minimum standards for all elementary and high schools, provision of advisory services to school districts and to report and recommend annually to the Governor and the legislature on the status and needs of Ohio schools.

The statutes which provide for the powers and duties of the Superintendent of Public Instruction appear in Sections 3301.08 to 3301.13, inclusive, of the Ohio Revised Code, and include serving as the executive and administrative head of the board of education, executing educational policies and directives of the Board, providing technical and professional assistance to school districts regarding all aspects of education,

prescribing forms for financial and other reports from school districts, officers and employees as necessary, conducting studies and research projects for the improvement of public schools, reporting annually to the Board on the activities of the department and needs and problems of public education. The Superintendent is also charged with supervising all agencies over which the Board has administrative control, including schools for the education of handicapped children.

School and Ministerial Lands

School and ministerial lands (lands for religious purposes) were held by the state in trust in accordance with land grants made by Congress in the 18th century. From the sale of school lands, which began in 1827, a fund for the support of common schools was established, consisting of money paid into the treasury from the sale of land for the support of schools donated by Congress and donations and legacies to the fund. The auditor of state was superintendent of the fund which was pledged for payment at 6% interest and known as the "irreducible debt". In 1917, the auditor became administrator of the school and ministerial funds, and he invested the money from the lands, and paid out interest, all at state expense. Revenue derived from the use of ministerial lands was divided among the religious denominations based on number of members living in the townships.

In 1968, the Supreme Court of the United States handed down several decisions throwing doubt on the constitutionality of such church-state relationships, and the Auditor of State ceased making annual payments to religious societies. That year, the Auditor requested Congress to allow the state to dispose of school and ministerial lands and to pay the proceeds entirely to school districts, thereby eliminating the ministerial and school land programs. The Ohio Constitution was amended in 1968 to read:

> Article VI, Section 1. The principal of all funds, arising from the sale, or other disposition of lands, or other property, granted or entrusted to the State for educational and religious purposes shall be used or disposed of in such manner as the General Assembly shall prescribe by law.

Essentially, the 1968 amendment and subsequent legislation enabled the General Assembly to distribute the principal as well as the interest of the funds to the schools. The

ministerial fund was transferred to the school fund, and the irreducible debt was abolished. Section 501.05 of the Revised Code enabling the auditor to sell or dispose of school and ministerial lands, was amended in 1973 by Am. Sub. H.B. 11 to specify that the school boards must request the sale of land and to give the auditor veto power over the school board's request. The veto guards against the sale of school lands, when such sale is in the interest of private persons but not in the interest of the inhabitants of the school districts. Sub. H.B. 11 also revised Section 501.09 of the Revised Code providing for the sale of ministerial lands and providing "the appraisal of the property shall not take into consideration the value added to the property by other improvements in this area". This law was observed as inadequate by the Auditor's office, in that it cost the state more money to survey the land than it could get from the sale, as the land had to be sold according to its 18th century value. The amendment to Section 501.09 practically assures the state that it will rid itself of ministerial lands, without going to the expense of appraising it, stipulating "The receipt of all rents due and an amount equal to the rent for one year from a lessee is deemed an offer to purchase the land, which offer the auditor shall accept." Although by provisions of Section 501.09, the state is soon to be rid of all its ministerial lands, a large amount of school land is still held by the state.(5)

I. Goals of Education

Ohio's Constitution contains two provisions relating to the goals of education. Article I, Section 7 states that "Religion, morality and knowledge...being essential to good government, it shall be the duty of the General Assembly...to encourage schools and the means of instruction." In Article VI, Section 2, the General Assembly is directed to "make such provisions, by taxation, or otherwise, as with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State;..." The issue which is being dealt with in several of the newer state constitutions is whether the state should be mandated by the state constitution to provide for an education system with certain mandated objectives. Several constitutions that have been recently revised use language somewhat broader and more descriptive than Ohio's "thorough and efficient" language. The Education and Bill of Rights Committee considered a memorandum which examined this constitutional language, including a comparison, contrast, and analysis of each example.

As noted earlier, the Federal Constitution is silent on education and the power to provide a system of public education is reserved to the states. In spite of the states' authority to provide a system of education, the Federal Constitution, by Court interpretation, is being read today to require non-discriminatory application of educational systems. As a result, some "goals" of an educational system, while not stated as such in constitutional or statutory law, must be assumed by the states as a result of the equal protection and due process guarantees of the Fourteenth Amendment to the U.S. Constitution, evolving from Supreme Court decisions. The first such decision was in Plessy v. Ferguson, 163 U.S. 537, (1896) which affirmed the "separate but equal" doctrine. Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) rejected that doctrine, and the Supreme Court held that where the state has undertaken to provide educational opportunity, it must be made available to all on equal terms. In the interim, and since the Brown decision, courts have focused on many areas of the educational process, not just the physical facilities. For example, in Sweatt v. Painter, 339 U.S. 629, 70 S. Ct. 848 (1950), the Court's examination went beyond the actual facilities of a

Texas Negro law school to find the school inferior to Texas Law School in "those qualities which are incapable of objective measurement", including such matters as alumni, prestige, and standing in the community. The court recognized that the two races were on unequal footing since segregation in education denied to Negroes access to the dominant racial groups which included most of the lawyers, judges, and jurors with whom a lawyer invariably deals.

Most of the earlier education cases centered around discrimination against Negroes. There have recently been several cases concerning other groups claiming that they are being deprived of an equal education by state law. One group traditionally excluded from the regular public school system consists of persons with handicaps. Two court decisions in this decade have affirmed the rights of these persons to an education equal to that of "normal" studients in the state. In P.A.R.C. v. Commonwealth of Pennsylvania, 343 F. Supp. 279 (1971), the court required free public education suited to their needs for all retarded children on the basis of the 14th Amendment Equal Protection Clause requiring equal educational opportunity for all children. The principle established in P.A.R.C. was extended to all children labelled mentally retarded, emotionally disturbed, behavioral problems or hyperactive in Mills v. D.C. Board of Education, 348 F. Supp. 866 (1972).

Other minority groups have been heard by the judicial system on claims that because of various cultural handicaps or characteristics, the school system was denying them equal educational opportunity. In Serna v. Portales Municipal Schools, U.S. District Court, N.M. 41 U.S.L.W. 2304 (Nov. 11, 1972), the court found that the schools ignored the needs of Spanish-speaking students, and that even though the concentration of Spanish-speaking students resulted from de facto segregation, the education being offered the Spanish in the "equal" facilities was a denial of the equal protection clause of the 14th Amendment. In direct contrast to the Serna v. Portales decision stands Lau v. Nichols, Court of Appeals, 9th Circuit, 41 U.S.L.W. 2389 (Jan. 5, 1973) which held that San Francisco School Districts' failure to provide all non-English speaking Chinese students with special compensatory instruction in the English language did not

violate the 14th Amendment.

A recent article in the Dickinson Law Review summarizes the present law as follows:

> "The Supreme Court of the United States has recognized that "education is perhaps the most important function of state and local governments...and (i)t is doubtful that any child may be reasonably expected to succeed in life if he is denied the opportunity of an education". (Brown v. Board of Education 347 U.S. 483 (1954)) However, since the right to a public education is not secured by the Constitution (Flemming v. Adams, 377 F. 2d 975 (10th Cir. 1967) cert. denied 389 U.S. 898 (1967))and remains unrecognized as a fundamental interest, (San Antonio Independent School District v. Rodriguez, 93 S. Ct. 1278 (1973)) it exists only insofar as it is granted by state legislatures. Yet once a state undertakes to provide public education, it must be equally available to all citizens since the right becomes subject to both the equal protection and due process guarantees of the 14th Amendment. (Brown v. Board of Education, 347 U.S. 483 (1954).)" (6)

Comment

In some of the recently-revised state constitutions, the goals of education are set forth more explicitly than in the Ohio Constitution with respect to educational development to "full potential" or to capacity, and with respect to equal opportunity. For example, the Illinois Constitution contains the following goals statement:

> Article X; Section 1. GOALS - FREE SCHOOLS
>
> A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities.
>
> The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law.
>
> The State has the primary responsibility for financing the system of public education.

In public hearings before the Education and Bill of Rights Committee, several proposals were presented to amend the Education Article of the Ohio Constitution to make the State responsible for the education of children or of all persons to the limits of their capacities through a system of equal educational opportunity. The people who testified represented groups interested primarily in particular kinds of persons; for example, children with learning disabilities and handicaps. The Education Review Committee, charged by the General Assembly to study school finance, the administration of elementary and secondary education, and the policies and practices of school districts, comments on the goals and objectives of education in Ohio, in its final report,

as follows:

> "Equality of educational opportunity is not presently possible in Ohio, however, because of unequal distribution of resources for public schools...A first goal of Ohio educational policy must be to correct this situation... Students come to school with different capabilities and from different cultural, economic and geographic backgrounds. They need different types of instruction. When the resources of schools are so limited and the instructional programs so uniform that they treat all children alike, education of high quality is not possible. A second goal of Ohio educational policy, therefore, must be to ensure instruction of high quality by making available the resources and the alternative instructional programs which will meet the individual needs of all Ohio students." (7)

The Education Review Committee did not propose a constitutional amendment concerning goals, although a proposal was made by its staff director.

The committee reviewed the specific proposals made by persons during public testimony as well as language prepared by the staff to incorporate the purposes expressed by those who testified and did not prepare amending language. The consensus of the committee was that the changes proposed were particular and detailed in nature, with limited application; therefore, inconsistent with the philosophy of the committee of keeping constitutional language as general as possible. The committee concurred in the sentiment that the present goals statement contained in Article VI is adequate, and that the Ohio Constitution does not stand in the way of the legislature in providing the broadest possible educational system. In some of the language that had been proposed for a goals statement, there were problems of ambiguity and possible too-broad interpretations. For example, some constitutions mandate the state to education "to the limits of one's capabilities". This standard may be nearly impossible to measure. In the case of a person with limited capabilities, it might be possible to judge when the limit had been reached, but for an average or gifted person, it would be unlikely to say with any degree of certainty that he had reached his limit and could not benefit from any further education. The committee believes that the legislature is the proper forum for the debates among various groups attempting to have the system extended.

II. Educational Governance
Elementary and Secondary Education

The ability of the state to meet the educational needs of the citizens and to comply with the constitutional mandate to "secure a thorough and efficient system of common schools throughout the State" may depend, in part, upon the structure created for the governance of education. Educational governance is comprised of a complex network of relationships among various associations, state educational agencies, executive officers, the legislature, and citizen groups. In addition to the formal structure of governance, other factors are significant, including the working relationships among various groups and political situations. Some elements of the education structure are in the Ohio Constitution. Article VI, Section 4 provides for the state board of education to be selected in such manner and for such terms as provided by law. The superintendent of public instruction is to be appointed by the state board of education. The respective powers and duties of the board and of the superintendent shall be prescribed by law. Hence, it was deemed relevant for the Commission to review structural questions in order to determine whether any changes should be made in the constitutional provisions regarding education.

The committee was presented with a survey of characteristics of state boards of education and chief state school officers compiled from State Departments of Education, State Boards of Education, and Chief State School Officers, published by the U.S. Department of Health, Education and Welfare, and containing data current to September, 1972. The staff memorandum used this survey and other commentary to compare methods of selection of boards, departments, and of the chief state school officer, and reported the opinions on the advantages and disadvantages of the various processes, which include: election by popular vote, election by representatives of the people, appointment by the governor - in some cases with confirmation by another body, and ex-officio membership.

The constitutional mandate to the legislature to draft laws specifying the powers and duties of the state board of education and superintendent of public instruction are

found in Title 33 of the Ohio Revised Code. The state board of education is created to be comprised of one member elected from each congressional district. At present there are 23 congressional districts and 23 board members. The terms of office are six years, with approximately one third of the members elected every two years. Each member of the state board of education is to be a qualified elector residing in the territory composing the district from which he is elected. Members are prohibited from holding any other public position of trust or profit or being employed by any institution of education. The procedures for organizational and regular meetings, held every three months, are set forth in the chapter, as well as the procedures for public meetings, record keeping, filling of vacancies and quorums. The Governor is empowered to fill a vacancy until the next general election at which members to the state board of education are regularly elected.

The board is empowered to exercise under the acts of the legislature general supervision of the system of public education in Ohio. It is granted broad and comprehensive powers to exercise policy formation, planning and evaluative functions for schools and adult education in accordance with law; to administer the educational policies of the state relating to public schools and public school matters. Specific powers are granted to the state board of education to administer and supervise the allocation and distribution of all state and federal funds for public school education; to prescribe minimum standards for elementary and high schools; to require a general education of high quality; to report annually to the Governor and General Assembly; to prepare the budget for the schools, agencies in education and the state board. Other specific powers are granted to coordinate the state system by reporting requirements, classification, standards, courses of study, etc. The state board of education retains discretionary power in several areas, including the formulation for the promotion of vocational education in areas for which funds are provided by the federal government including agriculture, business and home economics. It is empowered to grant certification to teachers and establish and maintain classes for the blind and deaf.

Section 3301.08 states: "The state board of education shall appoint the superin-

tendent of public instruction who shall serve at the pleasure of the board. The board shall fix the compensation for the position of superintendent of public instruction which shall not exceed the compensation fixed for the chancellor of the Ohio board of regents."

The superintendent of public instruction is secretary to the state board of education and a member of the Board of Trustees of the Ohio Archaeological and Historical Society. The superintendent is executive and administrative officer of the state board of education in its administration of all educational matters and functions placed under its control. "He shall execute, under the direction of the state board of education, the educational policies, orders, directives, and administrative functions of the board, and shall direct, under rules and regulations adopted by the board, the work of all persons employed in the state department of education." (R.C. Sec. 3301.11) As secretary. the superintendent has no vote on matters acted upon by the board, but he may be called upon to express opinions and make recommendations to the board.

The department of education consists of the state board of education, the superintendent of public instruction, and a staff of professional, clerical and other employees. The function of the department is to administer and carry out the directives and policies of the state board of education and superintendent of public instruction. The department is organized as provided by law or by order of the state department of education.

Comment

The Educational Governance Project, operating at the Ohio State University, began its work in January, 1972. The project, funded by the U.S. Office of Education, conducted a national inquiry to expand the knowledge of how states determine public school policy, and to develop alternative models for educational governance to be considered by policy makers and other persons. The project was completed in June, 1974. In a publication "Possible Alternative Models for State Governance of Elementary and Secondary Education," seven models were presented, and each model was evaluated with respect to the relationships and influence which resulted from particular kinds of structures,

e.g., elected vs. appointed state board of education. The model points out that when the state board of education is appointed by the governor, the advantages include "1. Articulation with other governmental services; 2. Access to policy-making resources of Governor; 3. Electoral accountability of policy makers; 4. Public discussion of major issues; 5. Representation of a diversity of issues." The model entails weakening the influence of educator organizations, and strengthening the influence of non-educator organizations, the governor's office and the legislature. The advantages of the model in which the state board of education is elected in a non-partisan election and the chief state school officer is appointed by the board (as in Ohio) are: "Insulation from partisan politics; Representation of 'the public', not special interest; Special emphasis on education and assurance of its state-level advocacy; Utilization of professional expertise; Continuity in education policy; Efficiency in decision making." The model is claimed to weaken the influence of the governor, legislature and non-educator organizations, and strengthen the impact of educator organizations. An issue which has been raised concerning the ability of the voters to select "experts" for an office, applies to the selection of the state board of education and chief state school officer. It is claimed that the public does not possess the knowledge to choose the most expert people for the office by the electoral method, and that appointment by the governor or by professionals (either educators or non-educators) should result in the selection of better-qualified people for the job.

In public testimony before the committee, no language was proposed to amend the constitution to provide for alternative methods of selection for the state board of education and superintendent of public instruction. Dr. Martin Essex, the Superintendent of Public Instruction, made several proposals to the committee for change. They were: reorganization and elimination of small, inefficient school districts; permit state taxation of public utility property for statewide distribution of receipts; recodification of school laws periodically (e.g. every 20 years); place technical schools under the supervision of the state board of education; equalize assessments in all counties, with annual adjustments in valuation due to inflation and other factors;

make the tax year compatible with the school year. An amendment was proposed to achieve the last change:

> Article VI, Section 6. The general assembly shall provide for the levy and collection of school district taxes, and the preparation, submission, and execution of school district budgets, for a year beginning July 1 and ending June 30.

The committee voted to recommend no changes in the constitutional provisions regarding governance of elementary and secondary education. It felt that changes that were proposed were legislative in nature, and that there was no constitutional hindrance to the legislature dealing with any of the matters suggested. The committee believes that the testimony provided no indication that constitutional change was required.

III. Educational Governance
Higher Education

In many constitutional conventions over the past two decades, university governance has received much attention. Public colleges and universities have been growing at a rapid rate, and in spite of a recent decline in student enrollment, institutions of higher education have expanded and become more specialized, demanding a sizeable amount of money, land, and other resources. Two basic issues have emerged in the area of governance of higher education: (1) should the system of public higher education be regulated by some statewide agency to insure maximum efficiency of the system as a whole; (2) how can institutional autonomy be preserved so that each institution is free to develop itself, its own goals and purposes?

Governance of higher education evolved in a pattern in Ohio and other states as follows:

> "1. Complete autonomy of institutions lasting from colonial days to the late 19th century;
> 2. Creation of single statewide governing boards beginning in the late 19th century, reaching a peak in the first two decades of this century, and currently undergoing a slight revival;
> 3. Creation of voluntary arrangements gaining impetus in the 1940s and 1950s; and
> 4. Creation of statewide coordinating boards beginning in the 1950s and still continuing." (8)

In Ohio, the first effort at cooperation among existing state universities resulted in the formation of a voluntary cooperative group known as the Inter-University Council, (I.U.C.). This agency was formed in 1939, consisting of 5 state universities. Central State University joined the Council in the year of the college's creation, 1951. For over 20 years, the I.U.C. was the key agency in the unversities' relationship with state government. Prior to the formation of the I.U.C., each school developed, submitted, and lobbied for its own programs and appropriations, with little regard for other institutions. The I.U.C. was able to present a more unified front on behalf of the member institutions as well as to regulate the activities of its membership. The failure of the alliance is attributed to several factors: failure to agree on dividing appropriated money among members of the Council and on the creation of additional institutions, par-

ticularly two-year campuses. Council members who were the presidents of the colleges that formed the I.U.C. continued to act on behalf of their own institutions rather than on behalf of the council, and bargained among themselves as well as with the Governor and Director of Finance. Business managers of the universities played an active part in lobbying for their institutions.

The failure of the I.U.C. to solve the problems plaguing higher education led to the creation of the Board of Regents in 1963. The Board was assigned specific duties and responsibilities by statute, and was required to report to the Governor and the General Assembly. The statutes creating the Board of Regents make a broad attempt to prevent the kind of self-serving actions that characterized the I.U.C. by prohibiting persons holding an interest in an institution of higher education from serving as a member of the board. The board retains many advisory and study powers as well as several crucial policy making powers such as the power to approve or disapprove the establishment of new branches, community colleges and technical institutes, and the power to approve or disapprove new degrees and new degree programs. The budgetary powers of the board are perhaps the most important.

The Board of Regents consists of nine members appointed by the governor with the advice and consent of the senate, and members serve for nine-year terms without compensation. The board is empowered to appoint a chancellor to serve at its pleasure with duties to be prescribed by the board. "The chancellor shall be a person qualified by training and experience to understand the problems and needs of the state in the field of higher education and to devise programs, plans, and methods of solving the problems and meeting the needs." (Sec. 3333.03 R.C.)

Comment

Constitutional status for higher education has received much attention recently. In "Influence of State Constitutional Conventions on the Future of Higher Education", university governance concerns at four constitutional conventions: Hawaii, Maryland, New York, and Michigan, are described. Among the specific questions asked are:

"Should the constitution contain provisions on the method of selecting the governing board? If so, what kind? Should some degree of autonomy be granted to segments of the higher educational system? If so, how much and to what institutions? Should the constitution provide for a statewide coordinating board? If so, how much power should it have?" (9)

The Ohio Constitution contains no provision for a state coordinating or governing board for higher education. In fact, the Constitution is virtually silent on the matter of public higher education. The only references deal with capital improvements programs (Article VIII, Section 2e and others) and guaranteeing loans to residents attending institutions of higher education (Article VI, Section 5).

In public testimony before the Education and Bill of Rights Committee, two points of view were expressed. The Chancellor of the Board of Regents proposed no changes in the Constitution regarding higher education governance, stating his feeling that authority exists under the present language to continue the process of development of higher education by the Board of Regents. A representative of the American Association of University Women proposed adding Section 6 to Article VI, providing for a Board of Regents as provided by law with powers and duties to be provided by law. "To only refer to loans for higher education seems to omit the section providing for this education. The importance of post secondary education in the changing society seems to merit inclusion in the Constitution of Ohio." (10)

It was suggested in committee deliberation on including a provision dealing with higher education that giving the Board of Regents constitutional rather than legal status would have no other result than making it harder to change. The members concurred that under the proposed amendments, whatever problems now exist with the Board of Regents would continue, and decided that the board should not be frozen into the Constitution nor prohibited by it.

The committee specifically studied whether any changes should be made in Section 5 which states, in part, "it is hereby determined to be in the public interest and a proper public purpose for the state to guarantee repayment of loans made to residents of this state to assist them in meeting the expenses of attending an institution of higher edu-

cation." The Student Loan Commission did not make any proposals to amend Section 5 in this respect, and the committee concluded that the program is operating satisfactorily under the present constitutional provision.

Dr. James Norton, Chancellor of the Ohio Board of Regents, and Dr. Rupert, Vice-chancellor for health matters, appeared before the committee to present two specific proposals designed to enhance the state's ability to retain physicians in Ohio. The programs would "forgive" loans to medical students and physicians who remained in Ohio to practice medicine, and in the case of physicians who went into areas of critical health care shortages, greater incentives were provided. The chairman of the committee commented that a "forgiveness" for loans should be available for other skills if it is available for doctors, in his opinion, and asked the staff to draft an amendment which would be of more general coverage. The language submitted was:

> Section 6. To provide greater access to post-secondary education, including graduate and professional education, in order to increase educational opportunities for individuals and to increase the economic, social, and physical health and welfare of the people of the state, it is hereby determined to be in the public interest and a proper public purpose for the state, its agencies and instrumentalities, as provided by law, to lend and related thereto to grant financial assistance to persons, either directly or indirectly, to assist them in meeting the expenses associated with the pursuit of post-secondary education, including graduate and professional education. Laws passed pursuant to this section are not subject to the limitations or restrictions of Section 4 of Article VIII of this constitution nor to any other limitations or restrictions of this constitution which are construed to prohibit or restrict lending or related granting of public funds for such purposes.

The committee rejected the proposed addition to the Constitution regarding loans for several reasons: it believed it was not a proper subject for the constitution; and because of its ad hoc nature that it was open-ended and might contain hidden issues which would produce undesirable results.

IV. State Aid to Nonpublic Schools
The Religious Issue

Several provisions in the state and federal constitutions are concerned with state aid to nonpublic schools. The Ohio constitutional provisions of most immediate concern are Article I, Section 7 which states: "...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;..." Other constitutional provisions dealing more specifically with education state: "...No religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state," (Article VI, Section 2) and "the General Assembly shall prescribe by law" for the use or disposal of funds for educational and religious purposes (Article VI, Section 1). The most common challenge under the state constitution of the General Assembly's schemes for the disposition of funds is that such disposition would place the funds in the exclusive control of some sect.

The First Amendment to the Federal Constitution provides: "Congress shall make no law respecting the establishment of religion..." This clause is referred to as the establishment clause, and has been applied to the states through the Fourteenth Amendment to the Federal Constitution. The federal decisions have evolved a three-prong test as to the validity of a given statute in the light of the First Amendment establishment clause. As stated in Lemon v. Kurtzman, 403 U.S. 602 (1971): (1) it must have a secular legislative purpose (2) its main effect must neither advance nor inhibit religion, citing Board of Education v. Allen, 392 U.S. 236 (1968); and (3) it must not foster an excessive entanglement between government and religion, citing Walz v. Tax Commission, 397 U.S. 664 (1970).

To determine the issue of excessive entanglement between government and religion, the court examines the character and purpose of the institutions benefitted, the nature of the aid provided by the state, and the resulting relationship between the government and religious authority. On this basis, the court in Lemon invalidated Pennsylvania and Rhode Island statutes providing for salary supplements to nonpublic school teachers..

Under an Ohio statute passed in 1967, aid was granted in the form of educational funds from local school districts for "services and materials to pupils attending nonpublic schools within the school districts for guidance, testing and counseling programs...audio visual aids; speech and hearing services; remedial programs, educational television services; programs for the improvement of the educational and cultural status of disadvantaged pupils..." and for programs of nonreligious instruction other than basic classroom instruction, with these services to be provided for nonpublic school pupils on the same basis as they are provided for public school students. The section withstood constitutional challenge in the Ohio Supreme Court under the First Amendment of the United States Constitution and Article VI, Section 2 of the Ohio Constitution in Protestants and Other Americans United for Separation of Church and State v. Essex, 28 Ohio St. 2d 79, 57 Ohio Op. 2d 263, 275 N.E. 2d 603 (1971) but was legislatively repealed in 1971.

In Wolman v. Essex, 342 F. Supp 379 (1972), a federal district court held that that portion of the Ohio Revised Code authorizing grants to reimburse parents for a portion of the tuition paid for a nonpublic school education (Section 3317.062) violates the establishment clause of the First Amendment by failing to provide sufficient mechanisms to insure that these public moneys will not ultimately be used for religious purposes. In Meek v. Pittinger, 43 U.S.L.W., May 19, 1975, the U. S. Supreme Court held, in an appeal of a federal district court decision, that acts providing all children enrolled in nonpublic elementary and secondary schools meeting Pennsylvania's compulsory attendance requirements, auxiliary services (e.g. counseling, speech and hearing therapy, testing, psychological services) and direct loan of instructional material and equipment useful to the education of nonpublic school children (e.g. maps, phonographs, films, projectors, recorders) violate the establishment clause of the First Amendment as made applicable to the states through the Fourteenth Amendment. The court upheld the constitutionality of the textbook loan provision of the act.

State aid to nonpublic educational institutions involves institutions of higher education and elementary and secondary schools, the latter including pupil transportation,

other services and materials, tax exemptions, and driver education programs. All of these types of aid have been tested in the courts and upheld against challenges to their constitutionality.

Comment

Neither advocates nor opponents of state aid to parochial schools presented testimony to the committee. Even if the state constitution's provisions were changed in the direction of removing or liberalizing the prohibition, such amendment would be overshadowed by an attack on a law authorized by such amendment on the grounds of the federal constitution. Any state amendment, if it is to be viable, must also be within the scope of permissible action under the federal constitution, as expounded by federal decisions. If an amendment were made on the federal level vis-a-vis aid to private parochial schools, there would be three options as to the applicability of such amendment to the state, first, the amendment may not apply to the states; secondly, the amendment may specifically apply to the states; and thirdly, even if the amendment on its face does not apply to the states it may be made applicable by the Fourteenth Amendment and a decision of the courts, as is now the situation with the First Amendment.

The committee recommends no change in the present constitutional provisions governing aid to private parochial schools.

V. Financing Elementary and Secondary Education

Article VI, Section 2 of the Ohio Constitution provides: "The General Assembly shall make such provisions, by taxation, or otherwise...as will secure a thorough and efficient system of common schools throughout the State..." Article VI, Section 3 provides, in part: "Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds..."

Most states, including Ohio, finance elementary and secondary education from two sources: local property tax and state funds, generally not derived from a property tax. Funds are channeled through a "foundation" program designed to provide "equalization" by guaranteeing a minimum per pupil expenditure by the school district. The bulk of school finance comes from state and local funds, but federal funds in the form of grants and revenue sharing account for part of the financial resources.

The Supreme Courts of several states, prior to 1973, held that a school financing system which depends for a major part of its funds on local real property tax, may be inherently unequal because of great disparities among school districts in tax burdens or per pupil wealth available for taxation. Courts claimed that such systems violated state and federal constitutional provisions. In some instances, where violation of "equal protection guarantees" in state and federal constitutions were cited, the courts held that education was such a fundamental right that states were obliged, under "equal protection" to offer equal educational opportunity to all. None of the decisions spelled out exactly how the states should achieve this goal.

In 1973, the United States Supreme Court in San Antonio Independent School District v. Rodriguez et al., 93 S. Ct. 1278, ended speculation that the school financing system of Texas, and, by comparison and implication, of many other states as well, would be found in violation of the Equal Protection Clause of the Fourteenth Amendment. The court did not so hold. Prior to Rodriguez, the leading decision was Serrano v. Priest, 5 Cal. 3d 584, 487 P. 2d 1241 (1971) where the California Supreme Court held the state constitutional provision controlling. Article IX, Section 6 of the California Consti-

tution mandates the legislature to authorize the government of each county, and city, to levy real property taxes within the school district at a rate necessary to meet the district's annual education budget. The California Supreme Court rejected the present system of school finance on the grounds that the state constitution required a revision of the distribution and the Fourteenth Amendment equal protection clause did so as well. Serrano led to many states altering provisions for school finance. It should be noted that although Rodriguez has resolved the issue of whether the federal constitution was being violated by the state's method of school finance, at least one other state's court decision was based on provisions almost identical to those of the Ohio Constitution. In Robinson v. Cahill (118 N.J. Super. 223, 287 A. 187, 1972), the Court found the New Jersey school finance system unconstitutional, holding the state's constitutional provisions require "equal protection of the laws" and the legislature is mandated to provide "for the maintenance and support of a thorough and efficient system of free public schools.

Comment

The search for a more equitable system of school finance continues, and citizen groups and legislatures have proposed ways to overcome inequality in school finance. A bill to revise the system for distributing state funds to school districts and resulting from a study by the Education Review Committee has passed this session in the Ohio General Assembly, although parts were vetoed by the Governor. Many alternatives were examined in a memorandum considered by the Education and Bill of Rights Committee, and some were commented on during public testimony before the committee.

Dr. Martin Essex, Superintendent of Public Instruction, in an appearance before the committee, made several proposals for changes in Ohio law relating to the problems of equal educational opportunity. These included: reorganization and elimination of small, inefficient school districts; a proposed amendment to permit state taxation of public utility property for statewide distribution of receipts; proposed amendment to equalize assessments in all counties, with annual adjustments in valuation due to inflation and other factors, rather than after the sexennial time for counties scheduled for reasses-

sment in 1975,1976, and 1977. Governor Gilligan, in addressing another of the Commission's committees on March 29, 1972, mentioned the problems of school finance equalization and proposed including language "which would compel the state to equalize financial resources for the education of each child in the primary and secondary school system..." He recommended no specific language, and indicated that the constitution should contain general language to provide "equal educational opportunity" to all children.

The committee, in considering whether any changes in the constitutional provisions should be made to effect equitable school finance, noted that in public testimony before the committee persons either suggested no change or felt that change should properly be made by the legislature. Dr. Essex prefaced his proposals by saying that his concerns were very likely legislative concerns, and that in the absence of legislative action, constitutional change was another approach. The consensus of the Education and Bill of Rights Committee appeared to be that inclusion of specific language to deal with the problem of school finance would undermine the committee's philosophy of retaining a constitution stating only general principles and guidelines. A system of school finance poses unique problems because so many factors are involved, many of which are legislative, economic and geographic considerations, and being subject to change, are not likely to be more adequately provided for in the constitution than by the language presently contained therein. As noted earlier, the issue of school finance was a prominent issue in the 1975 session of the General Assembly.

FOOTNOTES

1. Pearson, Jim B., and Fuller, Edgar, Editors, Education in the States: Historical Development and Outlook, National Education Association of the United States, Washington, D.C., 1969. (p. 949).

2. Atwater, Caleb, A History of the State of Ohio, Glazen and Shepard, 1838 (p. 254).

3. Goetting, Martin L., "The Development of Standards for Ohio High Schools to 1932". Abstract of Doctors' Dissertations, No. 10, Columbus, Ohio.

4. Op. cit., Pearson and Fuller. (p. 955).

5. "Ohio Land Grants", a publication of the office of the Auditor of the State of Ohio, 1973.

6. R. Stephen Shibla, Dickinson Law Review 77:577-84, September, 1973.

7. Education Review Committee Report (Pursuant to Amended Sub. H.B. 86, 110th G.A. of Ohio), December 15, 1974. (p. 1)

8. Pliner, Emogene, Coordination and Planning (Baton Rouge: Public Affairs Research Council of Louisiana, 1966).

9. Gove, Samuel J. and Welch, Susan, "The Influence of State Constitutional Conventions on the Future of Higher Education," Educational Record 50 (Spring, 1969). (p. 206).

10. Evans, Eileen, President Ohio State Division A.A.U.W. Testimony before the Education and Bill of Rights Committee, September 25, 1974. (p. 2)

Ohio Constitutional Revision Commission
November 25, 1974 Research Study No. 44A
Education and Bill of Rights Committee

The Ohio Bill of Rights
Part 1
Article I, Sections 1, 3, 4, 6, 9, 12, 13

This study, part 1 of the Bill of Rights, covers sections 1, 3, 4, 6, 9, 12 and 13 of Article I of the Ohio Constitution.

For each section, a brief history of the section is given, and then a commentary that includes reference to parallel provisions, if any, if the Federal Constitution. The discussion about the federal provisions includes whether or not the federal provision has been applied to the states through the 14th Amendment and the relevant federal cases interpreting the provision.

Some commentators on state constitutional Bills of Rights have asserted that they are no longer necessary, since many of the basic rights are set forth in the federal constitution and have been applied to the states. Other commentators take the position that the state provisions should be retained and even expanded to include rights not found in the federal constitution.

A final portion of the analysis for each section is a comparison of the Ohio provision with provisions found in the Constitutions of Alaska, Hawaii, Montana and Illinois. These states were chosen because they all have fairly recent new Constitutions.

In the last two sessions of the General Assembly, resolutions have been introduced to add to the Ohio Bill of Rights provisions related to those discussed in this memorandum. In the 110th, H.J.R. No. 44 relating to handguns was introduced, and would have amended section 4 of Article I. In the 109th General Assembly, S.J.R. No. 19 would have added a section 1a following section 1, to provide for environmental protection. S.J.R. No. 8 would have amended section 9 of Article I, relating to the death penalty.

Article I, 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.

History of Section

This section is an original section of the 1851 Constitution, unchanged from the date it was adopted. It is derived from Art. VIII, sec. 1 of the 1802 Constitution and was adopted in 1851 with minor modifications of the language. In both Constitutions, it is the first section; indicating, perhaps, that it is a statement of principle as well as a guarantee of rights. This view is supportable because of the linguistic and philosophical similarities between Art. I, sec. 1, and its predecessor in the 1802 Constitution, and the beginning of the second paragraph of the Declaration of Independence which states,

> . . . 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.

Comment

This section, which has no direct parallels in the United States Constitution, does more than merely provide a litany of general statements of freedom. Along with other sections, it provides for due process in a manner somewhat similar to the 14th Amendment and in this respect does have an indirect parallel with the federal Bill of Rights. To provide the full protection offered by the due process clause of the 14th Amendment it also is necessary to consider sections 16 and 19. The Supreme Court of Ohio has said that the "due course of law" clause of Art. I, sec. 16 of the Ohio Constitution has been considered the equivalent of the due process clause of the 14th Amendment. Similarly, Art. I, sec 1 with its assurance of equality before the law, and Art. I, sec. 19 guaranteeing the individuality of private property, run parallel with the protections of the 14th Amendment (D.P. Supply Co. v. Dayton, 138 O.S. 542, 1941.)

Indeed, when there is a possible violation of one of these sections, their closeness requires that a possible violation of the other sections be considered, and often in Ohio cases several of these sections, as well as the 14th Amendment, are alleged to have been violated by the same act. Each of these sections, though, has some distinct characteristics, so each must be separately considered. The decision in the D.P. Supply Co. case also identifies 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 Art. I, sec. 19.

Article I, sec. 1 guarantees inalienable rights and freedoms whether it be to live as one wishes or to run a business as one desires. These freedoms are absolutely given but they are not absolute in their scope and they are limited in a manner that is in accord with due process. Nevertheless, this section does provide the general grant of freedoms.

Among these freedoms, an individual has the right to treat his health as he deems best; as a parent, he has the right to rear and care for his children; he has the right to be free from medical experimentation on his person, and the right to freedom of religion. In Kraus v. Cleveland, 55 Ohio Op. 6 (Cuyahoga Co. C.P., 1953), dealing with the issue of fluoridation of the city water, the Court held that these freedoms must yield to a public health measure adopted pursuant to an exercise of the police power. The exercise of this power includes everything which is reasonable and necessary to secure health, safety and welfare of the community. When a measure passed to secure one of these objects is reasonable and necessary to secure it, and does not contravene the United States Constitution or the Ohio Constitution or any right granted or protected by either, and is not exercised in an arbitrary or oppressive manner, it is a valid measure limiting an individual's freedoms. The power of governmental bodies to regulate professions or businesses enables them to limit the freedom of individuals to hold certain positions or jobs (Bergman v. Cleveland, 39 Ohio St. 651, 1884). The laws of the State further provide for the curtailment of freedoms in ways other than a punishment for crime. Ohio law (Section 2111.02 of the Revised Code) provides that guardians may be appointed; thus giving, under certain circumstances, exclusive control over an individual's freedom or power to handle his own property to another. Certain freedoms may be voluntarily given up to guardians under specified conditions (In Re Guardianship of H.B. Faulder, 1 Ohio Op. 63, Auglaize Co. C.P., 1934). Thus, although not securing absolute freedom, this part of Art. I, sec. 1 guarantees a freedom subject only to the police power and other constitutional limitations and in so doing gives the Declaration of Independence, at least in part, force of law in Ohio (Fidelity and Casualty Co. v. Union Savings Bank Co., 29 Ohio App. 154, affd. 119 Ohio St. 124, 1928).

The second phase of Art. I, sec. 1 guarantees the right to life. This specific guarantee has never been litigated although it would seem that this right is effectuated indirectly by legislative acts. Chapter 2903 of the Revised Code defines the acts that constitute a deprivation of life in violation of this right and sections 2929.03 and 2929.04 provide the only circumstances under which the State may deprive an individual of this right, in specified types of homicide.

Similarly, the individual has the right to enjoy and defend his liberty. In Palmer v. Tingle, the Court said that liberty as used in Art. I, sec.1 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 (55 Ohio St. 423, 1896). Two years later, the Court again explained this concept of liberty saying that liberty is not license, but liberty regulated by law. The personal liberty of each man is subject to reasonable regulations determined by the legislature to be necessary to promote not only the peace of society, but also its well-being. The legislature, though, possesses the right

to restrain each one in his freedom of conduct only so far as is necessary to protect all others (State v. Powell, 58 Ohio St. 325, 1898). The concept that an individual's freedom to act could be limited even to the extent that the limitation infringed upon other freedoms was seen in Kraus. This is not intended to imply, though, that all liberties can be curtailed by the exercise of the police power. The Supreme Court of Ohio has established guidelines to evaluate the exercise of the police power; in City of Cincinnati v. Cornell 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.
>
> 141 Ohio St. 535 (1943)

If an exercise of the police power fails to meet these requirements in limiting an individual's freedom, the measure is invalid.

The next part of Art. I, sec. 1 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 does not change, thus satisfying the requirements of due process.

In Frecher v. Dayton, the Court found that street vending was a legitimate business and as such the owner had a property right in the business, 88 Ohio App. 52, affd. 153 Ohio St. 14 (1950). Having a property interest in a business afforded the plaintiff the protection of Art. I, sec 1 of the Ohio Constitution, and any attempt to interfere with that property interest had to be supportable on the basis of a reasonable exercise of the police powers. On the evidence given, the courts held that the city had not adequately shown that the plaintiff's ice cream vendors constituted a hazard to the public health, safety or welfare and issued an injunction against the operation of an ordinance that prohibited the sale of ice cream by vendors.

An attempt by the city of Cincinnati to regulate the length of time that a barber shop could remain open was the basis of the controversy in Cornell. The Court, recognizing that the freedom to conduct a business was not an absolute right and that the police power was elastic to meet changing conditions and needs, said that the police power could not be used to limit liberty or property rights contrary to constitutional sanction. The protection of Art. I, sec. 1 required that the limitation in his freedom to conduct business be justified on the basis that it protected the health,

safety or welfare of the public. There was not enough evidence to show that the ordinance was a valid exercise of the police power so the ordinance was found invalid. A set of Columbus ordinances that prohibited the use of pin ball or similar machines, enforced by the threat of a misdemean r penalty and confiscation of the machines, was attacked in Benjamin v. Columbus, 167 Ohio St. 103 (1957). The appellant sought to overturn the statutes arguing that the statutes were arbitrary and unreasonable and that the ordinances 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 Supreme Court, after ruling that Ohio Constitution, Art. XVIII, sec. 3 gave a municipality the right to prohibit as well as regulate, stated 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 Art. I, sec. 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. In Benjamin, the machines were subject to confiscation to help the city stop their use in gambling, a legitimate interest of the city, and the owners would not receive compensation. Due process would only require that a court convict the owner of a violation of the law and the machines would then become instruments of a crime which the state then has a legitimate right to keep, on the same principle that allows the state to seize narcotics or vehicles used to transport them. (For related material see Commentary on Art. I, sec.12.) In other circumstances, the State can seize or destroy with compensation.

The Supreme Court has held that statutes providing drastic measures for the elimination of disease whether in humans, crops, or stock, are in general authorized under the police powers. The preservation of public health is one of the duties evolving upon the state as a sovereignty; therefore, whatever reasonably tends to preserve the public health is within the police power. In Kroplin v. Truax, the appellant, a cattle owner, attacked a provision providing for the inspection of livestock. If found diseased, the cattle could be destroyed and the owner indemnified. Particularly, he attacked the sections that provided that there would be summary destruction upon a positive finding of disease and indemnification upon appraisal but not appraisal by a jury. The appellant contended the chapter violated all three due process clauses of the Ohio Constitution. First he argued that it contravened his right to possess and protect property under Art. I, sec. 1. Secondly, he said that Art. I, sec. 19 required that where private property was taken for a public purpose compensation was to be assessed by a jury.

Finally, he asserted that, since the chapter provided for no appeal or determination by a court and jury of the right to compensation, the law violated his right to due process under Art. I, sec. 16. The Court disagreed, holding that destruction or summary abatement of public nuisances inimical to public health may be ordered in measures providing for the public health. Further, the Court ruled that this destruction was not a taking for public use, but merely the abatement of a public nuisance under the police power of the state. Consequently, there was no violation of Art.I, sections 1 and 19, and since there was no contravention of private property rights, there was no violation of Art. I, sec. 16 of the Bill of Rights of the Ohio Constitution. Citing State, ex rel. Spillman v. Heldt, 115 Neb. 435, 213 N.W.578, on the issue of indemnification, the Supreme Court held that the fact that the legislature provides only partial indemnification for the owner of the destroyed cattle does not render the act unconstitutional either under the 14th Amendment or the State Constitution. The indemnification provided is merely a gratuity and the legislature might have directed the slaughter of the cattle without compensation.

The enjoyment, possession and protection of real property is also subject to regulation. In State, Ex Rel. Jack v. Russell, 162 Ohio St. 281 (1954), the plaintiffs wanted to build a dwelling on his land. The construction violated the local building code and permission was refused. The plaintiffs contended that such refusal denied them the protection and enjoyment of their property guaranteed by Art. I, sections 1, 16, and 19 because they were not allowed to use their land as they wished and because refusal did not allow them to utilize their land as best they might. The Supreme Court held that it was not its duty to pass on the wisdom of zoning ordinances. Further, the Court said that it was well established that zoning ordinances which were not purely fanciful or aesthetic but which were measurable and had a rational relationship to the preservation of the health, safety and welfare of the public did not violate any sections of the Ohio Constitution nor did they violate sec. 1 of the 14th Amendment.

Zoning is not the only regulation of property. Oberlin passed an open housing ordinance that provided for a fine of $100.00 for any discrimination in renting by any owner of five or more units and in any sale. The plaintiff attacked it as interferring with his property rights under Art. I, sections 1 and 19 (Porter v. Oberlin, 1 Ohio St. 2d 143, 1965). The Supreme Court upheld the statute. The Court held that, rather than interferring with the right to sell or rent private property, the ordinance was promoting sales by preventing interference with them on the grounds of race, creed, or color and promoting rentals by prohibiting the establishment of limitations in rentals. Even so, the Court said that the exercise of the police power could interfere with property rights or the right to make contracts if the legislature determined that there is a substantial need to be served, the exercise of the police power bears a substantial relationship to the end sought to be achieved, and if it is not exercised in an unreasonable and arbitrary manner. Finally, the Court held that those who claim that such legislation is unnecessary or unreasonable have to bear the substantial burden of proving that there is no need for it.

The police power can also be used to regulate the use of property in another way, through licensing and the establishment of regulations to regulate licensed businesses. One purpose of this licensing and regulation may be to prevent certain crimes as in Benjamin or as in Grown v. City of Cleveland, where the city required a license and required keeping books to regulate the sale of corn sugar (125 Ohio St. 455, 1932). Passed during prohibition, the statute was designed to enable the police to watch large purchases of the sugar, also called brewer's sugar, used in the production of alcoholic beverages. Laws passed to control illegal activities or possible instruments of illegal activities, as seen in Benjamin, are valid exercises of the police power. The Court held that, although it regulated the conduct of a private businessman, it did not constitute a taking of property without due process in violation of Art. I, sections 1 and 19 or of the 14th Amendment. In Auto Realty Service, Inc. v. Brown, 27 Ohio App. 2d 77 (Franklin County, Ct.A.1971), the license requirement was not to combat illegal activity but to protect the public. 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 Art. I, sec. 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. The State has the authority to enact licensing laws and to provide for regulations that are reasonably necessary for the safety of the public. The enactment of such legislation is within the discretion of the legislative body, unless it is clear that it is unreasonable or arbitrary or that it has no real relationship to the public health, safety, or welfare. The sole restraint is that it must not destroy lawful competition or create trade restraints tending to establish a monopoly.

The final phase of this section is that the individual has the right to seek and obtain happiness and safety. The right to seek and obtain happiness and safety is one of the inalienable rights of mankind, so declared by the Ohio Constitution, and guaranteed by that instrument, Myers v. City of Defiance, 67 Ohio App. 159 (1940). 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 makes this phase of Art. I, sec. 1, in part, the legal equivalent of the equal protection clause of the 14th Amendment. This also serves to reinforce the guarantee of equal protection in Art. I, sec. 2. This provision, though, has been rarely litigated and the full possible ramifications of its guarantee are not known. It is possible that its guarantee could be expanded to include more than the right to seek work of one's choosing. Additionally, while the interpretation seems to forbid action, it could come to establish positive obligations. An analogous situation can be seen in the development of welfare. In the 19th Century, the states had no positive obligation to act for the relief of the poor; it only had the negative obligation not to try to increase their difficulties or to try to force them into that position. Now, the states have certain recognized responsibilities for the poor. Similarly, this phrase could be expanded in the same manner for different purposes.

Finally, "due process" as represented in Art. I, sections 1, 16, and 19 of the Ohio Constitution and the 14th Amendment is a limitation upon the state's right to tax, Provident Savings Bank and Trust Co. v. Tax Commission, 10 Ohio Op. 469 (Hamilton Co., C.P. 1931). Due process requires that when property has been revalued the people have a right to appeal and that the people have a right to a hearing in this and certain other circumstances. Due process also requires that statutes regulating revaluation and other tax matters be followed.

Comparison with Other States

Section 1 is a statement of general principles and is parallel to sections in other state constitutions, similarly headed: "Inherent Rights," "Rights of Man," "Inherent and Inalienable Rights," and "Inalienable Rights." The near identity of language and title in all of these sections perhaps reflects their probable common ancestor, the Declaration of Independence, but there are differences. The most noticeable difference is that Alaska (Art. I, sec.1), Hawaii (Art. I, sec. 2), and Montana (Art II, sec. 3) have clauses, and Illinois (Art.I, sec. 23) has a section, all stating that people have or must recognize obligations to other people and to the State that correspond with those inalienable rights guaranteed to themselves, while Ohio's Art. I, sec. 1 places no such explicit obligation on its citizens. In addition, there are other differences, although for the most part, they are not substantive. Alaska's section (Art.I, sec.1), as does Hawaii's (Art.I, sec.2), includes a statement of equality. Illinois' Art.I, sec.1, which is almost a verbatim statement of the fundamental principles contained in the second paragraph of the Declaration of Independence, in the second sentence, reflects principles stated in Art.I, sec.2 of the Ohio Constitution. Finally, Montana has a right guaranteed in its "Inalienable Rights" section that is contained in no other constitution reviewed. Before stating the more commonly recognized rights, it states that people have the right to a clear and healthful environment.

Article I, Section 3

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

History of Section

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

Comment

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 inhabitants of the country, Elfbrandt v. Russell, 384 U.S. 11 (1966). The federal guarantee provides that:

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

Freedom to associate for the advancement of beliefs and ideas or to petition for redress of grievances is an inseparable aspect of liberty, as are the other rights protected by the First Amendment; freedom of religion, and freedom of speech and press. The freedom of association 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. Butler, 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. To contend that this freedom or some act growing out of its exercise was curtailed to preserve the health or safety of the community is not enough. The police power cannot be used merely to prevent or disperse annoying gatherings. Public officials may act to curtail the exercise of the freedom of association only to enforce statutes reasonably designed to protect life and order, and actions that exceed those required by the situation cannot be lawfully enforced. What is required is a balancing between the individual's right to associate, and to protest if he choose, and the state's duty to preserve order. This freedom cannot be restricted in any way because of possible dissatisfaction or hatred of the ideas expressed at assemblages, of the avowed intentions of an association, or of the membership of an association. It can only be limited by the state's need to protect itself from possible riot. So, the right to associate or assemble applies as long as it is used

in a lawful manner, that is, following the valid laws of the state without interfering with the rights of others. The protection of this right is lost, though, when the actions of those assembled interferes with the rights of others or when the state's interests predominate.

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 interferred 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.

Certain types of government restriction are regularly placed on activities, though, largely through statutes requiring permits for gatherings and marches, and the strict enforcement of disorderly conduct laws and similar statutes. These latter statutes are often legally used in situations that develop out of assemblies where there is a threat of violence. The presence of this threat 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 for governmental officials to selectively or discriminatorily enforce statutes that deal with disturbances, to enable them to use these laws in schemes to either allow or prohibit constitutionally protected activities at their discretion, violates the individual's right to equal protection, as well as his right to assemble, 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. Finally, the state must also have a statute, narrowly and fairly drawn, authorizing such interference with the right to assemble if the state expects its actions to withstand a constitutional attack.

Ohio's section allows similar freedom and restriction. The Municipal Court, in Toledo v. Sims, (14 Ohio Ops. 2d 66, 1960), said that the people of Ohio, by their reserved powers of sovereignty, had affirmed, through Art. I, sec. 3, the right of the inhabitants of the state to assemble or congregate. In applying Art. I, sec 3, Ohio courts have repeatedly interpreted it 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). Similar to the federal right, the freedom guaranteed by Art. I, sec. 3 is not absolute, and it may be restricted by local legislative bodies through laws passed on the basis of the police power. This legislation, though, has to be narrowly defined so as not to arbitrarily, or discrimatorily deny the right of assembly to the people. Anytime these strictures about narrowly defining the legislation are violated, the courts have held the laws to be unconstitutional on grounds similar to those established for violations of

Amendment One, clause 3 of the Bill of Rights. But even if state courts failed to curtail the use of the police power in this area, the State's actions would be circumscribed and limited by the overriding interest of the federal courts in protecting First Amendment rights.

Comparison With Other States

In keeping with the fundamental nature of this right, there is no substantive difference between the guarantees of freedom of assembly contained in the various Bills of Rights reviewed, although the language often varies. The framers of the Model State Constitution set out the guarantee in Art. I, sec. 1.01, a copy of the First Amendment. This right is set out in Hawaii's Bill of Rights in the same manner, Hawaii Const. Art. I, sec. 3. Alaska's Bill of Rights provides a slightly different copy of the federal wording in a separate section, Alas. Const., Art. I, sec. 6. Montana adds "peaceably protest" to their adaption of the federal form, a right presently implied in both the wording of the First Amendment and court interpretations of the right to assemble for redress of grievances, Mont. Const., Art. II, sec. 6. Illinois, alone of the five, has added significantly to the language, but Art. I, sec. 5 of the Illinois Constitution has not added to the basic right. Essentially what has been done is to enumerate certain aspects of the right, as was done in the Ohio section, although not in the same manner. Of these, only Montana seems to have made a change in the original language that contributes to a fuller understanding of the present conception of the right by specifically guaranteeing that act which was at the center of a great deal of controversy in the 1960s; the peaceful protest.

Article I, Section 4

> The people have the right to bear arms for their defense 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.

History of Section

This section, which was originally adopted in 1851, has never been altered. It was taken with minor alterations from the Constitution of 1802, Art. VIII, sec. 20. The second and third clauses of both are identical in content; the 1851 Constitution merely modernized the language. The first clause was altered. In the 1802 Constitution clause 1 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 seems to alter this by stating that individuals could bear arms for their (their own?) defense and security. One could hypothesize that this change was designed to separate the right to bear arms from the concept of an armed citizenry prepared to defend their homes and State, but such does not seem to be the case. If the members of the 1851 convention wished to make a radical change, one would assume that there would have been debate; there was none. Indeed, the change in the wording seems to have been accepted as if only the wording, and not the substance, had been modified.

Comment

This section reflects two of the fundamental principles contained in the Constitution and Bill of Rights of the United States. The first clause guarantees the right to bear arms as does Amendment II of the 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 Art. II, sec. 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 Art. 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. It further authorizes the Governor to call out the militia to execute state laws, to suppress insurrection, to repel invasion, and to act in the case of a disaster within the State, Art. IX, sec. 4.

The first clause of the Ohio section 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. "A well-regulated militia being necessary to the security of a free state . . ." U.S. Const. Am. II. The Second Amendment's prohibition upon the federal government against interfering with the right to bear arms is intimately connected with the concept of a citizen soldier and individual state's 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 Art. I, sec. 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 their 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 allows a large number of restrictions to be placed on this right as seen above and evidenced by Chapter 3773 of the Revised Code. In view of the position of Ohio courts on Art. I, sec. 4, a fuller understanding of this section can be obtained by analyzing the Second Amendment.

"The definition of 'bearing arms', as the phrase was used in legal instruments prior to the Revolutionary War, was serving in an organized armed force," Levin, The Right to Bear Arms: The Development of the American Experience, 48 Chi.-Kent L. Rev. 148 (1971). It did not imply any personal right to possess weapons, but rather the right to bear arms in defense of the community. During this period, the need to keep arms for defense was so great that some colonies passed statutes requiring people to carry arms or keep guns. These statutes were intended to fill the void created by the colonies' inability to pay for the costs of arming and maintaining regular troops, (Vir.) Acts of the Grand Assembly, 1623-24 Nos. 24, 25; 1658-59 No. 25. Other later statutes were enacted that further regulated arms. Laws were passed that controlled the sale or disposition of weapons to prevent them from falling into the wrong hands, and others were passed to prevent fires and injuries by prohibiting the discharge of firearms within the boundaries of towns or near inhabited dwellings.

During and after the Revolutionary Period the concept of bearing arms was redefined to meet the changing needs and perceptions of the people. Having fought to gain their liberties, the people sought a balance between themselves and their newly formed government. Fearing possible abuses of power by the central government through the instrument of a national army, the people felt that only by insuring the right to bear arms could the liberties of the people and the individual states be maintained. The opposition to standing armies as seen in state constitutions written in the late eighteenth century also illustrates this fear. The correct balance, it was thought, would only be insured

by an armed populace and a state militia; but the bearing of arms was intended to be within the context of an organized armed force. The fear of a national army and the belief that the rights of individuals and states could only be protected by force of arms came into direct conflict with the growing belief among many leaders that national sovereignty could only be protected by a standing army. Since Congress would control the army through appropriations, a compromise was reached which permitted the federal government to have a standing army and the power to call out the state militia while the states would control the militia except when federalized, U.S. Const. Art.I, sec. 8. Many felt this gave too much military power to the federal givernment so the Second Amendment was passed to restore the balance and was designed to ensure that the federal government would not be able to destroy the militias of the various states through the use of the federalization process.

Since its passage, the federal courts have narrowly interpreted the Second Amendment. No longer recognizing the need for a military balance between the individuals, the states and the federal government, courts have held that the interests of order and stability must be balanced against the need for revolution and such interests may outweigh it. Therefore, there could be restrictions upon rights subsidiary to the right to revolution--the right to bear arms.

In Cody v. United States, 460 F.2d 34 (8th Cir.1972), the court said that the Second Amendment guarantee extends only to the use or possession of arms which has some reasonable relationship to the preservation or effectiveness of a well-regulated militia. The purpose of the Second Amendment is not to confer a right but instead to preclude infringement of the right of the people to keep and bear arms by the federal government alone. Whatever rights the people may have in this respect are conferred by state constitutions and local legislatures, although the limitation in the federal government is not absolute. The federal government can limit the keeping and bearing of arms by single individuals, but it cannot prohibit the possession or use of any weapon which has a reasonable relationship to the preservation or effectiveness of a well-regulated militia, United States v. Miller, 307 U.S. 174 (1939). This though, is only a general rule and does not apply to state or local legislation nor does it assume the privilege of any individual to bear arms. Photos v. City of Toledo, 19 O. Misc. 147 (Ct. C.P. 2969).

The right guaranteed is not to bear arms on all occasions and in all places, but rather to bear them in a usual way or to keep them for ordinary purposes as for the defense of personal property or of the state, State v. Dawson, 272 N.C. 535, 159 SE2d 1 (1968). The arms referred to in the Second Amendment mean those adapted to the effectiveness of the citizen as a soldier and which are carried openly. The Supreme Court, in Miller, ruled that in the case of certain arms and in the absence of a showing of any reasonable relationship between the weapon and a well-regulated militia, legislation or regulations restricting the use of the arms does not violate the Second Amendment. The federal government, then, can regulate but not destroy the right. Similarly in Ohio, although the Second Amendment is not applicable, it has been held that the right can be regulated but not destroyed (City of Akron v. Williams, 113 Ohio

App. 293, app. dism., 172 Ohio St. 287, 1961). In the reasonable exercise of its police power and with the purpose of preventing crime and preserving the health and welfare of the public, a government, acting under a constitution or legislative grant of police power, may pass certain statutes. As long as the governmental body is not acting in a manner inconsistent with the general law, it may pass criminal or regulatory statutes to control the use or possession of arms regardless of the lack of an express constitutional provision authorizing the legislature to regulate the exercise of the right. Consequently, regardless of constitutional protections, statutes forbidding possession of concealed weapons or weapons of certain types or possession by certain people have all been upheld. Nor has a constitutional guarantee been held to operate to prevent the enactment of legislation regulating the manufacture, sale, gift, loan, or use of weapons, Miller, United States v. Fleish, 90 F. Supp. 273 (D.C. Mich. 1949).

The second clause of Ohio Constitution Art. I, sec. 4 providing for civilian control of the military is a self-evident proposition of fundamental democratic principles. The fundamental nature of this principle of subordination of military power is demonstrated by the fact that every state except New York has a comparable provision. The United States Constitution not only implies this concept through making the President the Commander-in-Chief of the armed forces but also through the prohibition of making military appropriations of more than two years assuring regular Congressional reviews of military spending (Art. I, sec. 8, cl. 12).

Comparison With Other States

Illinois has removed the subordination clause from its Bill of Rights and instead, has combined all such sections into its Art. XII. The subordination clause is not Art. XII, sec. 2 in the Illinois Constitution of 1970. Art.I, sec. 22 guarantees the right to keep and bear arms but this right is prefaced by the words "subject only to the police power," which are then followed by a traditional statement of the right. Hawaii provides a subordination section almost identical to the third clause of Art. I, sec. 4 in its Art. I, sec.14. In the next section Hawaii's Bill of Rights says that a well-regulated militia being necessary for the security of a free state, the right to keep and bear arms shall not be infringed, Art. I, sec 15.

Alaska ties its subordination clause to the prohibition against quartering troops, Art. I, sec. 20, and the section guaranteeing the right to keep and bear arms is tied with a statement concerning the necessity of a well-regulated militia in the same manner as Hawaii, Art. I, sec. 19. Montana also ties the subordination clause to the prohibition against quartering troops on the people, Art. II, sec. 32. The section guaranteeing the right to bear arms, though, is separate as is the parallel section in the Illinois Bill of Rights, but it is somewhat singular in its specificity. While other states usually provide a general statement of the right to keep and bear arms often in a manner that relates it to the concept of a militia; Montana does not, perhaps reflecting its old West past. This is supported by the fact that the section in the 1972 Constitution is identical to its predecessor in the 1889 Constitution Art. III, sec. 13. The Montana section states:

> The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil

power when thereto legally summoned, shall not be called in question, but nothing therein contained shall be held to permit the carrying of concealed weapons.

Montana Const. Art. III, sec. 12

Article I, Section 6

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

History of Section

This section had its basis in Art. 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, sec. 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 1850-51 retained only the opening clause after modernizing the language, and it is this clause that serves in the Ohio Bill of Rights as a statement of an inalienable right--that of freedom of person.

Comment

Freedom of person, the inviolability of the individual, is viewed by many as fundamental to the concept of ordered liberty. The absence of cases dealing with Art. I, sec. 6 of the Ohio Constitution attests to the right's obvious clarity, 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 Federal Constitution, though, contains a similar provision that has been litigated: the Thirteenth Amendment which 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.

While this Amendment was adopted subsequent to the passage of Art. I, sec. 6 of the Ohio Constitution, following the Civil War, it has relevance for Ohio. Not only was this Amendment made applicable to the states through the Fourteenth Amendment, but the similarity of language between the Thirteenth

Amendment and Art. I, sec. 6 leads one to believe that if a case arose under Art. I, sec. 6, courts would use cases interpreting the Thirteenth Amendment as guides in interpreting it. Therefore, Thirteenth Amendment cases are relevant.

In the "Slaughter-House" Cases, the Court said that the Thirteenth Amendment forbade slavery, as well as personal servitude which has a broader meaning, 83 U.S. 36 (1872). Its purpose was to forbid all shades and conditions of African slavery, including apprenticeships for long periods or any forms of serfdom. The general purpose of the Amendment, when read with the Fourteenth and Fifteenth, 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. 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 Thirteenth 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, which has no parallel in Ohio's Art. I, sec. 6, 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 Thirteenth Amendment acts against more than slavery, labor contracts, for example, may also violate this prohibition. A labor contract is basically an agreement between an employer and an employee that the employee for a certain amount of money will work for a period of time for certain wages. Its perfidious nature is revealed when the employee tries to break the contract. The employer uses 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. The Court, in United States v. Shackney, summarized these principles, 333 F.2d 475 (2 Cir. 1964). After reviewing the

history of the Amendment, the Court said that the purpose of those who outlawed involuntary servitude in the Thirteenth Amendment and in statutes to enforce it was to abolish all practices whereby subjection having some of the incidents of slavery was legally enforced. This applied to direct subjection, by a state using its power to return the servant to the master, as had been the case in the peonage system, 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 Thirteenth Amendment, although where the employee has a clear choice about leaving even when the alternative is unappealing there can be no violation.

Article I, Section 9

All persons shall be bailable by sufficient sureties, except for capital 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.

History of Section

Article I, sec. 9 was adopted in 1851 and has remained unchanged. It was a combination of two sections from the Constitution of 1802. Art. VIII, sec. 12 of the earlier Constitution guaranteed the right of bail in all but capital offenses and also guaranteed the writs of habeas corpus. The first clause of that section guaranteeing the right of bail was combined with Art. VIII, sec. 13, which prohobited excessive bail, fines and cruel and unusual punishments, to form what is now Art. I, sec. 9. 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.

Comment

Art. I, sec. 9 of the Ohio Constitution contains two basic principles regarding the treatment of those accused or convicted of crimes. Twenty-three states have a provision for bail similar to the first sentence; every other state provides that "excessive" bail is prohibited, and the United States Constitution, in the Eighth Amendment, states that "excessive bail shall not be required. . . ." The second sentence, which copies the Eighth Amendment, also prohibits "cruel and unusual punishment." The Supreme Court has held that this principle is so fundamental that it has applied it to the states through the Fourteenth Amendment.

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. 440, 1960).

In the federal courts, the contemporary bail system evolved from four sources: the Judiciary Act of 1789, the Eighth Amendment, the Fifth Amendment, and the Bail Reform Act of 1966. The Judiciary Act laid the groundwork for the federal system by providing that bail will be admitted in all criminal arrests, except where the punishment is death, making bail in capital cases discretionary. In applying this discretion, the judge was to base his decision upon his evaluation of the nature and circumstances of the offense, the

evidence, and the usages of law, Jud. Act 1789; ch. 20, sec. 33, 1 Stat. 73, 91. Discretion of federal judges to deny bail in non-capital cases was regarded as non-existent which later led to the belief that bail in non-capital cases was an absolute right, which it is not (Stack v. Boyle).

The Judiciary Act was followed two years later by the Eighth Amendment which reads in part, "Excessive bail shall not be required." This clause, while prohibiting excessive bail, does not establish the right to bail, nor does it distinguish between capital and non-capital crime. The absence of express language guaranteeing the right to bail implies that no absolute constitutional right was intended, and indeed, the historical development of the bail system clearly so indicates. This concept was upheld in Mastrian v. Hedman where the Court ruled that neither the Eighth nor the Fourteenth Amendments require that everyone charged with an offense must be given his liberty or the right to bail pending trial (326 F.2d 708, cert. den. 376 U.S. 965, 1964). 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.

The fact that the right to bail is not an absolute right placing a duty on the federal government to provide it under all circumstances gives Congress the power to regulate its usage in federal courts in determining who shall be released and under what conditions a release shall take place. Congress can thus establish the degree of latitude available to the courts in applying this right as well as those factors necessary to be considered to both protect society and preserve an accused's rights. To effectuate the right, Congress passed the Federal Rules of Criminal Procedure, Rule 46, 18 U.S.C., and the Bail Reform Act of 1966, 18 U.S.C., sec. 3146-49.

Rule 46 gives an accused the right to be released on bail prior to trial in non-capital cases and in capital cases at the discretion of the Court. The fixing of the bail must be based on standards provided in the Rule that are relevant to the purpose of assuring the presence of the accused. In addition to pre-trial bail federal practice allows for bail pending review, Rule 46(a)(2). This is based upon the reasoning that the defendant should not be compelled to undergo punishment until having been finally adjudged guilty by a court of last resort (Hudson v. Parker, 156 U.S. 277, 1895). Post-conviction bail is determined at the discretion of the trial judge according to guidelines established in Rule 46, and the discretion must be exercised soundly and fiarly (Rossi v. United States, 11 F.2d 264, 8 Cir., 1926). Finally, in the federal system the right to bail also extends to juveniles. The Court of Appeals of the Ninth Circuit, in Kenney v. Lenon (425 F.2d 209, 1970), held that juveniles are entitled to all bail rights available to adults as well as further rights because of the harsher consequences. The Court said that not only would the juvenile have served time unjustly if found innocent and would have a more difficult time preparing his defense, but he would also be stigmatized in the community and would lose his employment or be deprived of educational benefits.

Ohio procedures to implement section 9 of Art. I have given ample protection to the individual. The purpose of bail is to ensure that the defendant

appears, Ohio Rules of Criminal Procedure, Rule 46(A), (hereinafter ORCP), and the right to bail under Art. I, sec. 9 is absolute, the only exception being for capital offenses; there is no discretion for the trial court in such matters, Locke v. Jenkins (20 Ohio St. 2d 45, 1969). The Locke principle, which follows a long line of similar cases, has been codified in ORCP Rule 46(A). The absolute right to bail, though, is limited to pre-trial not post-trial while awaiting sentencing or appeal. Release on bail pending an appeal lies within the sound discretion of the reviewing court, and the Ohio Supreme Court will not interfere with the exercise of such discretion, in an action in habeas corpus, unless there appears to have been a gross abuse of the lower court's discretion (Colavecchio v. McGettrick, Sheriff, 2 Ohio St.2d 290, 1965). In using its discretion to determine the amount of bail, there are a number of factors that should be considered by the Court including: the character and past record of the accused, the number of the crimes for which he is charged and their seriousness, and the size of the possible penalties. The purpose of the bail is to secure the attendance of the accused at the trial; if the penalties involved are not great, the accused may have no incentive to jump bail, but if the charges may result in a long incarceration with little hope of early release or probation, the incentive is greater and the amount must be such as to discourage the accused from absconding (Bland v. Holden, 11 Ohio St. 2d 238, 1970).

More recently, action by the Ohio Supreme Court and the Ohio legislature has resolved many possible questions about bail by the enactment of Rule 46 of the Ohio Rules of Criminal Procedure. Rule 46(B) provides for pre-trial release on recognizance or unsecured appearance bond for individuals who appear in answer to a summons. For persons arrested in connection with a felony, the common pleas judge has these same two alternatives. If he feels that neither is sufficient to ensure the appearance of those persons, Rule 46(C) provides for additional means that may be used in lieu of or in addition to the primary forms of bail. Part (D) indicates the alternative methods available for the release of misdemeanants if the primary method of releasing with a summons (Rule 4(F)) is deemed to be insufficient with the added proviso that if neither the police, clerk of courts, or officer-in-charge feels the individual should be released under one of those methods provided, he should be taken before a judge without unnecessary delay for a determination of the conditions of release. Under Rule 46(E)(1), after conviction, a felon has a right to post conviction bail while awaiting sentence or appeal in the same manner in which he could obtain his release prior to trial (C), but this is not an absolute right. If the felon has been sentenced to death, if the judge believes that one or more conditions will not prevent flight, or if the individual represents a threat to the community, there is no right to post conviction release. Part (E)(2) provides a similar post-conviction right to those convicted of misdemeanors. A final part of great importance, Rule 46(F), lists the factors that should be considered in determining which conditions need be imposed to assure appearance. This helps determine the amount of bail necessary, and helps establish, along with the other parts, a uniform method of guaranteeing rights protected by Art. I, sec. 9.

Individuals charged with a capital crime in Ohio do not have the full right to bail, according to section 9. In ruling on the predecessor to section 2937.23 of the Revised Code, the Supreme Court said that courts of common pleas have the jurisdiction to admit to bail in all cases except those in which the statutes are overridden by the Constitution itself. Art. I, sec. 9 provides wuch a limitation by the words "except for capital offenses where the proof is evident, or the presumption great." The Court continued that this does not mean that the common pleas judge cannot admit to bail in a capital crime, but rather that the judge must analyze the available evidence and weigh the presumptions before releasing such an individual. An indictment raises a presumption against an accused, not upon the trial, but before, sufficient to warrant arrest and perhaps to be held in custody. This presumption may be rebutted, but it is for the Court to determine (State, ex rel. Reams v. Stuart, 127 Ohio St. 314, 1933). The judgment as to whether an individual accused of a capital crime should be released on bail is within the sound discretion of the trial court. Further, a denial of bail pending trial cannot be raised as a claim of error upon appeal from a judgment finding the defendant guilty of murder in the second degree (State v. Sheppard, 100 Ohio App. 345, 1955). On the basis of the Court decisions and legislative acts, Ohio provides at least as much protection for an accused in providing for bail as the United States; probably more, since the right is absolute. There is only one area where Ohio provides less protection--juveniles. The absolute right of Art.I, sec. 9 has been held not to extend to a minor being detained pending delinquency proceedings, since the bail provision was held to apply only to offences, State ex rel. Peaks v. Allaman, 51 Ohio Op. 321 (1954). In light of In Re Gault, 387 U.S. 1 (1967), in which the United States Supreme Court gave recognition to the trial nature and serious consequences of delinquency proceedings, it would seem that an extension of the right in this area would be proper. It is not clear, though, that this can be best accomplished by a constitutional change.

The last clause of the Eighth Amendment, "nor cruel and unusual punishments inflicted," was taken from the British Declaration of Rights of 1688, 1 William and Mary 2, C.2 (1688), and was originally thought to only proscribe tortures employed during the reign of the Stuarts. This concept was rejected by the Supreme Court in Weems v. United States (217 U.S. 349, 1910), where the Court held that the standards of the Eighth Amendment were subject to change as the public became enlightened by humane justice. Weems had embezzled money and had received a harsh sentence: 15 years at hard labor in chains, loss of all marital, guardian, and property rights, upon release periodic inspection and reporting, and a fine in excess of the money stolen. In declaring this sentence a violation of the Eighth Amendment, the Court made it clear that, in deciding whether the Amendment was applicable, the test to be applied was broader than whether or not the original drafters had this type of punishment in mind when they wrote this clause. The Weems case thus established the concept of the evolving standard for Amendment VIII. This was later reiterated in Trop v. Dulles (356 U.S. 86, 1958), where the Court held that the standards of the Eighth Amendment must be drawn from the evolving standards of decency of the society.

Following Weems, the next major decision was not handed down until 1947 in Louisiana ex rel. Francis v. Resweber (329 U.S. 459, 1947). Here the Supreme Court approved a second electrocution where the first attempt had failed due to

mechanical difficulties. The Court had earlier approved the use of the electric chair in In Re Kemmler (136 U.S. 436, 1890), noting that while it was unusual, it had been adopted for humane reasons and was therefore not cruel. Here, the Court approved its reuse because of the accident, stating that the Constitution protects the convicted person against an inherently cruel punishment and where there is no intention to inflict unnecessary pain and where none is involved, there is no violation of the Constitutional command. In Trop, a naturalized citizen was de-naturalized for desertion. Feeling that statelessness was inherently cruel and rejected by civilized nations, the Supreme Court ruled that no crime, even desertion was sufficient to warrant its infliction. The Court held that if a punishment violates the dignity of man, as measured by evolving standards of decency that mark the progress of a maturing society, then it violates the prohibition against cruel and unusual punishments. But in the same decision in dictum, the Court stated that the death penalty was a traditional and acceptable mode of punishment.

The first case to apply the Eighth Amendment to a state was Johnson v. Dye (175 F.2d 250, rev. on other gnds. 388 U.S. 864, 1949), and this was followed by other district court cases. The Supreme Court never followed this until it decided Robinson v. California (370 U.S. 660, 1962), but even here, it did not unequivocally state that the Eighth Amendment was applicable to the states through the Fourteenth Amendment. However, the Court assumed throughout its decision that the clause did apply. In this decision, the Court found a violation in the punishment of mere status--equating the punishment of narcotics addiction because of the addiction, to the punishment of mental illness or leprosy because of the existence of the illness. Justice Douglas, in his concurring opinion, suggested that a cruel and unusual punishment may result not merely from the confinement but also from the nature of the conviction itself. The Court, in Robinson, also repeated the idea that the meaning of the "punishments" clause must be determined in light of contemporary standards of humaneness. Ten years later this standard was applied to the death penalty.

In 1972, in Furman v. Georgia, the Supreme Court declared certain applications of the death penalty to be violative of the "cruel and unusual punishment" clause of the Eighth Amendment. In the 5-4 decision, this was all the majority could agree on, and there were nine separate opinions. Justices Brennan and Marshall based their opinions on the Trop test, with Justice Brennan writing that capital punishment is degrading, arbitrarily inflicted, offensive to contemporary society, and excessive. Marshall agreed that the punishment violates human dignity and is excessive and unacceptable to contemporary society. The other Justices ruled more narrowly with Justices White and Stewart holding that the death penalty was excessive in the instant case because the criminal justice system allowed people to escape the punishment by providing for alternate, lesser punishments with the result that those sentenced to death were among a capriciously selected random handful.

The four dissenters argued that the decision to abolish the death penalty was a legislative rather than a judicial matter. They also rejected the majority ruling that the death penalty in these cases violated Amendment VIII, asserting that the "punishments" clause does not encompass an inquiry into whether a punishment is excessive. The dissent further stated that the clause

does not deal with the problems of arbitrary, infrequent, and discriminatory applications of the death penalty.

The narrow holding of the majority is that the imposition of the death penalty is so infrequently imposed that it is excessive and that it can be discriminatorily and arbitrarily applied where the jury has complete discretionary powers to decide between life or death--the possible abuse of discretion being of primary importance. The enactment of mandatory sentences and standards which severely limit jury discretion could correct many of the cited abuses and re-legitimatize the death penalty but not if the penalty is thought to be disproportionate. If the death penalty is thought to be excessively harsh, there will still be an Eighth Amendment violation.

Weems spoke of proportionality; a sentence greatly disproportionate to the crime committed, according to the Court would be a cruel and unusual punishment. This was followed in both Trop and Robinson where the Court held punishments unconstitutional because they were disproportionately severe in relation to the offense committed. In Wilkerson v. Utah (99 U.S. 130, 1878), another test of excessiveness had been postulated. Following the traditional formulation, later rejected in Weems, the Court said that torture, beheading, quartering, burning, and other punishments in the same line of unnecessary cruelty violate the Eighth Amendment. Trop expanded this concern with physical pain to include mental and emotional pain combining with it the evolving standards test of Weems, which was accepted by all six Justices who dealt with the question in Furman.

It should not be imagined, though, that this clause is limited to consideration of the death penalty or tortures; it has even further ramifications as interpreted by contemporary courts. 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, the Court changed its policy saying that where federal rights were affected, they could be raised in federal courts. Soon thereafter, the District Court of Arkansas found that conditions at the Arkansas prison farms violated the Eighth Amendment rights of the prisoners (Holt v. Sarver, 309 F.Supp. 362, aff'd. 442 F.2d 304, 8 Cir., 1970). In condemning the deplorable living conditions and the trustee-guard system with its concomitant abuses and failings, the Court said that confinement itself may result in cruel and unusual punishment where the prison is characterized by conditions and practices shocking to the conscience of reasonably civilized people even though a particular inmate may never be disciplined. To correct the abuses, the judge ordered reforms of the prison farm system. Another federal judge took stronger action in Hamilton v. Schiro, 338 F.Supp. 1016 (E.D. La. 1970). He enjoined the use of a parish (county) prison rather than try to fashion relief because he felt that the prison conditions shocked the conscience as a matter of elementary decency. In Ohio, in James v. Wittenburg (323 F. Supp. 93, N.D. Ohio, 1971), a district court, following the earlier decisions, found that jails were properly within the control of the state authorities but that federal courts could properly intervene when paramount federal constitutional and statutory rights were involved. Here, the judge

found conditions that violated the Eighth Amendment, and foreseeing no relief because of fragmented administrative control, the judge retained jurisdiction in the matter to guarantee that ordered improvements were properly carried out. In Gates v. Collier (349 F. Supp. 881, N.E. Miss., 1972), with similarly disgusting conditions prevalent, another judge established and oversaw a timetable of ordered administrative and physical improvements. In so doing, he gave recognition to the principle that prisoners have a constitutional right to adequate provisions for their physical health and well being.

Courts have expanded these new concepts even further in dealing with juveniles. Not only have courts extended to them the rights available to adults, but the courts have recognized the rights to a higher standard that must be met in the confinement of juveniles. The most important of these is the right to receive rehabilitation from an on-going effectively run program, Inmates of Boy's Training School v. Affleck, 346 F. Supp. 1354 (D. R.I. 1972), Baker v. Hamilton, 345 F. Supp. 435 (W.D. Ky. 1972). The expansion of these rights into adult corrections could have a profound effect on the correctional system.

Courts have also intervened to stop specific prison practices. Corporal punishment of prisoners has been held to be cruel and unusual punishment in part because the standards of the people have changed and they have rejected it, Johnson v. Bishop, 404 F.2d 571 (8 Cir. 1968), Wyatt v. Stickney, 325 F.Supp. 781 (M.D. Ala. 1971). While solitary confinement has not been found objectionable, strip cells have been determined to be inhuman and to have the tendency to debase and degrade the individual in violation of his humanity and dignity according to contemporary standards (LaReau v. MacDougal, 473 F.2d 974, 2nd Cir., 1972).

The last clause of Art. I, sec. 9 prohibiting "cruel and unusual punishment" as mentioned earlier repeats the parallel clause in the Eighth Amendment and provides the same protection. Even prior to the incorporation of the clause through Amendment XIV, the Ohio Supreme Court followed the United States Supreme Court's interpretation of the Eighth Amendment in interpreting Art. I, sec. 9. In Holt v. State (107 Ohio St. 307, 1923), the Ohio Court said that it was content to follow Wilkerson v. Utah as interpreting the meaning of the expression. The Court in Wilkerson had ruled that the punishments prohibited by the Eighth Amendment were those atrocious tortures and forms of execution of the same nature as those mentioned by Blackstone, 4 Bl. Com. 377. With the exception of Zeny v. Alvis, 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, 66 Ohio Law Abs. 606 (Franklin Co. Ct. A. 1951).

Comparison With Other States

Because of the basic nature of these rights, it is not surprising that there are substantial similarities between Art. I, sec. 9 and the parallel

sections in other Bills of Rights. Article II, secs. 21 and 22 of the Montana Constitution when combined are almost identical, word for word to Art. I, s. 9 of the Ohio Constitution. Hawaii's Constitution, in Art. I, sec. 9, repeats the Eighth Amendment of the U. S. Constitution, as does the Ohio Constitution, but then it adds:

> "The court may dispense with bail if reasonably satisfied that the defendant or witness will appear when directed, except for a defendant charged with an offense punishable by life imprisonment."

It should be noted that this section does not grant an absolute right to bail as does the Ohio Constitution although it does imply it. The section does provide for a waiver of bail under certain conditions. Ohio, in the new Rules of Criminal Procedure, provides a more absolute command, making a release on recognizance or on summons the first consideration. Nevertheless, the right in Ohio is secured by a rule which may be altered by the legislature while in Hawaii the right is secured by their Constitution.

Alaska, in Art. I, sec. 11, establishes the right of bail in a manner similar to Ohio. In the next section (sec. 12), it also repeats the Eighth Amendment; the second sentence of that section adds something different also found in the Montana and Illinois Constitutions:

> "Penal administration shall be based on the principle of reformation and upon the need for protecting the public."
>
> Alas. Const. Art. I, sec. 12

> "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship."
>
> Ill. Const. Art. I, sec. 11

> "Laws for the punishment of crime shall be founded on the principles of prevention and reformation."
>
> Mont. Const. Art. II, sec. 28

All three of these sections deal with the punishment of crime. Alaska and Montana both consider prevention as a factor in fixing punishment, Illinois the seriousness of the crime. All three, though, also consider reformation a factor to be considered in establishing a penalty for a crime. It is unclear as to what is meant by this exactly, although it would seem that the sentence is to be tied in some manner with the length of time necessary for reforming the convicted individual. One might also speculate as to whether or not these clauses give prisoners a right to rehabilitation facilities, and whether the clauses impose positive duties in the states to reform criminals through the development and use of rehabilitative programs. If they do grant these rights and impose those duties, these sections could be seen as constitutional effectuations of the principles recently enumerated by federal courts in cases dealing with prison conditions.

Although the language is in part modernized, the parallel section of the Model State Constitution (sec. 1.06(b)) does not differ from Art. I, sec. 9 of the Ohio Constitution. The modernized section is that dealing with bail. The Model State Constitution states:

> "All persons shall, before conviction, be bailable by sufficient sureties, but bail may be denied to persons charged with capital offenses or offenses punishable by life imprisonment, giving due weight to the evidence and to the nature and circumstances of the event."
>
> Model State Constitution, sec. 1.06(b)

As is seen, this sentence does not differ from the bail provision of the Ohio Constitution as interpreted by the courts and codified in the Ohio Rules of Criminal Procedure. The second sentence of the section is identical to the second sentence of Ohio's Art. I, sec. 9 - the Eighth Amendment.

Article I, Section 12

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

History of Section

This section is another hybrid from the Constitution of 1802. The first clause of Art. I, sec. 12 originally was Art. VIII, sec. 17 of the 1802 Constitution. The Constitutional Convention added the second clause of Art.VIII, sec. 16 to that section to form the present Art. I, sec. 12. The restructured sec. 12 was then adopted as a part of the Constitution of 1851 and has remained unchanged.

Comment

This section should be read in conjunction with sec. 9 since it deals with the treatment of individuals after conviction as does the "cruel and unusual punishments" clause of sec. 9 and the bail provisions to a limited degree. While banishment or transportation has been held not to violate the prohibition against cruel and unusual punishment, it is generally held to be beyond the power of local or state courts, and is impliedly prohibited by public policy, People v. Baum, 251 Mich. 187, 231 N.W. 95 (1930). In Ohio, this public policy has been formalized by the first clause of sec. 9. The judiciary and legislature have heeded this prohibition against this form of punishment, obviating any decisional law.

On the federal level, transportation exists in a limited manner in the form of deportation which is regulated by federal statute, 8 USC secs. 1251-126D. National sovereignty gives the United States the power to expel or deport aliens whose presence is deemed detrimental to the public welfare and this power is absolute and unqualified. This right is based on the fact that since the foreigner is not part of the nation, his individual reception into the territory is a matter of pure permission and simple tolerance which creates no obligation on the part of the government to permit him to remain. The interest of the alien in remaining is protected only so far as Congress chooses to protect it, and as long as the alien fails to become naturalized he remains subject to the plenary power of Congress to expel him. A person who is a citizen by birth or naturalization may also be subject to exclusion or deportation if he loses his nationality. By the performance of certain acts as established by statute, an American citizen may be expatriated, 8 USC secs. 1481-1489. This may also result from de-naturalization. An order admitting a person to citizenship may be revoked and his certificate of naturalization canceled on the ground that such order and certificate were procured by the concealment of a material fact or by willful misrepresentation, 8 USC sec. 1451. This is considered a severe penalty only to be exercised if there is a clear violation of the express statutory requirements. In Trop v. Dulles, the Supreme Court ruled that de-naturalization was a cruel and unusual punishment and rejected its use as a punishment, limiting its application only in cases where actual concealment of facts or fraud occurred in obtaining citizenship.

The second clause has no verbatim counterpart in the United States Constitution. Art. III, sec. 3, cl. 2, though, which provides that no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted, is obviously much more limited in scope. The clause provides for a 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 of treason. Impliedly, all lesser crimes would require lesser penalties, but this is not stated. The second clause of Ohio Const. Art. I, sec. 12, though, does provide this greater protection by stating absolutely that there will be no transportation, corruption of blood, or forfeiture of estate. The case law is sparse on this section, but it does provide an adequate explanation for what seem to be exceptions.

The Supreme Court held that there was no constitutional violation in Miller v. State for a seizure to abate an existing nuisance. The property involved was seized and closed for a violation of the state liquor laws, and the actions of the trial judge in ordering the rooms be kept closed until bond and security were given pursuant to the act were upheld by the Court since the property was being used illegally at the time of the seizure, 3 Ohio St. 475 (1854). 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, in interpreting Art. I, sec. 12, the Court held that there was no violation of the constitutional prohibition where the use of property, declared a public nuisance under General Code sec. 13195-1 (RC sec. 4301.73), was lost for one year (State ex rel. v. Richardson, 24 N.P. (n.s.) 540, Butler Co. C.P., 1923). In Mills Operating Co. v. Toronto, the Court never had to rule on the clause finding that there is no property right in a gambling device and hence no right of recovery from the confiscation and destruction of the devices involved, pursuant to General Code sec. 3659 (RC sec. 715.51), 20 N.P. (N.S.) 525 (Jefferson Co. C.P. 1918). Murder, though, does provide a type of exception to this clause of the same nature as that seen in Mills. 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., 1910). More specifically, the Probate Court of Franklin County held that General Code sec. 10503-17 (RC sec. 2105.19), 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 Art. I, sec. 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). Further protection in Ohio has come as a result of judicial decision. In Thomas v. Mills, 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), 117 Ohio St. 114 (1927).

Comparison With Other States

Among those Constitutions reviewed, only Illinois had a section identical with Art. I, sec. 12, Illinois Const. Art. I, sec. 11. Alaska in Art. I,

sec. 15 of its Constitution provides that no conviction shall work corruption of blood or forfeiture of estate and does not specifically prohibit transportation, although one would assume that any attempt to transport convicted felons would violate Art. I, sec. 12 of their Bill of Rights and certainly would violate the Eighth Amendment of the U.S. Constitution. Montana provides that no person shall be attainted of treason or felony by the legislature (no corruption of blood) and more simply, no conviction shall cause the loss of property for relatives or heirs of the convicted, Art. II, sec. 30. The Montana section seems to imply that on conviction of a felony or treason all civil rights are lost, Revised Code of Montana 94-4720, 94-4721. Further, the second part seems to imply that there can be a loss of property for the convicted felon, although the property would go to the heris or relatives. Because these clauses follow those relating to treason in the same section, it can probably be assumed that forfeiture is limited to treason or other crimes specifically enumerated, see Revised Code of Montana 94-4725. While 94-4720 does provide that all civil rights are suspended upon conviction of a felony and that they, including citizenship, can only be regained from the governor, Art. II, sec 28 of the Montana Constitution was passed later and states that all rights lost by a person upon conviction of a felony are automatically restored by the termination of state supervision. Article I, sec. 12 only provides this to a limited degree. By statute in Ohio, upon conviction, rights to be an elector, juror, or to hold public office of honor, trust, or profit are lost. Upon release, the only right regained is that of elector, ORC sec. 2961.01 (Page Special Supp. 1973).

Article I, 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.

History of Section

Article I, sec. 13 was adopted as it now stands as part of the Constitution of 1851. Representing an old, cherished freedom, it was, of course, not a new guarantee of freedom in Ohio; it repeats Art. VIII, sec. 22 of the 1802 Constitution with only minor word changes.

Comment

This section of the Ohio Bill of Rights, which is identical to the Third Amendment, is self explanatory. So basic is this section that it does not even appear to have been litigated in Ohio.

Litigation dealing with the Third Amendment is almost as rare. In United States v. Valenzuela, 95 F. Supp. 363 (D.C. Cal. 1951), in a case 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).

There is little more that can be said concerning this section or the Third Amendment except for the specific language used. Narrowly read, the section allows the quartering of troops in a rented house with the consent of the owner regardless of the attitude of the lessee. Further, it provides no protection for the apartment dwellers or owner. It could probably be safely argued, though, that this section and the parallel Amendment are prophylactic and that interpretations of the wording change in response to different living conditions and patterns of property ownership, to provide identical protections to the people at all times. While no one can assume that this section would be interpreted in this manner in the future, any attempt to adapt the language of the section to 20th Century housing is fraught with difficulties. The complexity of property ownership would require an equally complex amended section with the possible implication that everything covered is protected and everything else is expressly excluded from protection, regardless of the intent of the legislators.

Comparison With Other States

In keeping with the fundamental nature of this right, all four states (Alaska, Art. I, sec. 20, Hawaii Art. I, sec. 16, Illinois Art. I, sec. 21, Montana Art. II, sec. 32) reviewed were found to have almost identical sections.

The authors of the Model State Constitution desiring to limit the scope of their Bill of Rights failed to include this right among those recommended for a state constitution. Relying instead upon the inclusion of many rights through the Fourteenth Amendment, they termed the inclusion of this right along with others "surplusage" in a state constitution, even though the Third Amendment has not been incorporated through the Fourteenth and made applicable to the states.

Among the four states, the specific sections are largely identical. The second sentence of Montana's Art. II, sec. 32 is identical to Ohio's Art. I, sec. 13. The first sentence, though, like the last in Alaska's Art. I, sec. 20 ties the right to the concept of strict subordination of the military to the civil power in words identical to the third clause of Art. I, sec 4 of the Ohio Constitution. Art. I, sec 21 of the Illinois Constitution only differs from the Ohio section in minor ways. The Constitutions of both Hawaii and Alaska have a greater difference. While these sections serve the same purpose as that of Ohio's, slight modifications have subtly enlarged the specific guarantee of the right. Alaska provides that no member of the "armed forces", and Hawaii that "no soldier or members of the militia", shall be quartered in any house. More importantly, both provide that the consent necessary in time of peace must come from either the "owner or occupant." While it might have been better to provide for permission from the owner and the occupant, this represents an attempt to deal with a complex problem in an understandable and brief manner.

5

Bill of Rights
Part 2
Article I, Section 19 and Article XIII, Section 5

EMINENT DOMAIN

Two Ohio constitutional sections relating to eminent domain are covered in this memorandum--Section 19 of Article I, the basic section--and Section 5 of Article XIII. The latter section was considered by the Elections and Suffrage Committee in connection with its study of the Corporations article, and that committee suggested that it should be studied in connection with the basic eminent domain section, Section 19 of Article I.

In the last two legislative sessions, one resolution was introduced affecting eminent domain. H.J.R. 17 of the 109th General Assembly proposed a constitutional amendment to extend the "quick take" provisions of Section 19 of Article I for water and sewer purposes. This proposal was placed before the voters by the legislature and defeated at the polls.

Article I, 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.

History of Section

The predecessor of this section was Art. VIII, sec. 4 of the Constitution of 1802, which provided that private property would be inviolate but subservient to the public welfare and that compensation would be paid to the owner of any property condemned. The present section of the Constitution of 1851 retains those basic principles from the earlier Bill of Rights, but goes to greater lengths to establish procedure. The earlier section had been inadequate to protect the property rights of the people and many people with influence used eminent domain 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 Art. I, sec. 19. The section has remained unchanged since 1851.

Comment

While Art. I, sec. 1 has no direct federal parallel, by its nature and operation it is one aspect of the state guarantee of due process. Art I, sec. 19 also provides an aspect of this guarantee with the result that often the two are cited in conjunction, but this is not always the case. Art. I, sec. 1 can always be raised in a case specifically covered by Art. I, sec. 19 while the converse does not apply. This is because Art. I, sec. 19 was written to provide specific protection for property owners in Ohio against state seizure of property without just compensation. This protection parallels that provided by the last clause of the Fifth Amendment, but where the Fifth Amendment gives only a general protection, Art. I, sec. 19 is more specific.

When the United States government needs private property for public use which it cannot acquire by purchase, it has the undoubted right to acquire such property by the exercise of the power of eminent domain, with or without the consent or a concurrent act of the state in which the land is situated (Monongahela Nav. Co. v. United States, 148 U.S. 312, 1892). The only limitation on this power is that contained in the Bill of Rights in the Fifth Amendment which requires that just compensation be paid, and many federal statutes specifically authorize the acquisition of property by condemnation for various public purposes. The United States may not only take land for itself for governmental purposes, but may also authorize the taking of land within a state by a private corporation for public uses within the sphere of federal control, such as interstate commerce.

This power of eminent domain may be exercised in all territory within the United States and is independent of either the power or wishes of the individual states. Further, it may be exercised either by entering into physical possession of the property without a court order or by instituting condemnation proceedings under various acts of Congress. This right to enter and take possession, though, is limited as mentioned previously.

The Fifth Amendment and the constitutions of forty-nine states (not North Carolina) have an eminent domain clause: "nor shall private property be taken for public use without just compensation", and the Supreme Court has made just compensation a requirement of due process and binding on the states through the Fourteenth Amendment, Griggs v. Allegheny Co., 369 U.S. 84 (1962).

Eminent domain is a transfer of property, but it has several unique characteristics. First, it occurs between an individual and the state or some alter ego of the state. Second, this transfer may be accomplished over the protests of the transferor due to the power of the state. It is an act of the state in its capacity as sovereign. The theory behind this power is that it is necessary for the independent existence and perpetuation of government, Kohl v. United States (91 U.S. 367, 1875). The power is also very extensive. American governmental bodies have the power to condemn any property rights to aid in accomplishing any permissible governmental enterprise, Berman v. Parker (348 U.S. 26, 1954). Further, this power can be used concurrently with other powers when this would better serve the public interest or use, which is determined by the legislature, although periodically such a decision is made by the judiciary. The Supreme Court, when it has interpreted public interest or use, has on occasion spoken more of public purpose, and of that very broadly, as being sufficient to enable a legislative body to act, and the Court has made clear that it cannot be interpreted in any literal sense.

In early cases, the property, land, or constructions, 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 interferring with certain riparian rights might not result in compensation. This does not mean that the property owner may be treated with impunity in all cases where there is no touching. 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).

Attendant to this concept is another concept reflected in the Fifth Amendment: that the state should be no better off after acquiring the property than it would have been had it been a private individual. This provides the rationale for compensation.

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 governments 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 Goodwin v. Cincinnati and Whitewater Canal Co. (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. In this transaction, a railroad was prohibited from benefiting from the fact that the canal company could no longer operate profitably and from paying the value of canal property as then used rather than its potential value converted for railroad 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).

As mentioned previously, Ohio, in its Bill of Rights, provides a more specific guarantee to property owners than does the federal government in the Fifth Amendment. While the State is bound by the strictures of that Amendment, Art. I, sec. 19 further restricts 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. The parameters of this protection, though, cannot be determined by an inspection of the section but must be found in reviewing the case law which has interpreted it.

In Pontiac Co. v. Commissioners (104 Ohio St. 447, 1922), the plaintiff sought to enjoin park commissioners from prosecuting an appropriation suit instituted to appropriate certain lands for public use. There were two parcels of land 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 plaintiff sought to prevent this by alleging that the purchase price had not been settled and that the commissioners

were without power to appropriate the second parcel although they did have sufficient power to act on the first parcel. The court held that, under the 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. Continuing, it said that the right of eminent domain is an attribute of sovereignty and only the sovereign or one to whom it has delegated such power can take property against the consent of the owner, and where this power has been delegated the terms of such grant must be strictly followed. When the matter is in doubt it must be resolved in favor of the property owner. The court then attacked the due process problems involved in the seizure of the second parcel. The rights and privileges to be secured were not certain and their exercise would be entirely too indefinite. There were no provisions made for the methods of exercising these rights, nor did it appear how they would be enforced, nor how often they could be altered nor if notice would be given upon an alteration and a chance to be heard provided. When an interest less than a fee is sought to be acquired, the owner, whose property is to be taken against his will, 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. The Constitution, in Art. I, sec. 19, contemplates physical possession and use, not the regulatory power exercised under the police power. Public use implies the possession, occupancy, and enjoyment of the land owned by the public or public agencies.

State and municipal authorities may make any provisions as may be reasonable, necessary and appropriate for the protection of the public health, safety, and welfare and when any such provision bears a real and substantial relationship to the object sought to be achieved and does not interfere with private rights beyond the necessities of the situation every intendment will be made in favor of its lawfulness. The exercise of the police power, though, is greatly different from the right of eminent domain. When the acquisition of an interest in private property is necessary for the promotion of the public welfare, the owner must yield in his interest, but Art. I, sec. 19 contains the guarantee that private property can only be taken for public use after compensation has been paid.

While the Court in Pontiac established the broad scope of protection provided by Art. I, sec. 19, seemingly at the expense of the police power, all interference with an individual's use of his land does not constitute a seizure requiring compensation and may be a legitimate exercise of the police powers. Sections 5516.01, .05, .99 of the Revised Code prohibit and regulate the use of billboards irrespective of ownership or location. In 1964, in Ghaster, Inc. v. Preston, the constitutionality of these statutes was attacked. The plaintiff contended that these statutes took private property without compensation in violation of Art. I, sec. 1, 16, 19 of the Ohio Constitution and Amendment Fourteen of the United States Constitution. He argued that property within the meaning of these constitutional provisions included the right to use land (in this case for billboards) and that deprivation of its use by the prohibition of the statute was a taking. The Court disagreed, citing Art. I, sec. 19 which states that private property will be subservient to the public welfare. The owner's

right to use his land is limited to lawful uses. Particular uses, previously lawful, may be prohibited by the legislature as either unlawful or a nuisance, and the validity of such limitations depends upon whether it falls within the police powers. Here, the statute only deprives an owner of his right to communicate with those using the road and the court held that any such right can be taken from the owner without compensation for the purpose of improving the highway for the public. Even though the exercise of the police power makes illegal what was formerly legal and thereby decreases or destroys the value of the property, there is no taking where the legislation bears a real and substantial relation to the public health, safety, or welfare and is not unreasonable or arbitrary. The difference between this case and the previous one is that here no positive controls were sought over the land. Although prohibitions, if extensive enough, could constitute a seizure, lesser controls are a valid exercise of the police powers. In Pontiac, not only were prohibitions proposed on owner's use of the land, but the commissioners also sought to exercise powers incident to ownership.

There are other types of interference with the use and enjoyment of property which are not of a regulatory or prohibitory nature which are not violative of Art. I, sec. 19. In McKee v. 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. After finding that a municipal corporation is not liable for a nuisance arising from the collection and disposition of garbage, the Court ruled further that there was no taking. In interpreting Art. I, sec. 19, the Court said 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. The determination of whether compensation is required in Ohio depends on whether the property has actually been taken. "Taken" denotes something different than "damaged" and to construe it as meaning damaged would be strained and unnatural. Therefore, to recover, a taking must be shown; it is not enough to show damage.

Ordinarily, to constitute a taking, the government activity must physically displace a person from space in which he is entitled to exercise dominion consistent with the rights of ownership. For example, if the government uses one's land for flood control, the government has appropriated the flooded area since the ability to use it for any normal purpose is denied. 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. Columbus, 3 Ohio St. 2d 154, 1965). There can also be a taking where the injury sustained by one is so extreme that it amounts to a substantial deprivation of all rights of ownership. Although if

property is rendered less desirable as a result of governmental action, there is not a taking per se for the purpose of Art. I, sec. 19.

In McKee, the plaintiff claimed damages resulting from the use of land appropriated nearby. Where land is appropriated, the plaintiff owner may receive compensation for the consequential damages to his remaining land and the market value of the land taken. If there has been no taking, damages consequential to the appropriation of other land are not recoverable although adjoining property owners may have certain rights of recovery under Art. I, sec. 19. The court ruled that there had been no displacement, no damage intentionally directed at the plaintiff's property, no deprivation of all or part of her interest in the property; nor had her home been made uninhabitable. Rather, her property had become less desirable, something suffered by everyone living in the vicinity, and since she shared in the benefits of such governmental activity, she would also have to share some of the incidental burden.

A later case succinctly summarized the problem of damage (State, Ex rel. Frejes v. 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. But, this was not recognized on the basis that construction of public improvements often result 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 "unassistable language" of Art. I, Sec. 19, the Court noted that the constitutional phrase "taken or damaged" found in many 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".

In Ohio, in the absence of a statute, there is no liability in a condemnation proceeding for consequential damages to adjoining property. However, the Supreme Court has maintained that, if property is taken by government authority either completely or pro tanto, Art. I, sec. 19 guarantees the right of compensation to the owner of the property. Any direct encroachment upon land which subjects it to public use that restricts or excludes the dominion of the owner is a compensable taking. More specifically for adjoining property owners, any use of land for a public purpose which inflicts an injury upon adjacent land, if it would be actionable if caused by a private owner, is a taking within the meaning of the Constitution. To deprive an owner of any valuable use of his land is to deprive him of his land, pro tanto, and the recovery extends to all lands affected. If there is an allegation of a lessening of the value of the land, there is only a damnum absque injuria, as in Frejes. Although where there is evidence of substantial interference with elemental rights incident to the ownership of property due to the performance of a public function, Art. I, sec. 19 requires that the owners be paid compensation (Lucas v. Carney, 167 Ohio St. 416, 1958).

Less obviously, Art. I, sec. 19 can blunt the most pernicious aspects of assessments. While not a limitation on power to assess for public

improvements, Art. I, sec. 19 is an available protection in a court against any actual confiscation of property whether made under a power of assessment or otherwise, Rogers v. Johnson, 21 Ohio App. 292 (Athens Co. Court of Appeals, 1926). In Domito v. Maumee (140 Ohio St. 229, 1940), a threatened collection of an assessment was enjoined as being confiscatory. The Court said that the fundamental principle underlying the imposition of a special assessment on property for public improvements is that the property benefited should bear its proportionate share of the cost, corresponding to the benefit received. Consequently, when the assessment is substantially equal or greater than the value of the property no advantage accrues and there is no justification for the assessment. It thereupon invades the inviolability of private property and contravenes Art. I, sec. 19. 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.

Article I, sec. 19 operates as a limitation of the sovereign power of eminent domain in the same manner as the Fifth Amendment by requiring compensation. It further acts to restrict this power by requiring payment or deposit before land may be taken for public use except in certain specified exceptions. In Biery v. Lima (21 Ohio App. 154, Allen Co., Ct., A., 1969), the plaintiff sought an injunction to prohibit the city from entering into possession of an easement across his land. The city tried to use "quick take" without the compensation first being assessed and paid or secured. The court said that only in time of war or public exigency, imperatively requiring seizure could property be taken without compensation first being paid. Since there was no war, the court had to determine if there was an "exigency," but first it was necessary to define the word. From the context "in time of war or other public exigency," the court said it seemed that the framers considered a time of war an exigency and that public exigency other than war would have to be of similar gravity. Further, the mere existence of these conditions are not, in and of themselves, sufficient to justify a quick take of property before compensation has been assessed and either paid or secured. Before the quick take is justified the situation must also be such as to "imperatively" require the "immediate seizure" of the property. The court then concluded that the comparison with the time of war and the additional requirement of imperativeness raised the character of such exigency beyond that of an ordinary exigency. Therefore, as defined in the Constitution, the court held that compensation was first required in all cases except those of unavoidable urgency and suddenness compelling or insistently calling for immediate action or remedy. (Also see Worthington v. Carskadon, 18 Ohio St. 2d 222, 1969). The City of Columbus attempted to use a similar procedure but with a variation, Cassady v. Columbus, 31 Ohio App. 2d 100 (Franklin Co., Ct. A., 1972). The city deposited money as security before acting, and the owner withdrew the money; on this basis, the city claimed to have the authority to proceed under Art. I, sec. 19. The court said that only under the specific circumstances outlined in the section would a quick take be valid and that any procedure that allowed a taking without following the proscribed procedure would be unconstitutional. The court continued by saying that it was not

enough to merely deposit money assessed by the city council. The money may or may not have adequately compensated the property owner, but 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.

Compensation is required by the Ohio Constitution, but its definition has had to be determined by the courts. 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 could reasonably and practically be adopted (Sowers v. Schaffer, 155 Ohio St. 454, 1951). This value can be arrived at by a consideration of numerous factors: values of the individual structures on the property as well as rental values, the business conducted there, the land value, and any special features that would add or detract from its value. In Manchester v. Boehm (34 Ohio App. 2d 43, Cuyahoga Co., Ct. A., 1973), the court gave a more detailed analysis of the valuation procedure involved in the taking of a business. If anything is constitutionally protected, it is the economic aspect of the interrelationship between the chattels and the land which is secured. Property is the interest of the owner in the thing owned and the rights of use, exclusion, and disposition of the property. There need not be a physical taking or even dispossession; any substantial interference with the elemental rights growing out of ownership of private property is considered a taking. The act of appropriation itself may be a substantial interference with the property owner's right to dispose of his property, because he is denied the right to sell the property as a unit, land and complete facilities, its most valuable form.

Personal property, without more, is not taken in a proceeding in an appropriation case, but where chattel property is united to the land by use so that the two are rendered, in effect, a single property, it can make no sense to deal with the taking of chattels, except as falling within the land appropriation case. Their severance will result in the loss of the ability to sell them together, a destruction of value reflecting the necessity of the one for the enjoyment of the other. If the nexus existing between the chattel and the land is severed by the appropriation of the land, and the chattel is retained by the condemnee, there can be no recovery for its removal and such costs are damnum absque injuria, at least to the extent that the state does not consent to be sued, since Art. I, sec. 19 does not extend its protection to damages nor incidental damages. Then the owner, deprived of the right to sell his business, is left with what has become second-hand machinery with a value much less than it would have been if sold as part of a plant. An appropriation of all of the property would avoid this injustice since the removal of chattel property and its subsequent exclusion from compensation should be undertaken in a voluntary rather than forced basis. The problem in these types of cases as with several of the previous cases discussed is the limitation on the compensation provided in Art. I, sec. 19 to things actually taken and the failure to provide for the payment of damages.

One method that has been used to circumvent the lack of a provision for damages has been utilized in the area of urban renewal, or other large public works projects (Bekos v. Masheter, 15 Ohio St. 2d 15, 1968). Where the value of a piece of property taken by appropriation by an urban renewal authority 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. This rule facilitates the valuation of property taken by adjusting the date of valuation in order to exclude depreciation due to delays in public projects and promotes the Constitutional requirement of just compensation. In somewhat similar situation, a court held that, where depreciation had resulted from changing government purposes and appropriations, the value would be established 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, as interpreted by Ohio courts, has broader ramifications than merely paying the value of the property taken. The Supreme Court has ruled that where the law permits possession to be taken before its value has been appraised and paid or tendered to the owner, or where possession has been taken without the institution of such proceeding with the owner's acquiesence, the just compensation to which the owner is entitled included interest on the value of the land from the time possession was taken by the condemnor, State Ex Rel. The Steubenville Ice Co. v. Merrell, 127 Ohio St. 453 (1934). The concept of just compensation is comprehensive and includes all elements, and no specific command to include interest is necessary when interest or its equivalent is part of such compensation. Where private property is taken by the public the Ohio and United States Constitutions guarantee full compensation. Therefore, interest must be paid since it is not just that the owner should bear a loss occasioned by a public act which he cannot resist. In Athens v. Warthman, the court said that it is evident where the agency takes possession prior to a jury determination and where possession may not be taken prior to the deposit of the award, the Constitutional right of interest from time of possession has been recognized and required (25 Ohio App. 91, Athens Co. Ct. A. 1970). This principle has been formalized by statute in Section 163.17 of the R. C. The section also gives a statutory right to interest beginning twenty-one days after the award, subject to certain conditions, to ensure prompt action by the condemnor and to give recognition to the fact that the owner has lost the right to dispose of his property from the time of the award.

In determining compensation in an appropriation proceeding, certain statutes provide a procedural framework to be followed. While the legislature possesses a limited right to provide criteria to be used in the determination of compensation the ultimate authority to determine such questions lies with the judiciary in its capacity as interpreter of Art. I, sec. 19 which guarantees that "such compensation shall be assessed by a jury." The law in Ohio as found in the Constitution and the statutes provides that the jury shall assess the compensation and damages and is entitled to

make the determination from all the evidence (In Re Appropriation of Easements for Highway Purposes, 172 Ohio St. 524, 1961). While this right to a jury determination is absolute, it may be waived by agreement by counsel and the question of compensation submitted to the trial court. 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., the Court held that the operation of section 163.08, 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 (16 Ohio St. 2d 76, 1968).

Section 163.09, which allows a judge to determine the value of property as set forth in any document properly filed with the clerk of courts by the public agency following the expiration of the time period, was also upheld in the same proceeding. The courts, though, have strictly construed this provision. Even if the owner fails to answer, the agency is prohibited from amending its petition subsequent to the expiration of the time period to state an appraisal. Consequently, section 163.09 does not apply and the value has to then be determined by a jury (Board of Education v. Dudra, 19 Ohio St. 2d 116, 1969).

Zoning

Zoning regulations often raise due process and equal protection questions involving the Fifth and Fourteenth Amendments of the United States Constitution and Art. I, sec. 1, 2, 16, 19 of the Ohio Constitution. The problems in Ohio, though, are more specifically related to Art. I, sec. 19, so these issues will be considered here but within the framework of due process. While Art.I, sec. 19 is not obviously concerned with regulation under the police power, the allegations that this power is being used in an unreasonable and confiscatory manner lead to demands for compensation under this section and indicates the necessity of a brief explanation of zoning.

Euclid v. Ambler Realty Co. (272 U.S. 359, 1926) was the first major zoning case decided by the Supreme Court of the United States. Even though zoning was and still is largely an exercise of local powers, federal courts become involved in this type of regulation because of alleged infringements upon the property rights of individuals in violation of due process and equal protection as guaranteed by the Fourteenth Amendment. In Ohio, state cases raised these issues in conjunction with alleged violations of similar state guarantees in the Ohio Bill of Rights. Federal precedents in this area, though, were established earlier and set the tone for later state actions in Ohio as well as elsewhere, and Euclid began the concept, regarding property, that individual liberties in this area were limited by the police powers of local governments to protect the public health, safety, and welfare.

Although regulations similar to zoning laws have existed in America since the first settlements, the regulations considered the first modern

zoning laws were not enacted until 1916 in New York City. Further, until the 1920's, the courts frequently found zoning ordinances invalid when non-nuisance uses were prohibited. Doubts about the validity of the exercise of police powers led to the use of eminent domain for zoning. Under eminent domain, where the right to develop was taken, compensation was paid and assessments were made on the areas benefited by the taking. Supreme Court cases following later led to widespread use of zoning regulations to control development, but several states still rely heavily on eminent domain. This notion that government should pay for the taking of development rights, should charge for the sale of those rights, and should compensate neighboring property owners damaged by the granting of development rights is the basis for this difference in theory. Nevertheless, the police power is still used extensively to control development, and its availability rests largely on a small number of Supreme Court cases that led the way for the states by defining its limits under due process and equal protection under both state and federal constitutions.

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. In 1926, in deciding Euclid, the Supreme Court made a major breakthrough. The case involved a number of large contiguous parcels of land ideally 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 Euclid'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. More extensive 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 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. Borass, the Supreme Court upheld a New York village ordinance that restricted land use to one-family dwellings, with certain exceptions, ___ U.S. ___ 39 L.Ed. 2d 797 (1974). The ordinance, in defining a family, prohibited occupancy by more than two unrelated individuals and on this basis ordered Borass 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 decisions would be upheld if they were not unreasonable or arbitrary and bore a rational relationship to a permissible governmental objective.

In Ohio, as previously mentioned, the 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 v. Joseph, 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 properly 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 Court then ruled that 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 and that the refusal to grant the permit was therefore arbitrary and unreasonable and violated the owner's property rights protected by Art. I, sec. 19 and the due process clause of the Fourteenth Amendment. This was reinforced in a later case (State, Ex Rel. Jack v. Russell, 162 Ohio St. 281, 1954). Holding that it was not the duty of the Supreme Court to pass on the wisdom of zoning ordinances, the Court said that zoning ordinances which were reasonable and which bore a rational relationship to the preservation of the health, safety, or welfare did not violate Art. I, sec. 1, 16, 19 of the Ohio Constitution nor the Fourteenth Amendment of the United States Constitution.

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 powers of local self-government as provided in the home rule amendment, Art. XVIII, sec. 3, and is specifically within 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), a case of alleged spot-zoning, the Supreme Court was more specific. In finding for the Village, the Court 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. The powers of the courts in such matters are severely limited and the court cannot usurp the legislative function by substituting its judgment for that of the council, particularly since governing bodies are better qualified to act in light of their

knowledge of the situation. The power of the 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.

Comparison With Other States

The eminent domain sections of other state constitutions provide concurrently both more and less protection than that provided in Art. I, sec. 19 of the Ohio Constitution. The greater protection is guaranteed by the addition of a word in all four constitutions--"damaged". The Ohio Constitution, as had been seen, guarantees compensation only for property taken and judicial decisions have expanded this to include certain consequential damages and damages extensive enough to constitute a taking. Conversely, Alaska (Art. I, sec. 18), Hawaii (Art. I, sec. 18), Illinois (Art. I, sec. 15), and Montana (Art II, sec. 29) provide that private property shall not be taken or damaged for public use without just compensation. In Alaska and Hawaii, though, this is the full extent of the protection provided, whereas, Ohio specifically states the circumstances th t will permit an appropriation prior to the payment or securing of compensation and assumes that compensation will be made or secured by money and that it will be assessed by a jury without deduction for any benefits accruing to the property owner from public improvements. One could argue that in Alaska or Hawaii private property could be taken at any time and in any manner as long as just compensation was paid eventually, only limited by considerations of due process and state statute. Illinois adds slightly more by stipulating that the compensation shall be determined by a jury as provided by law, but it does not explain when this jury determination must be made nor in what manner compensation must be made. The Montana Constitution allows property to be appropriated after compensation is paid into a court; the owner can then accept this sum or can go to court to try to recover more for his appropriated land. Ohio allows a similar procedure but restricts it. Ohio Revised Code, sec. 163.06 specifies that only public agencies appropriating property to build or repair roads or public agencies which qualify pursuant to Art. I, sec. 19 of the Ohio Constitution may take land upon the filing of a petition and a deposit of the value of the land prior to a jury determination of compensation. Clearly the specificity of the Ohio section provides more protection. Montana does provide for one other right not contained in the Ohio section. Article II, sec. 29 of the Montana Bill of Rights provides that in the event of litigation just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails. In Ohio, there is usually an offer made for the land prior to any formal proceedings perhaps to avoid litigation if possible, because people do not have to avail themselves of their right to litigate and have a jury fix compensation. It is not known by this writer, though, the incidence of litigation over these offers. One might speculate that if a provision similar to that in the Montana Constitution were included in the Ohio Bill of Rights there would be less litigation since the appropriating agency would be prodded to reach a just settlement prior to a formal proceeding. Montana's provision, which includes appraiser's and attorney's fees, would seem to be a great inducement to stay out of court.

Article XIII, Section 5

> Section 5. No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first paid 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 of Section - The current section 5 of Article XIII was adopted in its present form by the 1851 convention. The 1851 convention adopted this provision 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 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. Nevertheless, with the final floor vote of 49 to 37, section 5 was adopted.

Comment

Eminent domain is an inherent sovereign power of the state. Section 5 of Article XIII therefore merely sets forth the method of exercising the eminent domain power, rather than creating it. Clasy v. Cincinnati, Wilmington and Zanesville, Railroad, 4 Ohio St. 308 (1854). The power to grant rights of way to private corporations also would exist even in the absence of the implied grant of power found in section 5.

Section 19 of Article I of the Ohio Constitution reiterates and sets forth the inherent eminent domain powers of the state. The majority interpretation of the power of eminent domain allows the state to take private property for anything of public benefit, even if a private person or corporation will also benefit incidentally Berman v. Parker, 348 U. S. 26 (1954); J. Cribett, Principles of the Law of Property 334 (1962). The Ohio Supreme Court has adopted the majority rule and has interpreted Article I, section 19 in conformity therewith. In the case of Bruestle v. Rich, 159 Ohio St. 13, 110 N.E. 2d 778 (1953), the Ohio Supreme Court held that private property in "blighted" areas could be taken by the city and then turned over to private individuals and corporations for redevelopment. The court noted in Bruestle that the phrase "public use," found in section 19 was the equivalent of public benefit and that the redevelopment of the blighted areas was for the public benefit although private individuals did benefit from it incidentally.

The above public benefit analysis has also been applied to the taking of private land for rights of way given to private individuals and corporations. Clearly when the taking is a right of way for a road or public utility open to or for the benefit of the public, the taking is a valid public use or benefit. Shaver v. Starrett, 4 Ohio St. 495 (1855); 19 O. Jur. 2d sections 23 and 24. Further land may be taken for private uses such as the locating /of/ ditches or

roads which will assist individuals in the cultivation of their land and thus indirectly enhance the public welfare, "Pontiac Company v. Commissioners, 104 Ohio St. 447, 461 (1922). However, when land is taken to facilitate the development of land, it must be shown that the public will benefit from such a taking. 19 O. Jur. 2d 241.

The adoption of section 5 of Article XIII invalidated all prior Ohio laws inconsistent with it, Perrysburg Canal and Hydraulic Co. v. Fitzgerald 10 Ohio St. 514 (1874). Its adoption enabled the legislature to enact subsequent eminent domain laws consistent with its provisions and to establish these as the exclusive methods of compensation for injuries to private property. The Little Miami Railroad Co. v. Whitacre, 8 Ohio St. 590 (1858).

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).

The right to obtain property under a judgment of condemnation is contingent upon the payment of the judgment Wagner v. Railroad Co., 38 Ohio St. 32 (1882). However, the company has no obligation to pay the judgment if it abandons its right of way. Hayes v. Cincinnati and Indiana Railroad Co., 17 Ohio St. 103 (1866).

A judgment of condemnation under section 5 is obtainable by a corporation only upon a showing of properly derived power from the sovereign in the form of a corporate charter and a grant of eminent domain power and of substantial compliance with the terms conditioning the grant. Atkinson v. Marietta and Cincinnati Railroad, 15 Ohio St. 21 (1864).

Because a delegation of the eminent domain power is a delegation of sovereign power and contravenes the rights of property owner, 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. 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. 235 (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.

Further, the Ohio Supreme Court has held that the purchase of the property of a corporation does not carry with it the franchise of the corporation and its right of eminent domain, absent a legislative grant of specific authority for such a transfer. Coe v. Columbus, Piqua and Indiana Railroad Co. 10 Ohio St. 372 (1859) Atkinson v. Marietta and Cincinnati Railroad Co., 15 Ohio St. 21 (1864).

The compensation required by Article XIII, section 5 is the fair market value of the real estate taken, at the time it was taken, without any deductions for benefits as a result of the proposed improvement. Gersy v. Cincinnati, Wilmington and Zanesville Railroad Co., 4 Ohio St. 303 (1854). Additional damages, known as incidental damages may be payable for injury done to the residue of the land by the taking. Cleveland and Pittsburg Railroad Co. v. Ball, 5 Ohio St. 568 (1856).

Traditionally, section 5 has been read in conjunction with Article I, Section 19 so as to require that no "deduction for benefits to any property of the owner" be made. A long recognized exception to the rule, however, is that a benefit in direct mitigation of an incidental damage could be considered in determining the amount of incidental damage done. For example, when the construction of a limited access highway cuts off a landowner's former means of entrance and exit from his land, giving rise to incidental damages. the construction of an access road giving the owner a new means of access must be taken in mitigation of the incidental damages. (Richley v. Bowling, 299 N.E 2d 288, 1972) Another example of a benefit in mitigation of an incidental injury would occur when, in the construction of a railroad, a ditch or excavation is made which drains a swamp and renders a part ofthe owner's land valuable, which had previously been of little value, but the same ditch, in draining the swamp, destroys a valuable spring of water, the injury and benefit may be so blended that they must necessarily be taken into consideration in estimating the compensation to be made. (Cleveland and Pittsburgh Railroad Co. v. Ball, 5 Ohio St. 568, 1856).

The Ohio Supreme Court, in the Richley case, seems to indicate that another exception to the "no benefits" rule may be recognizable in the Ohio courts, that being the allowance of deductions for special benefits. However, the court only expresses this as a possibility and does not decide that this is the case. Special damages are defined as those that accrue directly and solely tothe owner rather than to the community as a whole .

The provisions of Section 5 do not apply to the taking of a right of way by a municipality or a county for a road open to the general public without charge. (Toledo v. Preston , 50 Ohio St. 361, 34 N.E. 353, 1903).

Comparison with Section 19 of Article I

Question: Why was Section 5 of Article XIII adopted, in addition to Section 19 of Article I? Could Section 5 be repealed without having any effect?

Section 5 of Article XIII was the subject of considerable heated discussion in the 1851 Constitutional Convention. Abuses by the railroad and turnpike companies in acquiring land for rights-of-way were fresh in the minds of the delegates; also, they evidently felt that in the new Constitution theywere adopting they were encouraging the proliferation of this type of private companyand any latitude for abuses would be magnified if they did not take care to prevent them. (1 Debates p. 445)

Thus, the language of Section5 can be seen to be elaborate compared to that of Section 19 of Article I. Following are points of difference:

Taking. Section 19 states that compensation must be paid when private property is "taken" for public use. Section 5 requires compensation when a right of way is "appropriated to the use" of a corporation. One of the abuses noted in the debates was the informality with which property was taken and damages paid. The Section 5 language may preclude an interpretation that property is not "taken" until title passes, and thus compensation need not be paid at the time a company comes in to cut trees or lay a roadbed. In light of the many subsequent cases interpeting the legal status of a "taking" requiring compensation under both the fedral and state provisions, however, the language of Section 5 appears to have no legal significance broader than that of Section 19, and this may be considered redundant.

Compensation. Section 19 requires that "a compensation" be made. Section 5 requires that "full compensation" be made. An Ohio case, however, holds that "compensation" as used in Section 19 means "full compensation". Athens v. Warthman, 25 O. App. 2d 91 , 54 00 2d 123, 1970. Thus the language of Section 5 does not appear to add anything to the language of Section 19.

Section 5 adds that compensation must be paid "to the owner", an instruction that Section 19 does not contain. The convention delegates told of cases where owners had no notice of the proceedings. (1 Debates p. 446) Although these words evidently are not discussed in the Debates, one can infer that it reflects an insistence that the owner himself receive the payment, rather than that it be held for him or deposited on his behalf. It would require, for instance, that the owner be ascertained. In current practice, it seems unlikely that these words add anything to the requirements of Section 19.

Benefit from Improvements. Section 19 states:

> "...compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

Section 5 states that compensation shall be made:

> "irrespective of any benefit from any improvement proposed by such corp oration."

Despite the language of Section 19, the courts have differentiated "special" and "general" benefits. This was first done in Little Miami R.R. Co. v. Collett, 6 O. St. 182, 1856. The Court of Appeals for Auglaize County repeated the distinction in Richley v. Bowling, cited earlier, in 1972, observing that some lower court cases (not identifying them) had allowed deduction of "special" benefits, not "general" benefits, the latter being those that accrue to the community at large and consequent enhancement of the value of lands and town lots. The court held that increase in value of land resulting from creation of exits from a limited access highway were general benefits, and thus not deductible. To be "special", the benefit would have to benefit the property directly and solely. The court did not rule as to whether a special benefit could be deducted -- it merely held that this was not special, and thus could not be deducted in any case. A dissenting judge described the benefit as a "windfall" that the jury should have been instructed upon so that it could take it into consideration in determining compensation.

The point of including theforegoing discussion is to indicate that there is judicial opinion that, although Section 19 states that compensation shall be assessed without deduction for benefits, some benefits may be deducted. The question is whether this judicial opinion would be the same under the stronger language of Section 5: "irrespective of any benefit from any improvement proposed by such corporation"?

The practice of the railroads and turnpike companies was evidently as often as possible to pay no compensation, on the theory that the road so benefitted neighborhood properties that benefits equalled or exceeded the loss to the landowner.

Jury. Section 19 requ ires that compensation be assessed by a jury. Section 5 requires that compensation be ascertained by a jury of twelve men, in a court of record. The delegates discussed this point. They feltthat the section must specify twelve men and a court of record, because, under existing practice, appointment of three commissioners was called a "jury," and the appraisal and compensation could be made withoutnotice to the landowner or a court trial (1 Debates p. 444). Subsequent case law appears to assure a twelve-man jury under Section 19, also, without this specification. (Lamb v. Lane, 4 Ohio St. 167, 1854). There the court held that "jury" means a jury of twelve men.

If section 5 were repealed, however, it is open to question whether a "jury" under Section 19 would have to consist of 12 persons in light of recent Supreme Court decisions holding that 12 persons were not required at common law for a criminal jury.

The committee that drafted the Secton 19 provision saw no necessity to define "jury" for they apprehended no disregard of the ordinary, legal meaning of the term;

the committee that prepared the Article on corporations apparently were less confident, or were of a more cautious temper, and they did define it.

Note also the difference in emphasis between "assessed" and "ascertained", the latter implying more clearly that the jury exercise its judgment in reaching an amount, i.e., it is notarubber stamp for the judgment of an appraiser or simply to review the amount awarded by a panel ofcommissioners, but it is to view the land and itself come to a figure.

Quick-Take. No "quick take" is allowed a private corporation under Section 5. There must be a judgment confirming the verdict of the jury, before the corporation is entitled, by a deposit of the amount of the verdict, to possession of the property. Wagner v. Railway Co., 38 Ohio St. 32 (1882). Section 19, on the other hand, allows "quick take" in war or other public exigency, imperatively requiring its immediate seizure, and for roads if they are open to the public without charge. Conceivably, this could allow a private corporation under some circumstances to use quick take, if it were not prohibited by section 5, but it seems highly unlikely that this would occur.

Spirit of the Delegates

Some of the delegates greatly feared the abuses of private corporations and their ability to influence the legislature.

Mr. Stanton: I want simply to protect the rights and interests of private individuals from the over-shadowing power of corporations. (1 Debates p. 446)

Mr. Gregg: The companies always manage to get such men as suit them, into the commission, and go over and value the ground all their own way, and the land owners have to give up to them. (Ibid.)

Mr. Hitchcock was quoted as saying that he wished the legislative power over corporations to be recognized. (2 Debates p. 849)

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). Mr. Stanberry urged that there was no distinction. In the course of this debate, Mr. Ranney stated that what Mr. Stanberry said was "all a fudge." Mr. Norris then rose to criticize the abuse of the "silver mouthed" Mr. Mason, whom Mr. Norris said "never speaks but in the malice of his heart"; Mr. Norris was brought down after some discourse by mounting cries for "order" and a note by the recorder of "great confusion." Mr. Mason was allowed to state that Mr. Norris' "fiery arrows" had fallen harmless at his feet. In the vote which followed, the resolution to strike out Section 5 was defeated by a vote of 49 to 37. (2 Debates p. 850).

Conclusion Section 5 gives more explicit protections, as noted above, where a taking is by a corp oration for a right-of-way. Court decisions have almost entirely eliminated the differences, although not completely.

Ohio Constitution Revision Commission
Judiciary Committee
Bill of Rights Committee
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Research Study No. 440

Bill of Rights
Part 3

Article I, Section 16 of the Ohio Constitution reads as follows:

> 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. Suit may be brought against the state, in such courts and in such manner, as may be provided by law.

The two sentences of this section are analyzed and discussed separately in this memorandum. They originated at different times, and, although related, they have separate impact on Ohio law.

The second sentence - "Suit may be brought against the state, in such courts and in such manner, as may be provided by law." will be discussed first.

A. SOVEREIGN IMMUNITY AND THE COURT OF CLAIMS

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." Squaring such a maxim with American notions of subordinating men to laws has required frequent repetition of the historical explanation of how such a doctrine became imbedded in American jurisprudence. "The real basis of the king's immunity from suit," writes an Ohio commentator[1] "was the impossibility of enforcing a judgment against him." Thus Blackstone, the venerable English authority of the 18th century is cited in footnote:

> "For all jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it; but who... shall command the king?" [1]Blackstone Commentaries on the Laws of England 235.

The sovereign immunity that was inherited by American states has thus come to be viewed as immunity from unconsented-to law 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. Reference to recognition of the rule may be found in the Federalist Papers. Hamilton argued[2]: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."

Early American jurists cited the rationale of a 1788 English case,

Russell v. Men of Devon, 100 Eng. Rep. 359, 362 (1788) as basis for the doctrine: "It is better that an individual sustain an injury than that the public should suffer an inconvenience."

The rationale of Men of Devon was adopted in America in an 1812 Massachusetts case, Mower v. Leichester, 9 Mass. 247 (1812). In that case Mower's horse was killed when it stepped into a hole on the Leichester Bridge. The Court held that Leichester, on the authority of Men of Devon was not liable. One critic has noted[3]: "Curiously, unlike the County of Devon, Leichester was incorporated, could sue and be sued, and had a corporate fund out of which the Judgment could be satisfied. Notwithstanding these differences, the Massachusetts court followed the early English case and thereby created what is today a prevailing American rule."

The Ohio Constitutions of 1803 and 1851 were silent on the question of governmental immunity, but case law shows that it was recognized from an early date.

Constitutional history of sovereign immunity in Ohio

A recent opinion of the Ohio Supreme Court in a case arising out of the Kent State conflagration in May, 1970, affirmed the rule that the state of Ohio is not subject to suits in tort (a civil suit for damages based upon alleged aggravated degrees of negligence in that case) without the consent of the General Assembly. In Krause v. State, 31 Ohio St. 2d 132 (1972) Chief Justice O'Neill, writer of the majority opinion, reviews the history of a proposal before the Convention of 1850-51 that would have constitutionally abrogated immunity in Ohio. He states:

> "Delegate Woodbury presented the convention with the following proposal: 'When any claim or demand shall be presented to the General Assembly, and one-fourth of the members elected to either branch thereof, shall be opposed to the allowance of such claim or demand, the General Assembly shall then and forever thereafter, be prohibited from allowing the same, but provision shall be made by law for the prosecution in the courts of law and equity, of all claims or demands against the state." Vol. 2, Debates and Proceedings of the Constitution Convention of 1850, page 182. Speaking on behalf of the amendment, Delegate Woodbury stated: 'We are all aware that claims are submitted to the Legislature, about which we have no means of ascertaining whether they are correct or not, because the evidence we have is merely ex parte. The allowances depend generally more upon the men who advance the claims than the justice of the claims.*** Claims have been brought here which parties would never think of applying to a court to enforce***.'
> He also argued that: 'Of all bodies in the world the Legislature is the poorest to settle disputes about claims." Id., Vol. 1, page 297

Delegates opposing the amendment argued that the state was immune to suit and to allow it to be sued would be 'no case at all -- there is no possibility of a fair trial, with the state on one side and an individual on the other.' The 'State *** will always be plucked in the absence of *** protection in some shape.' Id., Vol 2, page 182.

When the debate was over Delegate Woodbury withdrew the proposal and governmental immunity remained the law of Ohio. Id., Vol. 1, page 298. The amendment was ultimately rejected by the Convention on December 26, 1850. Id., Vol. 2, page 182. Private claims against the state were redressed only by petition to the General Assembly, as was done prior to 1850... ."

Although the doctrine of sovereign immunity from suit had a judicial origin, it is now constitutionally recognized. Section 16 of Article I of the Ohio Constitution provides as follows:

"16. Redress in courts.

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."

The first sentence of this section originated in 1803 and has been retained since that date without change. The second sentence, stating that suits "may be brought against the state, in such courts and in such manner, as may be provided by law" was proposed by the Constitutional Convention of 1912 and adopted by the electorate on September 3, 1912. The Proceedings and Debates of the Convention of 1912 are also quoted at length in the Krause majority opinion. Delegate Weybrecht's opening remarks about the proposal are noted:

> "The proposal ... recognizes the right of the individual to seek redress for claims against the state in such courts as may hereafter be designated, without petitioning the legislature as is now the custom."

Delegate Weybrecht's remarks indicate that past practices involving claims against the state had included both special legislation permitting suit and special appropriations for the settlement of claims, as determined by legislative committees instead of courts, and he questioned them:

> "Why should the humble claimant against the state be obliged to abjectly supplicate the legislature for the privilege of entering the court of justice? ... Why should the legislature appropriate the people's money in the settlement of claims against the state of dubious and uncertain origin and without the intervention of courts?"

Subsequent objection to the proposal was voiced by Delegate Woods, who feared that it would involve great expense to the state. "The cases will be tried by juries in the local county and the idea will be that 'The state has a lot of money and we will make the state pay.'"

However, the proposal, with a non-substantive amendment, was agreed to.

The Court in the Krause opinion cites one more exchange regarding Section 16.

> "When drafting the explanation to the people, Delegate Hoskins questioned whether the explanation to Section 16 of Article I conveyed 'the idea that legislation is necessary to confer that right or is the right given by the article itself? *** The amendment says that the Legislature shall provide the method of bringing suit. Will the amendment itself confer the right to bring suit?' (Emphasis added by the Court.) Delegate Peck stated: 'The amendment does confer that right.'"

On the basis of reading the amendment in light of its history and interpretations of similar constitutional language in other jurisdictions, the Krause Court held that Section 16 abolishes the defense of sovereign immunity but does not make the state amenable to suit without its express consent.

> "In other words, it was not intended to be self-executing. Consent by the General Assembly would be manifested by the enactment of a statute ... providing in what courts and in what manner suits may be brought against the state."

In holding that the tort action before it was not properly maintainable because Section 16 was not self-executing and because the General Assembly had not consented to such suit, the Ohio Supreme Court expressly approved earlier judicial rulings involving Section 16. Raudabaugh v. Ohio and Palmer v. Ohio, 96 Ohio St. 513, 518 (1917). It reversed the Ohio Court of Appeals for the 8th District, which had held that notwithstanding Raudabaugh-Palmer, the doctrine of sovereign immunity cannot be supported in light of the history of Section 16 as amended in the Convention of 1912 on the non-self-executing issue. That appellate court had further held that operation of the doctrine of sovereign immunity violated the injured party's federal constitutional rights to due process of law and equal protection of the law.

It was to be expected that the events at Kent State in the spring of 1970 would produce litigation which would, in one commentator's view, subject the judicial system to a penetrating re-examination. Litigation is currently pending in federal court that charges public officials and guardsmen with a violation of federal civil rights legislation for performing allegedly illegal acts "under color of state law."[4] In that action the federal District Court dismissed the complaint, holding that respondents were being sued in their official capacities and that the actions were therefore in effect against the state and barred by the 11th Amendment to the U.S. Constitution. That amendment, which states simply that the "judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State," is said to have resulted from the state of alarm that resulted when in 1793 the U.S. Supreme Court declared that a citizen of one state could sue another

in federal court.[5] According to Mr. Justice Bradley, the Chisholm decision so shocked and surprised the states that at the first meeting of Congress following the decision, Congress almost unanimously proposed the 11th Amendment to reinstate the rule stated in the Federalist Papers that it is not in the power of individuals to call any state into court.[6]

In the pending federal court action against Ohio officials the Court of Appeals affirmed the district court on the ground of the 11th Amendment prohibition and the alternative ground that the common law doctrine of executive immunity was absolute and barred action. However, dismissal of the case on the pleadings alone was reversed by the United States Supreme Court in April, 1974, under a holding that (1) the 11th Amendment does not in some circumstances bar an action for damages against a state official charged with depriving a person of a federal right under color of state law and the District Court acted prematurely and hence erroneously in dismissing the complaints as it did so without affording petitioners any opportunity by subsequent proof to establish their claims; (2) the immunity of officers of the executive branch of a state government for their acts is not absolute but qualified and of varying degree, depending upon the scope of discretion and responsibilities of the particular office and the circumstances existing at the time the challenged action was taken.

The action pending is thus against named officers and not against the state. The concept of immunity of government officers from personal liability is said to spring from the same considerations that generated the doctrine of sovereigh immunity.

> "This official immunity apparently rested in its genesis on two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith of subjecting to liability an officer who is required by the legal obligation of his position to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good."

In the Krause case reversed by the U.S. Supreme Court the Court said that implicit in the idea that officials have some immunity -- absolute or qualified -- for their acts, is a recognition that they may err. But the civil rights legislation upon which suit was based, said Chief Justice Burger, "Would be drained of meaning were we to hold that the acts of a governor or other high executive officer has the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government."

Ohio law

Ohio courts have taken a narrow view of what constitutes consent to suit. The rationale for such approach has been the rule of construction that statutes in derogation of the common law are to be

strictly construed. Therefore, since consent to sue is in derogation of the common law doctrine of sovereign immunity, Ohio courts have refused to find consent in the absence of clear and express language to that effect.[8] For example, in Wolf v. Ohio State University Hospital 170 Ohio St. 49 (1959) the Court refused to find consent to sue where the code provides that the Ohio State University Board of Trustees may "sue and be sued." The Court reasoned that since this section does not provide in what courts and what manner suit may be brought against the Board, it was not the intention of the legislature to consent to suits being brought. Furthermore, the code provision establishing the powers of the Board of Trustees was enacted in 1870, and Section 16 of Article I was enacted in 1912. Hence, the statute obviously was not enacted pursuant to the constitutional provision, and according to its terms the constitutional provision is not self-executing.

Prior to the passage of Amended Substitute House Bill No. 800 in 1974 the Ohio General Assembly made no general provision for contract or tort suits to be brought against the state. Specific suits which it authorized (or appeals in instances where an appeal might otherwise not be possible) include the following:

R. C. Sec. 111.19, which authorizes an action to recover fees paid under protest to the Secretary of State;

R. C. Sec. 115.46, which permits a creditor of a state employee to maintain a garnishment proceeding against the state;

R. C. Sec. 119.12, which allows a party adversely affected by any order of an agency issued pursuant to an adjudication denying an applicant admission to an examination, or denying the issuance or renewal of a licensor to take an appeal from such order to the court of Common Pleas;

R. C. Sec. 1523.10, which grants a holder of state conservation bonds permission to maintain an action against the state to recover on them;

R. C. Sec. 2505.03, which enables a party adversely affected by any final order of any board, commission, etc., to appeal to the Court of Common Pleas in certain circumstances;

R. C. Sec. 5301.24, which entitles a person owning real estate in which the state has an interest to join the state as a party;

R. C. Sec. 5519.02, which empowers an owner of land condemned by the Director of Highways to sue the Director in a condemnation proceeding.

This list, though not exhaustive, is fairly complete.

R. C. Section 9.83 authorizes the purchase of liability insurance to protect state officials, employees and agents against liability on

account of damage or injury occurring through the negligent operation of a motor vehicle owned by the state and prohibits the insurance company from denying coverage because of the state's immunity. Thus, the state has provided a fund to compensate people injured or damaged through the negligent operation of state-owned automobiles.

Political Subdivisions

The state's immunity from suit has been held to extend in some degree to its political subdivisions. Having been created almost exclusively with a view towards the policy of the state and for purposes of political organization and civil administration, counties are agencies or instrumentalities of the state and as such are clothed with the same immunity from suit as the state, Schaffer v. Board of Trustees of the Franklin Veterans Memorial, 171 Ohio St. 228, 231 (1960). An individual can sue the county only where the legislature has expressly authorized suits to be brought. The General Assembly has permitted County Commissioners to be sued for damages received by negligence in not keeping a road or bridge in repair (R. C. Sec. 305.12); for the relief of a person temporarily or permanently disabled when his automobile was commandered by a police officer (R. C. Sec. 307.47); for appeals from decisions of the Board of County Commissioners by a person aggrieved by the decision of the Board (R. C. Sec. 307.56); for damages to livestock injured by a dog (R. C. Sec. 955.29); for medical expenses (up to $500) for a person bitten by a rabid dog (R. C. Sec. 955.41 - .42); for injuries (up to $1000) received by a person taken from officers of justice by a mob and assaulted (R. C. Sec. 3761.02); and for injuries (up to $5000) received by a person lynched by a mob (R. C. Sec. 3761.04). Sections 9.83 and 307.44 of the Revised Code authorize to Board to purchase liability insurance.

Municipal corporations have not been as fully protected by sovereign immunity as counties and townships. Courts have recognized the distinction between governmental and proprietary functions of a municipality and have held that a municipal corporation is liable for injuries or damages arising from proprietary activity. Governmental activity is protected, although the General Assembly has subjected municipalities to suit for injuries arising from the following governmental activities: a municipality is liable for injury to persons or property caused by the negligent operation of a municipality owned motor vehicle, with the exception of the police and fire departments while engaging in their official duties (R. C. Sec. 701.02) and for its failure to keep streets, bridges, viaducts and other named ways within the municipality in good repair and free from nuisances. (R. C. Sec. 723.01)[9]

Sundry Claims Board

Prior to 1974 legislation permitting suits against the state to be brought in a new Court of Claims and waiving state immunity from liability, as to most matters the state chose to have its liability determined by the Sundry Claims Board instead of in a court of law. That Board, originally established in 1917, was composed of the Auditor, Attorney General, Chairman of the House Finance Committee, Chairman of the Senate Finance Committee, and Director of the State Office of Budget and Management (formerly the Director of Finance)or representative.

This Board and the method by which claims against the state were heard and decided received considerable criticism over the years. Investigation of claims was said to have caused difficulties because the Board lacked budget and staff to investigate the approximately 500 claims filed annually.[10]

Delays were sometimes "unconscionable" because the Board had to rely upon investigation of the claim by the state agency in question. Other deficiences that have been cited include inadequacy of investigation reports, lack of court procedures such as discovery devices and pre-trial conferences, acceptance of hearsay evidence, uncertainty about legal standards applied by the Board and the availability of precedents, and the difficulty faced by a Board purporting to make decisions on legal considerations where, except for the Attorney General, there was no requirement that Board members have legal training. Furthermore, action after hearing resulted in payment only of claims of $1000 or less and only then if money had been appropriated. Claims over $1000 required approval by the legislature as part of a sundry claims appropriation bill. Board awards were subject to change or deletion as such a bill moved through the legislative process, and the legislature was under no duty to appropriate the funds for payment of claims. Furthermore, the Governor had veto power over the sundry claims bill.

Objections to Board procedures led to a number of attempts to grant broad powers of consent to sue the state. Between 1917 and 1953, some 8 bills were introduced and rejected. By 1953, under the sponsorship of the Ohio State Bar Association, legislation establishing a court of claims finally passed both houses of the legislature, only to be vetoed by Governor Lausche.

"Thereafter, despite continuing scholarly and bar association criticism of the existing system," observe two commentators in a recent issue of Ohio Bar[11]" only one bill received serious consideration prior to 1973. A Court of Claims bill, introduced in 1971, passed the House 59-21 but died in the Senate Rules Committee."

New Court of Claims

Legislation passed in 1974 abolishes the Sundry Claims Board and allows claims to be made against the state through the mechanism of a new Court of Claims. Am. Sub. H.B. No. 800 provides that beginning January 1, 1975 under new Chapter 2743 of the Revised Code "The State ... waives its immunity from liability and consents to be sued, and have its liability determined in the Court of Claims ... with the same rules of law applicable to suits between private parties, subject to limitations set forth ..." It should be kept in mind that the Ohio Supreme Court has said that technically the defense of sovereign immunity was abolished in 1912 but that a defense was still available to the state based on lack of consent to sue because the legislature had never provided for the manner of suit. The waiver and consent in H. B. 800 are limited to the state and its agencies and do not extend to "political subdivisions," defined as municipal corporations, townships, counties, school districts, and other bodies "responsible for

governmental activities only in geographic areas smaller than that of the state..." This exclusion has been contrasted with broad consent statutes in other states and criticized because of the ambiguities in the current law arising out of the governmental-proprietary distinction.[12]

The new law creates a Court of Claims with "exclusive, original jurisdiction of all civil actions against the state permitted by the waiver of immunity..." The new court, designated a court of record, is to be staffed on a case by case appointment by the Chief Justice of the Supreme Court from ranks of incumbent judges of the Supreme Court, Courts of Appeals, Courts of Common Pleas, or retired judges eligible for active duty. The Court is to sit in Franklin County although the Chief Justice may direct it to sit in any county "upon a showing of substantial hardship and whenever justice dictates." A case will normally be heard by only one judge, but may be heard by a panel of three if a claim presents "novel or complex issues of law or fact."

The Supreme Court appoints the clerk and deputy clerks, who must be Ohio attorneys. The clerk's offices are in Columbus, and general operation of the office is subject to Supreme Court control. Practice and procedure are to be regulated by the rules of civil procedure except insofar as they are inconsistent with special procedures in the legislation.

One departure from the rules of civil procedure is a requirement in tort cases involving personal injury or property damage that the claimant give notice of intention to file a claim to the state within 180 days after the cause of action arises. Once notice is given the claimant has two years after the tort was committed in which to file a formal complaint. Failure to file notice may be grounds for dismissal of the suit although it can be waived. The object of the notice procedure is to accommodate peculiarities of state government. A massive turnover of personel or casual record keeping might preclude effective defense of a suit if the first notice was receipt of complaint two years after the act upon which it is based.

Under the statutory procedures claims of less than $100 must and claims less than $1000 may, if the claimant agrees, be determined administratively by the clerk of court. The state agency being sued must investigate the claim and report to the clerk. Either party may have the clerk's determination reviewed by the Court of Claims. No further appeal is allowed on claims decided in this manner. Appeals in cases heard by the Court itself may be taken in the same manner as appeals from the Courts of Common Pleas.

There is provision for removal to the Court of Claims as a matter of right by a party in another court who names the state in a counterclaim or makes the state a third party defendant. The Court of Claims retains the right to remand any case.

Rights of claimants in Court of Claims cases are distinguishable from rights of those in normal civil actions in at least three instances: (1) Except for third party or counterclaim actions not against the state, there is no jury trial for claims against the state

in the Court of Claims; (2) Any award to a claimant against the state must be reduced by the amount of insurance the claimant receives; (3) There are limitations upon the amount of interest that may be included in judgments and upon the payment of judgments.

Specific provision is made for settlement of a claim by a state agency once it is formally filed with the court.

Should the Court of Claims grant a claim against the state, and after all appeals have been completed, it must report its decision to the Auditor of State, who is to issue a warrant to pay the claim. The payment is charged against and paid out of the "available unencumbered moneys" of whatever department, board, or agency is liable on the claim. If no unencumbered moneys are available to pay the claim, it is paid out of the emergency purpose funds. The Office of Budget and Management is charged with making the determination of whether there are "available unencumbered funds" or "emergency purposes funds." If there are no emergency purposes funds available to pay the claim, then the General Assembly will be requested to appropriate the money to pay the claim.

In order to preserve existing rights before the Sundry Claims Board and in order to provide for an orderly transition, the act, by use of references to the respective statute of limitations, waives immunity for varying periods prior to its effective date. Although the number of cases to take advantage of this is expected to be small, immunity is waived, for example, in the following instances: since 1960 for a contract in writing; since 1969 for a contract not in writing; since 1971 for trespass upon real property or for recovery of personal property; since 1973 for bodily injury or injury to personal property; since 1974 for libel, slander, assault, batter, malicious prosecution, false imprisonment, or forfeiture; and since 1965 for all other relief.

Pro's and Cons of Sovereign Immunity

Many prominent legal scholars have protested the continuation of the doctrine of sovereign immunity, and numerous law review writers have called for its amelioration or abolition. Courts and legislatures have both responded to the criticism.

An argument pro and an argument con were respectively the subjects of two recent law review articles,[13] based largely upon the Krause case.

Pro

Robert Howarth argues that the doctrine does not violate rights to due process and equal protection of the laws under the 14th Amendment to the United States Constitution. His authorities cited affirm the point that the question involved is one of local state law, not one involving a federal right.

To the argument that sovereign immunity violates equal protection in that it creates suspect classifications of claimants -- those injured by private wrongs and those injured by public wrongs -- he reasons:

"While one of the most compelling and critical aspects for not granting a court jurisdiction over the state is the necessity of protecting the state from an astronomical invasion of its treasury, the policy also enables the state government to function unhampered by the threat of time and energy consuming legal actions which would appreciably inhibit the rigorous and effective administration of traditional state activities. Additionally, it affords that degree of protection demanded by the numerous administrative and high-risk activities undertaken by the state government; activities unknown to private enterprise (e.g. maintaining a highway system, penal institutions, mental hospitals, providing police and fire protection, etcetera). Clearly, these circumstances establish more than a reasonable basis for leaving to legislative determination the instances when the state shall be subject to suit."

The classification, if one exists, he argues, is a reasonable one. Economic justification and public policy are involved in the rationale which he puts forth. He finds force in stare decisis -- the long-standing judicial recognition of the need for state consent. If access to the courts is a fundamental right, he asserts, that right has been circumscribed by the limitation requiring consent to sue since the origin of our nation's Constitution. In his view orderly administration of law in our country demands that the integrity of the majority be honored.

Justifications for retention of the doctrine have been summarized by Dean Prosser, authority on the Law of Torts, as follows:

"The immunity is said to rest upon public policy; the absurdity of a wrong committed by an entire people; the idea that whatever the state does must be lawful, which has replaced the king who can do no wrong; the very dubious theory that an agency of the state is always outside the scope of his authority and employment when he commits any wrongful act; reluctance to divert public funds to compensate for private injuries; and the inconvenience and embarassment which would descend upon the government if it should be subject to such liability."

Con

In opposition Steven A. Sindell asserts that the doctrine should be abolished as a controlling legal principle because it is unjust, arbitrary and unreasonable and violates the 14th Amendment. He cites the Ohio Court of Appeals rationale (rejected by the Ohio Supreme Court) that:

"If the threat of multiple suits is not a tenable basis for the distinctions created by the immunity, and we hold it is not, then there is none. The distinctions then depend upon a gossamer as frail as that supporting those distinctions founded on nationality or race. A

> distinction so based is capricious and represents no policy but an arbitrary attempt to lift state responsibility without reason. In such circumstances the permissible line between reasonable classification or a rational policy, and a denial of equal protection is crossed. This fatally offends the Constitution. (Emphasis added.)"

Sindell calls the bases for retention -- fear of economic consequences, judicial deference to legislatures, and stare decisis -- an excuse, not a justification. A California study is cited to allay fears of economic catastrophe and as indicative of the fact that tort claims can be adequately buffered by insurance. A California Supreme Court in 1961 repudiated the logic of Men of Devon when it asserted: "Public convenience does not outweigh individual compensation."

Sindell cites the dissenting opinion in the Krause case in maintaining that sovereign immunity violates the equal protection of the laws clause of the 14th Amendment:

> "Lack of equal protection of the laws can arise from the denial to one segment of society the rights to due process of law required by Fourteenth Amendment which are enjoyed by the rest. Discrimination against such a legally 'disenfranchised' group (the victims of state negligence), in derogation of as important a right as due process of law by impeding open and equal access to the court, is, in the absence of a showing of compelling justification, 'invidious discrimination' which violates the equal protection clause."

Critical of the Krause decision, Sindell asserts that it ignored the fundamental issue as to which party is better able to bear the cost, and he calls for change.

Other States

"Criticism of sovereign immunity in the United States dates back to the nineteenth century but did not become widespread until late in the 1920's," reports the often quoted commentary on the subject in Ohio. "Since then the flow of criticism from bench and bar has continued unabated." The criticism has not gone unheeded. Sovereign immunity has been abrogated in many jurisdictions, by legislation or judicial decision, or a combination of the two.

In 1855 the United States Court of Claims was established with authority to hear claims against the government but not including tort claims. The relief allowed was primarily for contractual claims. The jurisdiction of the Court of Claims has been modified and strengthened many times. Where a claim is for less than $10,000 the federal District Court has concurrent jurisdiction with the Court of Claims.

The Federal Tort Claims Act was passed in 1946. It provides that the federal government may be sued in tort and liability established

in substantially the same manner as for a private citizen. Its principal limitation is the area of non-liability for harm caused by "discretionary" acts. Jury trial is not allowed in tort actions.

The national trend appears to be toward abrogation of the doctrine. At least the four state supreme courts of Arizona, California, Colorado and New Jersey have abolished it outright. Decisions in state supreme courts of 12 other states can be said to have limited governmental immunity. These states are: Alaska, Florida, Idaho, Illinois, Kentucky, Michigan, Minnesota, Nebraska, Nevada, Rhode Island, South Dakota, and Washington. In 21 states (not including Ohio) sovereign immunity has been partially or totally abrogated by the legislature. These states are: Alaska, California, Hawaii, Illinois, Indiana, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, North Dakota, Oregon, South Dakota, Texas, Utah, Vermont, and Washington. Although there is some duplication in the last two lists of states, one can say in summary that approximately half of the jurisdictions in this country have repealed or limited the doctrine of governmental immunity in varying degrees. The most common arrangement is for the state court of general jurisdiction to hear actions against the state. Illinois and New York both have a separate Court of Claims.

Ohio has joined the national trend by adopting legislation that waives immunity and grants consent to sue the state. As in most jurisdictions the waiver and consent are subject to some limitations. In Ohio the waiver and consent do not extend to political subdivisions. However, no monetary limit is established as is the case in some states. Also, the Ohio law extends to both contract and tort cases.

The Ohio law incorporates a special court and some specialized procedures, although the rules of civil procedure apply where not inconsistent.

The legislation has received acclaim by commentators who point to extensive criticism of the doctrine of sovereign immunity in this state. One writer applauds the incorporation of the Court of Claims, calling it a more appealing device than using the court system for several reasons:

(1) The legislation prevents a whole new class of suits from being added to the overloaded dockets of metropolitan courts of common pleas and thus promises speedier trials.

(2) To the extent that judges of a special court become familiar with unique types of actions, they develop expertise that leads to a higher quality jurisprudence. To illustrate the point the statement is made that claims such as those arising out of complicated multimillion dollar highway construction contract, which ususlly include hundreds of pages of standard and specialized specifications would be more likely to be tried properly by judges who have experience with them.

(3) The operation of a specialized court, with appeals to a single court of appeals, permits a uniformity of judgment which could not be matched if existing trial

(3) Cont. courts were used.

B. DUE COURSE OF LAW

The first sentence of section 16 reads as follows: "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." This portion of the memorandum discusses this first sentence.

History

The sentence is an almost verbatim copy of its predecessor, Art. VIII, Sec. 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 whether this section was intentionally omitted from consideration by the committee delegated to study the Bill of Rights, whether it was considered but deemed not necessary, or whether its exclusion was an oversight. In any event, its omission was noticed by a delegate, and he introduced a motion to include the original section in the new Bill of Rights. The motion carried amongst general laughter at the thought of being able to receive a speedy trial, and Art. VIII, Sec. 7 of the 1802 Constitution after some minor changes became what is now Art. I, s16, cl. 1 of the Ohio Constitution. 2 Ohio Convention Debates: 1850-1851 337

Comment

"Due Process" as a legal concept cannot be defined in incisive and precise terms, and an analysis of every case that deals with this concept would be impossible. The breadth of this historical limitation upon governmental power is vast, encompassing almost unlimited areas of governmental impact upon individual and corporate rights and privileges. This right, though, was not intended to insulate individuals from all forms of governmental activity which interferred with life, liberty or property. In a society governed by rule of law, in which government is the servant deriving its "just powers from the consent of the governed," the rights of individuals must yield to the greater interests of the society.

The state can and does constitutionally deprive an individual of his life if he commits a capital offense, and his liberty if he is convicted of a crime. Eminent domain enables the state to take an individual's land, and the police power provides the basis for a plethora of state controls on a broad range of activities including land use. Due process acts to regulate the exercise of those powers to protect the individual's interests from society's.

Due process was originally conceived of only as a procedural guarantee; that is, before life, liberty, or property could be taken or impaired, certain procedural steps deemed fundamental as a matter of fair play, and essential as a restraint upon possible arbitrary or uncontrolled governmental action, had to be taken. This limited procedural concept evolved into the principle that due process operates

as a limitation on the power of government to enact laws which were deemed substantively, but not necessarily procedurally, to be oppressive arbitrary or unreasonable.

Due process of law, on the federal level, is essentially composed of the Fourth, Fifth, Sixth, and Eighth Amendments, as well as others. Its fundamental purpose is to safeguard the individual in his well-being: his life, freedom, and possessions. It is the basic standard of conduct in the government's dealings with individuals, requiring that the government abide by the required limits and procedures which the people have established as guidelines for its actions, and due process has been violated whenever the government denies any individual any of his rights as guaranteed by the Bill of Rights. In addition due process is violated when the government would convict someone through the use of a irrational presumption. That is, when the inference of the ultimate fact from the proved fact is arbitrary or lacking in connection between the two in common experience. It is violated when the government has used false or perjured testimony, or where it has suppressed evidence favorable to a defendant that would be material and admissible at trial. The Fourteenth, also, requires that there be a sufficiency of evidence to support a conviction, and in a felony case, that the defendant be afforded his right to be present whenever his presence has a reasonable substantial relation to his own defense.

This is not the full extent of these freedons. In the dissenting opinion in Solesbee v. Balkcom, Justice Frankfurter stated,

> It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just. The more fundamental the beliefs are the less likely they are to be explicitly stated. But respect for them is of the very essence of the Due Process Clause.

339 U.S. 9 reh. den., 339 U.S. 926 (1950)

An earlier opinion had said that procedural due process could only be determined by asking whether or not a certain action violated a fundamental principle of liberty and justice which lies at the base of all our civil and political institutions, Herbert v. Louisiana, 272 U.S. 312 (1926). In Palko v. Connecticut, the Supreme Court held that due process could only be satisfied if there was respect for those principles which are "the very essence of a scheme of ordered liberty" or "implicit in the concept of ordered liberty," 302 U.S. 319 (1937). Broadly stated, this means that individuals have a right to a fair trial or hearing. This same due process prevents the government from acting in a way that shocks the conscience. In such a case, the court will act to negate its effect upon the individual. The underlying factor in determining due process is a consideration of what society

conceives to be fair and just. Due process is not limited to criminal cases alone, but is also a requirement in administrative and civil proceedings.

In civil cases, the government is not usually a party, but the government provides the forum and establishes and enforces the rules governing the use of the court, so it must fulfill its obligation to ensure that justice is done. There are many specific requirements of due process in this area. For example, due process requires that individuals have access to the courts without unreasonable restraints on the exercise of that right, although it does not require that a state open its courts to a foreign corporation for suits on transitory causes of action occurring elsewhere. Under due process, individuals have the right to notice of the pendency of a suit and the right to confrontation. Due process also gives the right to a hearing on the merits combined with the opportunity to present witnesses and the right to know the claims of the opposing party with a chance to meet those claims. Due process opposes an unfair allocation of the burden of proof or presumptions that are arbitrary or that operate to deny a fair opportunity to repel them. Finally, statutes affecting personal or private property will be deemed invalid under due process when they are so vague and uncertain that men of common intelligence must necessarily guess their meaning.

The Fourteenth Amendment due process clause operates to extend the same protections against arbitrary state legislation affecting life, liberty and property as the Fifth, and other Amendments, offer against federal action. The result is that federal laws, invalid because of infringements upon the Bill of Rights, would be equally invalid as violative of the Fourteenth Amendment if instituted by states.

In the Nineteenth and early Twentieth Centuries due process of law in the Fourteenth Amendment was largely used to protect businesses from governmental interference and to promote the doctrine of laissez faire, but in the 1930's that concept's support in the courts collapsed. Substantive due process became a standard for broad rather than narrow government power and specifically extended to previously judicially disapproved regulations of labor conditions, utility activities and rate-making, various business practices, and the general use of the police power. More significantly, substantive and procedural due process tended to merge.

Art. I, s16 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 has been interpreted as an aspect of due process. The first clause, though, has come to mean more than an aspect of due process in the sense of "public" trial as used in the Sixth Amendment of the United States Constitution and Art. I, s10 of the Ohio Constitution. It is interpreted as providing for a specific right for which there is no direct federal parallel, although certain aspects are contained within the concepts of freedom of press and freedom of information, while others are contained within the concept of public

trial for which there is already a specific guarantee. Early cases, as shall be seen, did nothing to clarify this amorphous situation.

State, Ex Rel. Christian v. Barry raised the issue of an "open" court, but the issue was left ambiguous, 123 Ohio St. 458 (1931). The plaintiff, a policeman, brought suit against several superiors who had dismissed him because of his violation of a departmental rule. The rule, in part, stated 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 the man reinstated because of the wording of the rule. The rule did not read that a suit could not be brought until the officer consulted with the department, but rather that a suit could only be brought upon receiving permission. The implication was that permission could either be granted or withheld and the court found that this violated the guarantees of Art. I, §16, that all courts be open, and every person have a remedy by due course of law for an injury done him. Armstrong v. Duffy was similarly general, 90 Ohio App. 233 (Columbia Co., Ct. A., 1951). The National Brotherhood of Operative Potters (N.B.O.P.) 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 passed subsequent to their beginning, but the plaintiffs nevertheless were found guilty of violating these ex post facto rules by a union congress. Those disciplined brought this suit to prevent enforcement. The court ruled against the union discipline saying that under our system of jurisprudence, the courts are open to all citizens, and no person shall be deprived of life, liberty or property without due process of law, and that any provision of any organization restricting its members from pursuing their rights must be strictly construed. In the absence of self-binding limitations by contract, the Fourteenth Amendment of the United States Constitution, Art. I, §16 of the Ohio Constitution and G.C. sec. 12866 insure the right of every citizen of Ohio to seek a remedy in court for any injury done to him or his person or property, and entitle him to have justice administered without denial or delay. Any person who illegally interferred with this right, the court concluded, violated fundamental principles secured by constitutional and statutory guarantees. A later case gave a more definite interpretation of "open" court that has not been overruled.

In Scripps Co. v. Fulton, the company brought suit against a Common Pleas judge to prohibit him from enforcing an order excluding Scripps reporters from a felony case or from excluding them from the courtroom at any other time the court was in session, 100 Ohio App. 157 (Cuyahoga Co., Ct. A., 1955). The order had been given solely upon the request of an alleged felon that part of a trial be conducted in secret. Basing its reasoning on Art. I, sections 10, 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. The Court said that 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 member of the public when on trial for a criminal offense.

The concurring opinion dealt with the constitutional concept of "open" court more directly. It began by saying that in Ohio the "open Court" concept derived from two sources: the Ohio Constitution, and the common law, and that the phraseology of the first five words of Art. I, sec. 16 created an unequivocal mandate that "all courts shall be open," that could not be misconstrued. Judge Hurd then dealt with the argument that this clause was to guarantee that the courts would be open to litigants. This argument, he averred, completely ignored the separation of the open court phrase from the phrase providing for redress of grievances. He argued that if the framers had intended other than to separate these guarantees, they would have made it clear in plain, unambiguous, and unmistakable language. He buttressed his conclusions by tracing the historical development of the concept, from the original right protected in the Northwest Ordinance through all four Ohio Constitutional Conventions. Art. I, sec. 16, he stated, has a twofold purpose: to guarantee justice will be administered in an open court, and to insure that all persons would receive due process, and it is futile to argue that either of these clauses should have a more restricted meaning. While the Ohio Constitution grants the accused in a criminal proceeding the right to a speedy trial, he has no absolute right to a private trial merely because he waives his right to a public trial.

While there is no federal parallel to this guarantee, the second clause of Art. I, sec. 16, which provides for "due course of law," was designed to provide the same protections as the Fifth or Fourteenth Amendment "due process" clauses. This is more than mere parallelism, because Ohio courts have repeatedly held that "due course" of law is equivalent to "due process of law" as it appears in Amendment Fourteen of the United States Constitution, In Re Appropriation for Highway Purposes, 104 Ohio App. 243 (Lorain Co., Ct. A., 1957). Judge Cooley wrote a definition of due process which has received approval in Ohio.

> due process of law, in each particular case means, such as exertion of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.
> 2 Cooley, Const. Lim. 8th Ed., p. 741

This, though, does not clearly give the full extent of the concept of due process. In In Re Schott, there was an extension of power beyond the statutes to deprive an individual of his liberty without the safeguards for the protection of his rights, 16 Ohio App. 2d 72 (Hamilton Co., Ct. A., 1968). The Court in granting habeas corpus said that no citizen of Ohio could be deprived of his liberty without due process of law and one who is so deprived is entitled to a writ of habeas corpus for the purpose of inquiring into the matter. State, Ex Rel. Smilack v. Bushing better exemplifies Cooley's definition, 159 Ohio

St. 259 (1953). One aspect of due process is the requirement that the laws must be followed exactly as written in order to guarantee to each individual affected by the law that he will be treated in a manner no differently than others and will be provided the full measure of protection intended by the applicable laws. In Bushing, an individual was summarily committed for 30 days observation over his and his attorney's objections. This was done soley upon the unsworn statement of the prosecution attorney as to his belief, based on hearsay, that the accused was not sane. There was no semblance of a formal hearing as to the accused's mental condition, and no evidence, tending to prove insanity, was presented. The court acted summarily without following the required statutory procedures, and in sentencing the accused, the court fully and effectively deprived him of his personal liberty. On this basis, the Court of Appeals ruled that the procedure followed operated to deprive the accused of due process of law as guaranteed by Art. I, s16 of the Ohio Constitution and the Fourteenth Amendment of the United States Constitution.

Due process also acts to limit legislative acts or the use of the police power. Anything which a legislative body may declare, without regard to constitutional limitations, is not due process, but if the laws have a reasonable relation to the proper legislative purpose and are neither arbitrary nor discriminatory the requirements of due process are satisfied.

> Law, in its regular course of administration through the courts of justice, is due process, and, when secured by the law of the state, the constitutional requirement is satisfied. Due process is so secured by operating on all alike, and not subjecting the individual to the arbitrary exercise of powers of government unrestrained by the established principles of private right and distributive justice.
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> Sexton v. Barry 233 F.2d 220 (6th Cir.) cert. den. 352 U.S. 870 (1956)

Where there is an arbitrary exercise of the police power by government, the court will act to strike the measure down. In Akron v. Chapman, 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, 160 Ohio St. 382 (1953). The Supreme Court answered in favor of the junkyard dealer saying 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 Art. I, sec. 16, which provides that no man shall be deprived of life, liberty, or property without due process of law. In a similar case, the City of Columbus attempted 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. Further, there was no evidence to support an inference that the failure of the building to conform would constitute an iminent threat to the health, safety, morals, or welfare of the public. The Court,

citing Akron v. Chapman, ruled against the city, holding that Art. I, sec. 16 protected the lawful non-nuisance use of property, saying that courts are obliged to proceed with great caution in these instances and will not interfere with the use of property by the owner unless such use is unreasonable. Selling would not improve the owner's position either, because until the unwilling seller of non-nuisance property found a buyer willing to pay one-half of the value of the property extra to make a non-nuisance improvement, the seller would be subject to a minimum fine of $25 a day, and to this extent, the Code is confiscatory. The Court concluded that to hold otherwise would permit the compulsive improvement 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.

The Ohio Supreme Court overthrew a Toledo statute which limited the hours of grocery stores while expressly excluding other stores from the operation of the law, on the basis of due process, Olds v. Klotz, 131 Ohio St. 447 (1936). The Court said that regulation is not within the police power unless the relation to the public interest and the common good is substantial and the terms of the law or ordinance are reasonable and not arbitrary in character. The exercise of the police power is inherent in government and essential to its existence and inevitably comes into conflict with the right to property and the liberty of contract. In each case the courts must draw the lines of demarcation. Here, the Court held that the ordinance had no substantial relation to the public health, safety, or welfare and therefore, was in contravention of the due process clause of the Fourteenth Amendment and Art. I, s16, because it represented an arbitrary restriction on the ownership of property.

This section, like sections 1 and 19, with which this section must be read, is limited by the police powers of the state, and to this extent, these three sections give a protection somewhat limited by the needs of the state. The police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet 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 all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state. The legislature has the perfect right to act in this manner and the expediency, necessity, or justice of the enactment is determined by legislative not judicial discretion, The Cincinnati, Hamilton, and Dayton Railroad Company v. Sullivan, 32 Ohio St. 152 (1877). Where an 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 effect on certain people, Benjamin v. Columbus, 167 Ohio St. 103 (1957). Whether it is arbitrary or unreasonable is a question for the legislative body and unless its decision is clearly erroneous the courts will not interfere, and where

the legislative body has made determinations that are concerned with health, safety and welfare, the power of the courts is severely limited. A court cannot usurp the legislative function by substituting its 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 inoperative and void 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. If a court decides that a statute fails to comply, it must overturn the law, because 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. 22 43 (1969). It is not enough to define due process in terms of certain acts or conditions, because its meaning changes in reference to the power being exerted, whether executive, legislative, or judicial, the specific incident involved, and the sum of all conditions present at the time of the incident. Generally, though, the guarantee protects all "persons," including corporations.

"Persons" has a broad scope as defined by the courts in Ohio. An enemy alien had had a wrongful death action, begun before the outbreak of World War II, continued until the cessation of hostilities, but a Court of Appeals overruled the lower court's action as an abuse of discretion, Liebert v. Vitangeli, 90 Ohio App. 470 (Stark Co., Ct. A., 1942). The court made its ruling on several grounds. First, there was no federal statute nor had the Chief Executive issued an edict, denying a resident enemy alien the right to prosecute a civil action. Second, the right was protected by Art. I, sec. 16. The Court held that this section protects the right of a "person" to conduct a suit, and "person" means anyone who has been allowed to reside peacefully within our borders (Ohio, United States) may resort to our courts for redress of an injury done to his lands, goods, person, or reputation. In Williams v. Marion Rapid Transit, 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 its mother. Being born and living, after having been injured as a viable fetus qualifies the individual as a "person" within the scope of Art. I, sec. 16.

Comparison With Other States

In comparing Art. I, sec. 16 with similar sections in other state constitutions, obvious differences are immediately apparent. Irrespective of other guarantees or provisions, one phrase appears repeatedly using language taken almost verbatim from the Fifth and Fourteenth Amendment of the United States Constitution,

No person shall be deprived of life, liberty, or property, without due process of law.

Alaska Const. Art. I, s7; Hawaii Const. Art. I, s4; Illinois Const. Art. 1, s2; Montana Const. Art. II, s17; Model Const. Art. I, s1.02.

Article I, s16 of the Ohio Constitution provides that every person shall have a remedy by due course of law for any injury done him in his land, goods, person, or reputation. This section then acts with Art. I, sec. 1 to provide the Ohio guarantee of due process, according to court interpretations. While Art. I, sec. 16 and Art. I, sec. 1 have adequately served to provide the guarantee of due process, their use in this manner seems strained. From the history of these sections, it does not seem that the framers of the 1851 Constitution placed as much importance on them as later courts had to do when relying on them to provide due process. Naturally, this could be the result of changed perceptions of due process, but one could argue that if they had intended to provide due process of the same nature as that of the federal Bill of Rights, they would have done so in the "unmistakable language" that the Supreme Court of Ohio referred to in McKee v. Akron, 176 Ohio St. 282 (1964). This area, then, might become a tumultuous one if the United States Supreme Court changed its stand on certain issues and the Ohio Section was cited frequently. This is not the only difference, though, and with the exception of Art. I, s1.02 of the Model State Constitution, every other constitution studied has a clause or section providing certain other guarantees. Before continuing to those differences, it should be noted, however, that Ohio's Art. I, s16 provides for an open court and prompt justice. Montana's Art. II, s16 provides that all courts will be open, but "open" there is used in the sense of accessibility of the courts to litigants, as distinct from "open" as defined by the Court of Appeals in the Scripps case although earlier Ohio cases implied the concept of accessibility, Bonnet v. Seeking, 126, M. 24, 243 P. 2d 317 (1952). In addition, only Montana's Art. II, s16 and Illinois' Art. I, s12 provide for prompt redress in the courts, but there is a problem that arises from these sections.

Both Illinois and Montana have a due process clause or section and both a separate section that provides for the same rights as does Art. I, sec. 16 of the Ohio Constitution with two differences. Illinois provides a remedy for an injury to privacy, and Montana removes the right to seek remedy from a fellow employee or from an employer if the employer is covered by Workmen's Compensation. (See sec. 35 of Article II of the Ohio Constitution.) Nevertheless, the presence of both sections in both constitutions seem to indicate that the due process clause is designed to provide protection against governmental action, while providing for a remedy at law for injuries, is designed to guarantee the right of civil suit. If Ohio's Art. I, sec. 16 was written for just that purpose, to guarantee the right of civil suit, it would explain its strained interpretation and would account for the presence of the second part of Art. I, sec. 16 declaring that suits may be brought against the state as provided by law, a sentence relating to civil suits, not the concept of due process.

There are other differences between Ohio and Alaska and Hawaii. As part of its due process clause, Alaska also provides that all persons have a right to fair and just treatment in executive and legislative investigations. Since this section was originally drafted in 1956, it is not hard to see why the Alaska Constitution makes this specific, Alas. Const. Art, I, s7. Whether this aspect of due process would always be available in the absence of a specific guarantee is unclear, but it would seem that its availability might depend largely upon the attitudes of the people and courts when the issue is raised. And finally, as an aspect of due process, as well as other rights, in Art. I, s6, Hawaii provides that no citizen shall be disfranchised, or deprived of any rights or privileges of other citizens unless by operation of the law.

FOOTNOTES

1. Comment, "Ohio Sovereign Immunity: Long Lives the King," 2° Ohio St. L.J. 75 (1967)

2. The Federalist No. 81 at 567 (Dawson ed. 1873)

3. Sindell, "Sovereign Immunity -- An Argument Con, 22 Cleve. St. L. Rev. 55, 58 (1973)

4. Krause v. Rhodes, 94 S. Ct. 1683 (1974) based upon 42 U.S.C. Sec. 1983 (charges against guardsmen have been dismissed)

5. Chisholm v. Georgia, 2 U.S. (2 Dall) 419 (1793)

6. Hans v. Louisiana, 134 U.S. 1, 11 (1890)

7. Jaffe, "Suits Against Governments and Officers: Damage Actions," 77 Harv. L. Rev. 209 (1963)

8. Comment, supra note 1, at 84

9. Note, "Claims Against the State of Ohio: Sovereign Immunity, the Sundry Claims Board, and Proposed Court of Claims Act," 35 Ohio St. L.J. 462 (1974)

10. Id. at 476

11. Jenkins and Frye, "The New Ohio Court of Claims -- The Demise of Sovereign Immunity," September 9, 1974 at 991

12. Note, supra note 9

13. 22 Cleve. St. L. Rev. 48 and 55 (1973)

BILL OF RIGHTS
Part 4
Article I, Section 7 - Religious Freedom

Section 7 of Article I of the Ohio Constitution reads as follows:

> 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 beliefs; 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.

History of Section

ArticleI, Section 7 has remained unchanged since it was included in the Constitution of 1851. Largely copied from its predecessor, Art. VIII, Section 3, of the Constitution of 1802, it was re-written and enlarged in 1851. The Constitutional Convention added three new clauses to the old section to expand the guarantee of rights contained in Art. VIII, Section 3. In light of present interpretations of the First Amendment to the Federal Constitution, it might be more proper to say that they only specified what was previously implied. The one provision that is truly different from the Federal, establishing an affirmative obligation in the legislature to promote education, existed in the 1802 Constitution. 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.

Comment

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(speech, press and assembly are covered elsewhere). Although basic to the American concept of government and democracy, this right has, nevertheless, engendered a great deal of litigation, producing broad guidelines and interpretations with test to determine the extent of the protection for individuals and the limits of governmental action in respect to religion. The commentary, though, will be limited. Because of the breadth of this subject and because of the still unresolved questions, even now being litigated, involving the relationships between religinn, schools, and public monies, this section will only attempt to provide an overview of the substantive law involved.

The First Amendment's constitutional guarantee and inhibition has a broad and double aspect. It forestalls compulsion by law of any creed or form of worship. Freedom of conscience and freedom to adhere to the religious organization or form of worship of one's choice cannot be restricted by law. Not only does the Amendment protect freedom of conscience, but it also safeguards the free exercise of the chosen form of religion, embracing freedom to believe and freedom to act. Freedom to believe is absolute but freedom to act is not, because conduct, even religious actions, can be regulated for the protection of society. This power to regulate, though, to help attain the permissible goals of society, cannot be exercised in a manner that infringes upon a protected freedom.

In Cantwell v. Connecticut, (310 U.S. 296, 1940) such an issue was raised. Cantwell was arrested and convicted of violating a statute requiring that anyone engaged in the solicitation of funds for religious purposes first obtain a certificate, which indicated that the person had been determined to be actually connected with a religious organization and engaged in activities on its behalf. Cantwell appealed, contending that the act, as applied to him, offended the due process clause of the Fourteenth Amendment because it abridged or denied religious freedom and the freedom of speech and press. The Supreme Court recognized the Fourteenth Amendment argument saying,

> The fundamental concept of liberty embodied in that (Fourteenth) Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislature of the states as incompetent as Congress to enact such laws...

The Court continued, saying that prior and absolute restraint in denying the right to disseminate religious views clearly violates the terms of the guarantee of the First Amendment. The state, though, has an equally clear right to regulate by general and non-discriminatory laws the times, the manner and places of soliciting, and the holding of meetings in its streets, and may in other respects safeguard the peace, good order, and comfort of the community without unconstitutionally invading liberties protected by the Fourteenth Amendment. This statute was held to be unconstitutional. Drafts and conscientious objection are not recent responses to war nor are the legal conflicts that they raise. During World War II, a man named John Baxley, among others, knowingly counselled people to evade registration and service in the army, Baxley v. United States, 134 F.2d 937 (4 Cir., 1943). In doing so, he violated a law and was arrested, tried and convicted. He appealed. As part of his defense, he argued that under the First Amendment, he had an unrestricted guarantee of the right to teach and preach his religion, part of which was an opposition to war. The Court said that the First Amendment was a broad guarantee that should be generously and liberally construed by the courts, but that it was also clear that the rights of an individual under this Amendment were neither absolute nor limitless. Further, one may not be punished for his views or beliefs, but when these views, as practiced, constitute a clear and present danger to the health, safety, or general welfare of the community and are violative of laws enacted for its protection, a violation may be punished. The Court said that if one violates a criminal statute out of a sincere religious belief that the act was not only right but also a duty, the person was criminally responsible. The civil authority, the Court asserted can never concede the extreme claim that police regulations of general application, which are not directed against any sect or creed, are constitutionally inapplicable to persons who sincerely believe that the observance of those laws is an insult to God. The law, criminalizing counselling to avoid registration or service, the Court held, was designed for the protection of the community; its violation was not a protected activity under the First Amendment.

Gillette v. United States combined several cases dealing with the problem of conscientious objectors, 401 U.S. 437 (1971). The question in these cases was whether conscientious scruples, relating to a particular conflict, were within the purview of established provisions relieving conscientious objectors from military service. As part of their argument, petitioners contended that Congress interfered with the free exercise of religion by failing to relieve objectors to a particular war from military service when the objection was religious or conscientious in nature. More specifically, they argued that the special statutory status accorded conscientious objection to all war, but not objection to a particular war, worked a de facto discrimination among religions. The Court did not agree.

The Establishment Clause, Congress shall make no law respecting an establishment of religion, it said, prohibits the government from abandoning secular purposes in order to put an imprimatur on one religion or on religions as such, or to favor the adherants of any sect or religious organization. It stands, at least, for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in impact.

The Free Exercise Clause ("...or prohibiting the free exercise thereof..."), the Court said, bans government regulation of religious beliefs or interference with the dissemination of religious ideas. It prohibits misuse of secular government programs "to impede the observance of one or all religions or... to discriminate invidiously between religions,... even though the burden may be characterized as being only indirect," Brownfeld v. Brown, 366 U.S. 599 (1961) (opinion of Warren). The Free Exercise Clause may even condemn certain applications of neutral prohibitory or regulatory laws having secular aims, when the burden on the First Amendment is not justifiable in terms of a government's valid aims.

In finding for the government, the Court concluded that the impact of the conscription laws on objectors to particular wars was far from unjustified. The conscription laws were not designed to interfere with any religious belief or practice and did not penalize any theological position. The incidental burdens to people in the plaintiffs' position were strictly justified by substantial government interests in preventing totally free choices in whether to serve or not and in procuring manpower necessary for military purposes, pursuant to the constitutional grant of power to Congress to raise and support armies.

In Everson v. Board of Education, 330 U.S. 1, 1947, the Supreme Court formulated a more concise definition of the Establishment Clause,

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

> Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

In Sherbert v. Verner, 374 U.S. 398, 1963, the Supreme Court said that the Free Exercise Clause prohibited government regulation of religious beliefs as such, Government said, it could neither compel affirmation of a repugnant belief nor penalize or discriminate against individuals or groups because they held religious beliefs abhorrent to the authorities, nor could the government employ the taxing powers to inhibit the dissemination of particular religious views. On the other hand, the Court has rejected challenges under the Free Exercise Clause to government regulations of certain overt acts prompted by religious beliefs or principles. Even when the action is in accord with one's religious principles, it is not totally free from legislative restrictions. The conduct so regulated, though, has invariably been seen as posing some substantial threat to public safety, peace and order.

While the exercise of the police powers by the state and delegated power by the federal government does limit absolute freedom in the exercise of certain religiously oriented or motivated actions, there are areas of protected activity which conflict with the state's exercise of its power for the health, safety and general welfare of the community. In Wisconsin v. Yoder, 406 U.S. 205, 1972, the state sought to enforce its law requiring school attendance until age sixteen against the Amish. The Wisconsin Supreme Court invalidated the conviction and the United States Supreme Court affirmed. The law required that all parents, including the Amish, send their children to school until age sixteen, but the Amish had refused to send their children to school beyond the eighth grade. They defended their violation of the law on the grounds that the law violated their First and Fourteenth Amendment rights. Attendance was against the tenets of the Amish religion and way of life. They believed that by sending their children to school they would expose themselves to the censure of their church and endanger their salvation and that of their children. The Amish viewed secondary school education as an impermissible exposure of their children to a worldly influence incompatible with their beliefs. The Courts, in upholding their claims, said that a state's interest, however highly ranked, in universal education was not totally free from a balancing process where its interest impinged upon fundamental rights and interests, as those protected by the Free Exercise Clause of the First Amendment, and the traditional interests of parents in the religious upbringing of their children, so long as the parents prepared the children for additional obligations. In order for Wisconsin to compel school attendance against the claim that it infringed upon freedom of religion, the state would have to show that the requirement did not interfere with the exercise of religious beliefs, or that the state's interest was of sufficient magnitude to override the individual's interest.

A Black Muslim, an inmate of a Virginia state prison, was denied the right to receive or obtain certain Black Muslim materials and to hold prayer meetings, Brown v. Peyton, 437 F.2d 1228 (4 Cir., 1971). In ruling on the case, the Court said that prisoners did not shed their First Amendment rights at the prison door.

The First Amendment is a preferred right, though, not an unlimited one, and it could be restricted to protect the health, safety, and welfare upon a showing of a compelling state interest. Prison officials have a legitimate interest in the rehabilitation of prisoners and may legally restrict freedoms in order to further this interest where a coherent, consistently-applied program of rehabilitation exists. Furthermore, the Court said, many restrictions on First Amendment rights were undoubtedly justifiable as part of the punitive regimen of a prison and additional restrictions could be imposed as part of a system of punishing misbehavior within the prison. The state has an interest in reducing the burden and expense of administration, but the individual's desire to practice his religion could only be restricted upon a convincing showing that a paramount state interest so requires.

In the 1960's, controversy under the First Amendment centered on religion, schools, and public monies. The legal arguments have been intense with equally intense partisans supporting opposing arguments and the controversy continues. Out of the contention, a final solution to these problems has not yet been reached.

While the First Amendment has been argued to keep children out of schools, as in Yoder, it has also been used to keep public schools free from sectarian considerations. The major case establishing this and perhaps the first major case in this controversy involving religion, schools, and money, was Engel v. Vitale, 370 U.S. 421, 1962, the "school-prayer" case. In ruling against the use of prayers or Bible reading in public schools, the Supreme Court said that the constitutional prohibition against laws respecting an establishment of religion must at least mean that, in this country, it is not part of the business of government to compose official prayers for any group to be recited as part of a religious program carried on by government. The First Amendment was added to the Constitution as a guarantee that neither the power nor prestige of the federal government would be used to control, support or influence the type of prayers Americans say. This was reinforced by the Fourteenth Amendment which incorporated it to make it applicable to the states. Consequently, neither federal nor state government possesses the power to prescribe a prayer to be used as part of any program of governmentally sponsored religious activity. The Establishment Clause rests on the belief that a union of government and religion tends to destroy government and degrade religion, and unlike the Free Exercise Clause, which is violated by a showing of direct government compulsion, it is violated by the enactment of laws which establish an official religion whether or not the laws operate directly to coerce non believing individuals.

Walz v. Tax Commission of the City of New York, dealt with next issue - subsidies, 397 U.S. 664 (1970). Tax exemptions for churches were attacked, but the Supreme Court held that they did not violate the Establishment Clause. The Court asserted that granting tax exemptions to churches necessarily operated to afford an indirect economic benefit and also gave rise to some, but yet a lesser, involvement than would taxing them. A direct subsidy would closely involve the state with the church, but this was not the case. A subsidy would involve a direct transfer of public money to the subsidized enterprise and would use resources extracted from the taxpayers as a whole. An exemption involved no such transfer. Rather it assisted passively by relieving a privately funded venture of the burden of paying taxes. In direct subsidies, the state would divert income of both believers and non-believers to the churches, in using exemptions, the state merely refrained from diverting to its own use income independently generated through private contributions.

Thus, the symbolism of tax exemption was significant as a manifestation that organized religion was not expected to support the state and by the same token the state was not expected to support the church.

The Supreme Court had ruled against direct subsidies to religious institutions, but the education "crunch" forced many state legislatures to try to funnel money into the area of private education, a large portion of which was sectarian. As educational expenses grew, private school tuition went up forcing school-aged children into public schools. The argument was made that, if money could be channelled to relieve some of the burden on private schools or parents, the children would remain in private schools at a small percentage of the cost of educating them in the public school. Twenty percent of New York's children were in private schools, 98% of which were sectarian. An added benefit would be the preservation of institutions that contributed towards a pluralistic society. The number and variety of the various state plans designed to funnel the public funds into private schools brough about more exact tests to determine whether any legislative activity would lead a violation of the First Amendment. The first Supreme Court case in, was Lemon v. Kurtzman, 403 U.S. 602 (1971). The case was a consolidation of two cases, one dealing with a Rhode Island statute, the other with a Pennsylvania statute. Rhode Island passed a law which basically provided for 15% salary supplements for teachers of secular subjects in non-public elementary schools. Pennsylvania adopted a somewhat similar program which provided for a reimbursement of the costs of secular educational services for teachers' salaries, textbooks and instructional materials. The Supreme Court held that both plans violated the First Amendment. The Court declared that the authors of the First Amendment did not simply prohibit the establishment of a church or state religion; instead, they commanded that there should be "no law respecting the establishment of religion." A given law might not establish a religion, but would be a law "respecting" that and would therefore violate the First Amendment. They asserted that the Establishment Clause was written to guard against three main evils: sponsorship, financial support, and active involvement of the sovereign in religious activity. The Court then set out three tests to determine whether the First Amendment prohibition had been violated. A statute was consitutional if it had a secular legislative purpose, if its principal or primary effect was one that neither fostered nor inhibited religion, and if the statute did not foster an excessive government entanglement with religion.

Brusca v. State of Missouri, Ex Rel. State Board of Education, clarified the rights of parents and students with respect to school funds, (332 F. Supp. 275, D.C. E.D. Mo. 1971, aff. 405 U.S. 1050, 1972. Plaintiffs sought to invalidate certain sections of the Missouri Constitution and the implementing statutes on the grounds that they prevented or impaired the free exercise of religion by the plaintiffs and denied them equal protection by providing or allowing the funding of only public schools from taxes. The plaintiffs claimed a share of tax monies for the purpose of providing religious education for their children. The Court in ruling against their claim found that there was nothing arbitrary or unreasonable in the determination by the State to deny its funds to sectarian schools or for religious instruction. So long as no invidious discrimination existed, it held, the courts could not interfere. All children have the same right to attend free secular schools maintained with tax funds. The fact that parents chose to forego the exercise of this right to educational benefits, provided by the public school system, did not deprive them of anything by state action. In addition, the parent had no constitutional right to any credit for his taxes which support the public schools simply because he did not make use of the schools.

That the result of a voluntary choice by the parents was the imposition of an economic burden upon them was not, however, violative of either the First or the Fourteenth Amendment.

The Lemon test was used in Levitt v. Committee for Public Education, 413 U.S. 472 (1973). The appellants argued that the state should pay for everything mandated. This argument was rejected by the Supreme Court. By analogy, it said, if the state required minimum lighting and sanitary facilities, such commands would not authorize a state to support these facilities in church-supported schools. The essential consideration was whether the challenged state aid had the primary purpose or effect of advancing religion or religious education or whether it led to excessive entanglement by the state in the affairs of the religious institution. That inquiry, it concluded, would be irreversibly frustrated if the Establishment Clause were read as permitting a state to pay for whatever it required a private school to do.

Among the most recent cases is Wolman v. Essex, 342 F. Supp. 399, aff. 409 U.S. 808, re. den. 413 U.S. 923 1973, which is illustrative of the present legal interpretations as well as the importance of the Lemon test. The plaintiff sought to have an Ohio statute declared unconstitutional as violative of the Establishment Clause of the First Amendment. The Ohio statute provided that money would go as educational grants to parents with children in non-public schools and to promote services and provide materials for pupils attending these schools. The grants were to reimburse parents for a portion of the financial burden experienced by them in providing for their children, at a reduced cost to the taxpayer, educational opportunities equal to those available to public school pupils in the district. The Court ruled against the statute, although that decision was subsequently reviewed and the case is now pending in the U.S. Supreme Court.

The Free Exercise clause, it said, has been read in a more restrictive manner historically than has the Establishment Clause. Secular and religious purposes do co-exist and sometimes clash, when this happens the secular purpose can override the religious in appropriate circumstances without constitutional infirmity. In a like manner, the state can require that church property meet secular safety standards and may pass regulations and inspect to insure that parochial schools are certifiable under secular criteria, and neither of these requirements or others of like character violate the free exercise clause. The Court then applied the Lemon test, and the statute failed.

The statute passed the first requirement that the statute express valid secular purpose, but it began failing on the second. The second test is that the primary effect of the statute must not be one that either advances or inhibits religion. Here, the Court determined that the limited nature of the class and the fact that one class so predominated made the constitutionality of the act suspect. In cases where the courts had upheld legislation attacked on the basis of the Establishment Clause, the affected class had been much broader than the class affected by the Ohio law (private school pupils). Valid statutes had provided for reimbursement of travel expenses of children attending all schools; they had required school boards to supply books to all students, regardless of school attended; they had allowed property tax exemptions to a huge class of non-profit institutions, including all religious denominations along with libraries, parks, hospitals and museums; and they had authorized construction grants generally to all institutions of higher learning, while placing certain restrictions on grants to religiously affiliated institutions.

In each of these statutes, religiously affiliated institutions were among a broad class of beneficaries deriving direct or indirect benefits from a general broad based policy. The Ohio plan was restricted to a small number of the entire class of Ohio students, so its neutrality was cast into doubt. The Ohio statute also failed the third test requiring that the statute does not foster excessive entanglements. The Wolman court divided this test into two aspects that had to be considered whether there would be administrative or political entanglement. Administratively, it was necessary to consider the use of the aid, to whom it was given and the extent it was necessary for the state to intervene. The statute was suspect on every point. The money was partial reimbursement for tuition which could not be said to be neutral, non-ideological, or indifferent on religion when used for parochial schools. Further, the statute provided no restriction nor guidelines to insure that money would not be used for secular purposes. Politically, the statute could be divisive since it would have required periodic grants of money from the legislature for a statute that had a sectarian cast. For all these reasons, the statute was declared unconstitutional. However, the final result on this statute is not yet known.

The Ohio Constitution adopts a hand-off policy towards religion and requires that each religious denomination maintain that same policy towards the others. It also recognizes that men have the constitutional privilege to worship God according to the dictates of their consciences, and the right to teach these beliefs to their children; the commitment to this right has been formalized by Art. 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, and Art. I, Section 7 guarantees by its second sentence that the legislature cannot pormote Christianity or any other belief beyond passing laws to protect them from outside interference, Board of Education 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 (1878). Ohio, further, specifically states that an individual's religious beliefs will not disqualify him as a witness; Art. 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. Outside of the court room, whenever the attorney of the person to be sworn is called to the fact that a statement will not be a mere assernation, but must be sworn to, and in recognition the individual is asked to perform some act, this is considered a statement under oath.

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.

Accordingly, the courts felt that they were not allowed to interfere with decisions of local school administrators about their policies of either allowing or prohibiting some religiously oriented activities, as Bible reading. Recent decisions, however, starting with Engels v. Vitale, in the federal courts have removed this freedom of choice from the hands of Ohio public school administrations. This particular line of cases will continue to govern in this area until overturned, which now seems doubtful, or until there is a constitutional amendment, which would allow each state or school district to decide.

The state section, while following the express or implied concept of separation of church and state in the federal Amendment, at the end contains an anomaly. Article I, Section 7 has provided that schools be encouraged and the section was not limited to secular schools, Honohan v. Holt, 46 Ohio Op. 2d 79, 244 N.E. 2d 537 (Franklin Co., C.P., 1968). Since there is no direct prohibition in the state Constitution, benefits directly available to all students of the state are also open to pupils of religious schools. This last phrase of Art. I, Section 7, "to encourage schools and the means of instruction," has been interpreted generally as separate from the preceeding clauses, as in Holt. It is viewed as providing the constitutional basis for legislative control of education, and as giving the legislature the power to pass laws to secure the organization and management of a comprehensive school system with few express restrictions. The restrictions are those generally provided by the rest of Art. I, Section 7 separating church and state and by Art.VI, section 6 requiring that no religious sect ever has any exclusive right or control over school funds.

Comparison With Other States

With the exception of Illinois, all of the other states' sections reviewed guaranteeing freedom of religion are simple. Hawaii and the Model State Constitution both guarantee this freedom in a section that is identical to the First Amendment, Hawaii Const. Art. I, Section 3; Model State Constitution Art. I, Section 1.01. Alaska's Art. I, Section 4 says,

> No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof.

Montana's Constitution has an identical guarantee but prefixes it with "the state shall make no law respecting, " Montana Const. Art. II, Section 5. Illinois, like Ohio, is more specific, but Art. I, Section 3 of the Illinois Constitution adds several phrases not contained in Art. I, Section 7 of the Ohio Constitution while condensing others. For example, it states, "no person shall be denied any civil or political right, privilege or capacity, on account of his religious beliefs," and it adds that liberty of conscience shall not excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state. But these are not necessary; all are implied in the simpler phraseology. This implication, though, is by interpretation, and this can change. Several of these states provide specific protection from religous discrimination in other sections of their Bills of Rights, but this will be discussed in conjunction with equal protection. Finally, it should be noted that none of these states have any parallel to the last part of Art. I, section 7 of the Ohio Constitution, either in establishing a duty for the legislature to pass laws to protect different modes of public worship, or in establishing a duty to encourage schools and the means of instruction, although Illinois has a section among its school laws that relates to the question of using school monies for private schools. Illinois statute 122 section 22-10 makes it a serious misdemeanor for any official or public officer with responsibility for school funds or property to divert either for the benefit of any edcational institution controlled by any denomination.

Ohio Constitutional Revision Commission
Bill of Rights Committee
December 16, 1974 Research Study No. 44E

Bill of Rights Part 5
Article I, Section 11

Section 11 of Article I reads as follows:
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.*

History of Section 11

The predecessor of this section was Art. VIII, Section 6 of the 1802 Constitution. Article I, section 11 of the Constitution of 1851 altered the rights protected under the original section and subtly changed its focus. The original section seems to have been largely concerned with protecting freedom of the press and the press' 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 Ninteenth Century. It provided a general guarantee of freedom of speech and press and it is this guarantee which forms the opening clause of Art. I, section 11 of the 1851 Constitution. One could surmise that the press' 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 Art. I, section 11 was added to further protect the basic right of freedom of speech and press. In addition, Ohio has several statutes that make the protection of the press more explicit. Sections 2739.04 and 2739.12 of the Revised Code guarantee the privilege of confidentiality to members of the various media against an attempt by an organ of government to force them to reveal sources of information.

* so in the original

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 Art. 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.

Comment; Comparison With Federal Constitution

Freedom of speech and of the press, as guaranteed by the First Amendment to the Federal Constitution and interpreted by the courts, is a basic constitutional right, secured by a very general statement:

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

* so in the original

Problems arise because of the danger that the totally free exercise of that right will interfere with the rights and interests of others. However, a complex guarantee would not simplify the difficulty because of the danger of the exclusion of non-specified protected activity. As a consequence of the ever present tensions between conflicting interests, the courts have had to develop guidelines to regulate the exercise of the right with the result that the right, as it presently exists, is largely a product of judicial interpretation. The courts, though, have not established a final set of guidelines. As society changes and has different needs and interests, as the membership of the courts changes and applies new interpretations, as a new problem arises and demands new solutions, freedom of speech and of the press has also changed. As a result, there are no easy answers to the question of what is the First Amendment freedom of speech and press. Consequently, this section will attempt to provide only the most general statement about this freedom, pointing out certain limitations and recent interpretations, and is not intended as a definitive or complete explanation of the rights.

The First Amendment secures freedom of expression upon public questions. It was fashioned to assure an unfettered exchange of ideas in order that the people could secure the political and social changes that they desired. The ultimate end desired to be achieved by the exercise of this right, and, therefore, the need for its protection, was that government would be responsive to the will of the people in order that change would be obtained by peaceful means. That end is essential to the security of the Republic and a fundamental principle of our system. So necessary is this freedom that it does not turn upon the truth, popularity, or social utility of the ideas or beliefs which are offered, New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Justice Black, in his concurring opinion in Sullivan, said that the Fourteenth Amendment made the First Amendment applicable to the states. This meant that since the adoption of the Fourteenth Amendment, neither a state nor the federal government has power to use civil libel laws or any other law to impose damages for merely discussing public affairs and criticizing public officials. A faithful interpretation of the First Amendment, he said, would be that, at least, it leaves the people and the press free to criticize officials and discuss public affairs with impunity. While the Court held that obscenity and fighting words were not expressions within the protection of the First Amendment, freedom to discuss public affairs and public officials was unquestionably the kind of speech the First Amendment was primarily designed to keep within the area of free discussion.

Justice Goldberg, in a concurring opinion, said that the First and Fourteenth Amendments afforded the citizen and the press with an absolute and unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses. The theory of the Constitution, he said, was that all may express an opinion on matters of public concern and may not be barred from speaking or publishing because those in control of the government think that what is said or written is unwise, unfair, false, or malicious. In a democratic society, one who acts for the people in an executive, legislative, or judicial capacity must expect his acts to be discussed and criticized and he can not deter this by using courts to punish this free exercise under the label of libel.

In a later New York Times case, the "Pentagon Papers" case, several of the justices were more specific about the First Amendment and the nature of freedom of the press in a free society, New York Times Co. v. United States, 403, U.S. 713 (1971).

Justice Black, in his concurring opinion, maintained that both the history and the language of the First Amendment supported the view that the press had to remain free to publish news, whatever the source, without censorship, injuctions, or prior restraint. The First Amendment, he said, gave the free press the protection it needed to fulfill its essential role in society. The government power to censor the press was abolished so that the press could remin free to censure the government, and the press was protected so that it could reveal the secrets of government and inform the people. Justice Brennan asserted the chief purpose of the First Amendment was to prevent previous restraint on publication. Only a government allegation and proof that publication must inevitably, directly, and immdiately cause the occurance of an event, of the same magnitude as imperiling the safety of a troopship already at sea, he felt, could support even the issuance of an interim restraining order. This freedom of the press is not limited to newspapers alone.

The Supreme Court, in Lovell v. City of Griffin, 303 U.S. 444, 1938, declared a municipal statute unconstitutional because it violated the First and Fourteenth Amendments. Because municpal ordinances are adopted under state authority, they constitute state action and are within the prohibitions of the Fourteenth Amendment which made the First Amendment applicable to the states. The statute in question forbade the distribution of literature in the city without a permit from the City Manager, who had discretion in their issuance. This discretion led to the overthrow of the statute, because it could lead to abuses. In finding for the appellant, the court said that the liberty of the press was not confined to newspapers and periodicals; it also embraced pamphlets and leaflets. The press, in its historic connotation, included every sort of publication which afforded a vehicle of information and opinion. Further, the Court said that liberty of circulation was as essential to freedom of the press as liberty of publishing because, without circulation, the publishing would be of little value. In Griswold v. Connecticut, 381 U.S. 479, 1965 the Court said that the state could not, consistently with the spirit of the First Amendment, constrict the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or print but the right to distribute, to receive, and to read, and the freedoms of inquiry, thought, and teaching, the freedom of the entire university community.

Symbolic speech, although not always distinguishable from conduct and accordingly ill-defined in the law, is also accorded First Amendment protection equal to that provided more conventional speech. Melton v. Young 328 F. Supp. 88, D. C., E.D., Tenn. 1971 involved freedom of expression. The plaintiff wore a prohibited emblem to school on his jacket and was suspended for his refusal to discontinue wearing it. Citing Tinker v. Des Moines, 393 U.S. 503 (1969), the court said that, although the language of the First Amendment was a limitation on Congress, the principle was firmly established that the concept of due process, as contained in the Fourteenth Amendment, incorporated all of the fundamental rights contained within the First Amendment and accordingly forbade state abridgement of freedom of speech. The Court continued by saying that whenever any public body acted in a manner injurious to persons or property or restricted the freedom of an individual, the Constitution required that the action be consonant with due process. Therefore, regulatory measures, no matter how well intentioned or sophisticated could not be employed by public bodies if their purpose or effect was to stifle, penalize, or curb the exercise of rights guaranteed by the First Amendment, which did not speak equivocally but rather in broad and explicit terms. Melton, though, lost his appeal because in this instance his symbolic speech was not protected.

Freedom of speech is not an absolute right; it must be exercised, and has been interpreted, so that it does not infringe upon other rights equally secured by the Constitution. Reasonable and non-discriminatory regulations of time, place, and manner have always been permissible restrictions on expression although as stated previously, it may not be limited merely because of disagreement with or dislike of the content of the expression. Another limit on the freedom of expression is the clear and present danger rule which says that a limitation of free speech may be permissible if it is justified by a clear public interest -- that the public will be threatened by a clear and present danger by the exercise of the freedom of speech.

The clear and present danger rule was the issue in Carroll v. President and Commissioners of Princess Anne Co., 393 U.S. 175 (1968). Here, the appellant was enjoined for ten days from holding a rally which, it was alleged, would tend to disturb or endanger the citizens of the country. The injunction was obtained after the appellant held a rally that was filled with language that the listeners might well have construed to be a provocation to Blacks and an incitement to Whites. In response, the appellant urged that the injunction constituted prior restraint of speech. The Supreme Court overturned the injunction because it was ex parte without notice. In doing so, the Court said that there was no place in the area of basic freedoms guaranteed by the First Amendment for such orders when there was no showing that it was impossible to serve opposing parties and give them an opportunity to participate in the injunction proceeding. However, the Court added that there were special limited circumstances where speech was so intentioned with burgeoning violence that it was not protected by the First Amendment.

Ordinarily, the state's constitutionally permissible interests were served by penalties imposed after the exercise of freedom of speech had been so grossly abused the immunity was breached, but this is constitutionally different from prior restraint, which suppresses the precise freedom which the First Amendment sought to protect from abridgement. Consequently, prior restraint, as was sought to be exercised in Carroll, bears a heavy presumption against constitutional validity in the Supreme Court. The Court has insisted upon the most careful procedural provisions which the circumstances permit to assume the fullest presentation and consideration of the matter. In this area, the state may not employ means that broadly stiffle fundamental personal liberties when the end can be more narrowly achieved. In Carroll, the Court said that the proper procedure would have been first to call both parties to the hearing, rather than only the prosecutor, and then to fashion a remedy in as narrow as possible terms to protect the First Amendment rights in as full a manner as possible.

Cohan v. California is another case where a possibly disturbing exercise of First Amendment rights was held permissible because of the broad scope of the protection provided, 403 U.S. 15 (1971). It does not, though, deal with a clear and present danger but rather with alleged obscene language. The petitioner was convicted in California of maliciously and willfully disturbing the peace by offensive conduct by wearing a jacket bearing the words "Fuck the Draft.: The conviction clearly rested upon the asserted offensiveness of the words Cohan used to express his feelings about the draft and the war in Viet Nam. The only "conduct" the California courts sought to punish was the fact of communication -- the conviction rested totally on speech not on any separately identifiable conduct. The Supreme Court said that the appellant's conviction rested squarely upon his exercise of the freedom of speech, and governmental interference with this right could only be justified on the basis of a valid regulation of the manner in which he exercised his right, not as a permissible prohibition of the substantive useage involved. The states were free to ban the use of fighting words without a demonstration of additional justifying circumstances.

"Fighting words" are personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke a violent reaction, Chaphinsky v. New Hampshire, 315 U.S. 568 (1948). But, the Court said that the words, while often used in a provocative fashion were not here directed at the person of a hearer. Obscene language is also not protected, but the Court found no evidence that anyone was violently aroused nor was that the intent. The Court also rejected the California argument that it had the legitimate right to protect unsuspecting and sensitive viewers from exposure to the appellant's crude form of protest. To this argument, the Court replied that the government may properly act in many circumstances to prohibit intrusions into the privacy of the home of unwelcome views and ideas which cannot be totally learned form the public dialogue, but that people were often captives outside of the home and subject to objectionable speech. The Court concluded that the ability of the government to shut off objectionable speech was dependent upon a showing that substantial privacy interests were being invaded in an essentially intolerable manner. An undifferentiated fear or apprehension of vilence or a breach of the peace was not enough to overcome the right to freedom of expression.

A subject of intense controversy in the free speech and expression area is that of obscenity. The Supreme Court has attempted on numerous occasions to establish guidelines for and a definition of obscenity, which is not protected by the First Amendment, but the very nature of the issue, in addition to changing mores, have combined to defeat efforts to find a permanent solution. Although any type of constitutional action in this area is impractical, a brief summary of the Supreme Court's position has been included, because of the notoriety of the controversy.

In Roth v. United States, 354 U.S. 476 (1957), the Supreme Court said that in the light of history, it was apparant that the unconditional phrasing of the First Amendment was not intended to protect every utterance, and that libel and obscenity were considered to be outside of the protection intended for speech and press. All ideas having even the slightest redeeming social importance were to have the full protection of the First Amendment guarantees unless they were excludable because they encroached upon the limited area of more important interests. Implicit in this was the rejection of obscenity as utterly without redeeming social importance. As a result courts consistently held that obscenity was not within the area of constitutionally protected speech or press. The Court, in Roth, though, went on to say that sex and obscenity were not synonomous. Obscene material dealt with sex in a manner appealing to prurient interests. The portrayal itself was not sufficient reason to deny material the constitutional protection of freedom of speech and press.

A period of great social change and upheaval followed the Roth case, One area of liberalization was in overthrowing laws, interpretations, and guidelines dealing with obscenity. A public reaction, and with a different majority in the Court, the Supreme Court withdrew to what many considered a more reasonable stand on obscenity in Miller v. California, 413 U.S. 15 (1973), where the Court applied the "community standard" test.

In Miller, the Court held that at a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political or scientific value to merit First Amendment protection. The Court also established three guidelines for use in determining whether an activity, expression, speech, or publication was protected by the First Amendment or was unprotected obscenity. There was no protection if (a) "the average person, applying contemporary standards," would find that the work, taken as a whole, appealled to the prurient interests, the work depicted

or described, in a patently offensive manner, sexual conduct specifically defined by the applicable state statute, (c) the work, taken as a whole, lacked serious literary, artistic, political, or scientific value. Some feared a parochial application of the "community standard" test and the possible harmful affect it could have on motion pictures and the arts, and that those ultimately responsible for artistic and literary works would be forced, by law or self-censorship, to limit the scope of their works to meet the approval of the most conservative segment of society. This was felt to be particularly probable in respect to those works that would have nationwide distribution, since Miller had expressly stated that standards applicable to New York and Las Vegas need not be the standards applicable in Maine and Mississippi. Miller had made clear that juries would not have to evaluate obscenity in terms of a hypothetical nationwide standard or community. Within a year, the Court clarified its latest set of guidelines in Jenkins v. Georgia, No. 73-557, 42 Law Week 5055 (June 24, 1974). In Jenkins, the State argued that the jury resolved the question of obscenity against Jenkins with some evidence to support the conviction, therefore, the conviction had to be supported. The basis for their argument was that Miller had established the questions of what appeals to prurient interests and what is patently offensive as questions of fact to be resolved by the jury on the basis of local standards. Georgia contended that these facts had been found. Nevertheless, the Court said that it would be a serious misreading of Miller to conclude that juries have unbridled discretion to determine what is patently offensive. To clarify, a short explanation of obscenity was provided, it was not exhaustive, but was intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to a determination of obscenity. To be obscene the material must represent or describe ultimate sexual acts, normal or preverted, actual or simulated or it must represent or describe masturbation, excretory functions, or lewd exhibitions of the genitals.

The rights guaranteed by Art. I, section 11 of the Ohio Constitution are very similar to the freedoms of speech and press guaranteed by the First Amendment of the federal Constitution, and many recent cases demonstrate a high degree of interchangeability between the two. This interchangeability, though, obscures some basic differences as does the contemporary reliance upon the federal guarantees in lieu of the state rights. The incorporation of the First Amendment through the Fourteenth to apply to the states has made it more attractive to those wishing to exercise their rights of speech or press, because generally it is read more expansively than comparable state guarantees. Nevertheless, Art. I, section 11 especially as interpreted, provides the same basic protection, although there are differences, and, in the absence of the federal guarantee, the state guarantee would be controlling.

In Cincinnati Gazette Co. v. Timberlake, 10 Ohio St. 549 (1860), the Court said that the same instrument (Ohio Bill of Rights) which guaranteed to every citizen the right to freely speak, write, and publish his sentiments on every subject also declared that he would be responsible for the abuse of the right (Art. I, section 11), and that every person for any injury done him on his land, goods, person or reputation would have a remedy by due course of law, (Art. I, section 16). The Court then continued saying that liberty of the press was not, therefore, inconsistent with the protection due to private character. It 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 stated the differences more succinctly.

The Court said that the Federal Bill of Rights on the subject of freedom of speech and of the press differed from Art. I, section 11 of the Ohio Bill of Rights. The federal Amendment was much more sweeping in its provisions, and it was apparent from the language that Art. I, section 11 did not guarantee the rights freely and without restraint. Article I, section 11 the Court asserted, recognized the responsibility for the abuse of that right and established a limit beyond which one could not go. Exceeding that limit made the individual responsible for the abuse. Given this difference, the court concluded by saying that the Federal Bill of Rights, while not applicable to the states (at that time), was nevertheless the proper basis for interpretation of the Ohio Bill of Rights because the language of the federal Bill was stated without exception, while the Ohio section had a reservation. One could perhaps interpret this to mean that, absent the incorporation of the First Amendment, Art. I, section 11 would be interpreted like the First Amendment with the limitation that the right be exercised with good motives and for justifiable ends. Without this limitation, Art. I, section 11 would seem to be indistinguishable from the First Amendment.

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 sould 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 the making the "V" sign. Absolute prohibitions of these gestures or symbols, the Court reasoned, would be unconstitutional, but not if they were used alone or in such a manner that the rights of others were violated. Article I, section 11 provided, the Court said, that one could exercise such constitutional rights of freedom of expression within the limitation of not interferring with the same constitutionally guaranteed rights of others. While the right of freedom of expression may have neared the realm of the absolute, the exercise of the right was necessarily limited by the circumstances, and the right of freedom of expression and of communication, as enjoyed by others.

Limitations on Art. I, section 11 are also resisted, as is censorship. A District Court, commenting on both the Ohio and federal guarantees, said that censorship in any form was an assult on freedom of the press, New American Library of World Literature, Inc. v. Allen, 114 F. Supp. 823 (D. Ct., N.D. Ohio, 1953). A censorship that suppresses books in circulation was an infringement of that freedom. 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 publications or violations of the obscenity laws to determine if there were problble cause to prosecute.

Licensing has also been attacked by the Ohio courts when it acts to restrain Art. I, section 11 rights. Bowling Green v. Lodico, 71 Ohio St. 2d 135, 1967, involved a conviction for failing to obtain a license to sell a purely political magazine. The Court overturned the conviction saying that initially the right to publish is unconditional.. To the extent that the police are permitted to limit publication, the right to publish is diminished and to the extent that the police may impede the circulation of a publication, the right is delimited. Censorship, when done in the guise of determining moral character, is no less censorship and may not be employed as a basis for inhibiting freedom of expression. An ordinance requiring a license to sell a political magazine in the streets is a prior restraint on speech and publication.

Door to door canvasing involves a balancing of convenience between some householder's desire for privacy and the publisher's right to distribute publications in the precise way that those soliciting for him think brings the best results. Street soliciting does not involve the same balancing. Peripetatic 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 aginst Ohio's Art. I, section 11 and the First Amendment 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.

The constitutional guaranty of freedom of speech and press, though, does not deprive the state of its police power to enact laws for the protection of the public health, safety, and welfare. If a statute regulating its exercise 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). In addition to constitutional limitiations of these freedoms, through the use of the police powers, there are other limitations that arise out of the nature of the right. A Dayton newspaper claimed that the freedom of the press conferred upon it an absolute freedom of access to any meeting, regardless of its character, of public officials or employees, and that its representatives could not be refused admittance or access if any incident of public operation was discussed, Dayton Newspapers, Inc. v. Dayton, 23 Ohio Misc. 49 (Montgomery Co., C.P., 1970) aff'd. 28 Ohio App. 2d 95 (Mont. Co., Ct. A., 1971). The Courts disagreed saying that the Ohio Constitution (Art. I, section 11) provides for freedom of speech and press, but that the Ohio document is more explicit, recognizing responsibility for an abuse of the constitutional freedoms while restraining the legislature from passing laws that restrict either freedom of speech or press. The right, though, it continued, includes no right to freely collect, acquire, or appropriate information with or without compensation. It includes no right to represent anyone else and no duty of any kind. It also does not include the right to enter uninvited on to property or into gatherings of people. The Constitution grants the press a freedom, shared by all, but no special or other right to insure its success. The press has no special rights over and above those of other citizens, and the "right of the public to know" is a rationalization developed by the Fourth Estate to gain rights not shared by others. This "right," the Court asserted, was an attempt by the press to usurp an ultra-legal and self-appointed position of behalf of the people from which to assert incidents of sovereign power in order to improve its private ability to acquire information which is the asset of its business. Freedom of the press is subordinated to public and private rights as well as to any abuse of the freedom, the Court concluded. The press may not print all it considers news. When privacy or restricted information is violated, the press is responsible to those injured. Writings, correspondence, and photographs are private property and may not be appropriated by the press without the writer's or owner's consent, and surveillance by phone or wire, without lawful justification, and other forms of spying are as reprehensible when done by the press or by the government or by other people.

Comparison with Other States

An analysis of the guarantees of freedom of speech and press in other state Bills of Rights reveals no great differences in the language and in the nature of the general substantive guarantee, but it does reveal differences in other subsidiary guarantees.

Hawaii, Art. I, section 3, and the Model State Constitution, Art. I, section 1.01, provide the same guarantee as the First Amendment, with the one exception. Their sections begin "No law shall be enacted...;" the First Amendment's opening words are "Congress shall make no law...". Alaska provides a similarly short guarantee in Art. I, section 5,

> Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

Illinois' section in its Bill of Rights begins in a fashion almost identical to the complete Alaska section, but it contains a further guarantee, Ill. Const. Art. 1, section 4. In libel trials, both civil and criminal, the truth is a sufficient defense when published with good motives and for justifiable ends. Montana's section closely resembles the Illinois guarantee but there are differences. The Montana section begins by stating that no law shall be passed impairing the freedom of speech or expression. This is followed by a sentence similar to the Alaska section. A greater difference is in the treatment of libel cases. Montana only provides that the truth will be admitted into evidence, not that it will be a complete defense, as in Illinois.

The Ohio section contains the same basic guarantee, but differs in its treatment of libel. Alaska, Hawaii, and the Model State Constitution make no provision regarding libel. The admission of truth as evidence would therefore be governed by statute, rule, or the common law. The protection of a statute or rule would not be as secure as if it had been guaranteed by a constitutional provision, and if the common law regulated the admission of the truth, in criminal libel, the truth would not be admissible. Article II, section 7 of the Montana Constitution only goes as far as allowing the truth to be admitted into evidence in both civil and criminal libel, while Article I, section 4 of the Illinois Constitution make the truth in those cases a complete defense when published with good motives and for justifiable ends. Ohio's Art. I, section 7 only extends this protection in cases of criminal libel. In cases of civil libel, although there is no constitutional guarantee of truth as a defense in civil libel, Ohio provides this complete defense by statute, Section 2739.02 of the R. C.

Montana, in addition to providing for freedom of speech and press, also provides certain related rights in its Bill of Rights. In Art. II, section 8 of the Montana Constitution, the people are guaranteed a right to participate in the decisions of governmental agencies, which could probably be interpreted as a right to be heard on matters of interest. Article II, section 9 guarantees the right to know. It provides that no person shall be denied the right to examine public records or to observe public deliberations of public bodies on all levels unless the right to privacy clearly outweighs the merits of public disclosure.

Bill of Rights Part 6
Article I, 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.

History of Section 14

This section, which copies the Fourth Amendment with only scant differences, is the successor to an earlier, similar guarantee. Article VIII, Section 5 of the Constitution of 1802, in language reminiscent of earlier times with slightly altered problems, 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 rejected the old section replacing it with the present guarantee which has since remained unchanged.

Comment; Comparison With Federal Constitution

The Fourth Amendment guaranty against warrantless or unreasonable searches and seizures, or those conducted without probable cause, has as its basis the recognition that arbitrary intrusions by the police violate the fundamental rights of a free citizenry. The recognition of the right to be free of these intrusions indicates that the right of privacy is one of the unique values recognized and protected by the Fourth Amendment. To further expand the protection provided by the Fourth Amendment, courts have ruled that the Amendment is to be liberally construed in favor of the individual to safeguard the right of privacy and to prevent the impairment of the protection provided. The Fourth Amendment, though, does not forbid every search and seizure, only those which are unreasonable, and the courts have established sufficient probability of crime, not certainty, as the criterion of reasonableness. Nor does the Fourth Amendment give a general grant of privacy. The privacy protected is akin to that protected by the Fifth Amendment right against self-incrimination, and in the case of the Fourth Amendment, the protection takes the form of protecting the individual from involuntarily revealing tangible or intangible evidence against himself to government officials or their agents. The protection provided by the Fourth Amendment, though differs from that of the Fifth in an important respect. Where the Fifth Amendment provides absolute protection to the individual against coerced self-incrimination, the Fourth Amendment provides no such absolute protection. Instead, the Amendment serves as a restriction upon government officials acting without restraint in searching and seizing. The difference between the two recognizes a subtle distinction between the inviolability of the "person" and the more mundane nature of statements made by an individual or of objects under his control. Even though this distinction is made, an aura of privacy still surrounds the individual, and because of its fundamental nature, it can only be pierced at a risk to society. Consequently, the Fourth Amendment was designed to minimize the risk by placing restraints on the exercise of the police powers to guarantee that government officials could not act until there was sufficient justification to do so.

To insure that the guarantee is not a hollow promise, the courts have enforced it negatively by preventing any government official from benefitting from searches or seizures carried out in violation of the Amendment, and it is this non-written aspect of the Fourth Amendment that gives it its strength and power to protect.

In 1949, in Wolf v. California, 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, (which prohibits the use of evidence obtained illegally) was not held to be implied in this concept of liberty, and until recently the relatively explicit Fourth Amendment guarantees were not broadly interpreted in the states. One of the principle ways these rights were expanded was through Mapp v. Ohio, 367 U.S. 643 (1961) which held that the exclusionary rule was applicable to the states. The extension of this rule to the states was seen as a method to guarantee this right which, without this rule, would be little more than a moral commitment. The states can develop workable rules governing arrests and searches and seizures to meet the demands of criminal investigation and law enforcement, but their latitude of action is not limited by the Fourth Amendment and Mapp, Beck v Ohio, 379 U.S. 89 (1964).

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 seized in violation of the Constitution was illegally obtained and was therefore inadmissable. The purpose was both to show disapproval of illegal acts by the government by removing any benefit obtained by these acts, and to maintain the dignity of the federal judiciary. A series of cases followed that brought the Court to the Mapp decision.

In Rochin v. California, 342 U.S. 165,(1952) the Court refused to allow a conviction to stand based on evidence seized by police methods that would shock the conscience. Later, in Rea v. United States and Elkins v. United States, 364 U.S. 206 (1960) the Court ruled that state and federal officers could not exchange illegally obtained evidence for use by either in criminal prosecutions. The difficulty was to set standards for exclusion based on what was shocking to the conscience. In Mapp, the Court solved the problem by ruling that all evidence obtained by searches and seizures in violation of the Constitution was inadmissible in state courts. The Court felt that since the Fourth Amendment was applicable to the states, it was enforceable against them the same way as enforced against the federal government: if it were not, then the freedoms would be unprotected against abuses by state officials. The Court continued by saying that the lack of exclusion tended to destroy the whole system of constitutional restraints and that the Fourth Amendment should not be subject to the whim of any public official and revocable at his will. The exclusionary rule was designed to counter just such a trend.

It is from this perspective that all cases dealing with the Fourth Amendment should now be viewed, for any decision that helps determine the meaning of application of the Fourth Amendment, has application to state as well as federal officers, and its effects are so pervasive that similar state protections are seldom invoked.

Fourth Amendment rules have, however, been under attack. The exclusionary rule has been criticized by members of all three branches of government in all levels, and some of the recent criticism has come from the Supreme Court itself. In Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), Chief Justice Burger stated his objections and proposed that an alternative method of protecting Fourth Amendment rights be passed by Congress. In so doing, he rejected the traditional justifications of exclusionary rules. This increased hostility has led several commentators to predict that Mapp would be overruled. In view of this it might be well to determine Ohio's position: whether it wants to follow the federal courts if Mapp is overturned, or whether it wants to maintain the Mapp standards. If Mapp is to be maintained, it would be advisable to include the rule as part of Art. I, Sec. 14 of the Ohio Constitution to ensure that the full protection of Art. I, Sec. 14 be extended, even if the Fourth Amendment protections were no longer so pervasive.

If a search or seizure has occurred within the meaning of the Fourth Amendment, the next inquiry is whether the particular search and seizure involved required a warrant to satisfy the Constitutional guarantee. This is because a search of an individual or of private property is per se unreasonable unless it has been authorized by a valid search warrant, except in certain carefully defined cases. A search is [illegible]ful or unlawful at its inception and is not legitimized by evidence discovered d[illegible] the search. Merely having sufficient evidence of a crime does not justify [illegible]arch either; there must be a warrant unless the search is a recognized exception to the requirement of a search warrant. The requirement of a search warrant ensures that the final decision as to the reasonableness of the search will be decided by a detached magistrate rather than the police who might lack the objectivity required to judge the necessary probable cause. This, though, does not severely hamper the police since the exceptions to the warrants requirement serve the legitimate needs of law enforcement officials to protect themselves and the public well-being and to preserve evidence from destruction, according to Katz v. United States, 389 U.S. 347 (1967).

The Supreme Court has consistently manifested a strong preference for the use of warrants in order that the justification of a search be evaluated by a magistrate prior to its occurence but the Fourth Amendment only condemns those searches which are unreasonable. This is the basis for exceptions to the Fourth Amendment's warrants requirements, the most common being a search incident to an arrest with or without an arrest warrant. The concept of a search incident to an arrest implies a physical and temporal relationship between an arrest and the search. Chimel v. California 395 U.S. 752, (1969) made that implication clear, a position arrived at through gradual development, but having established this principle, the Supreme Court is now relaxing its precise requirements of physical and temporal proximity to an arrest.

In Agnello v. United States, 269 U.S. 20, (1925) the Supreme Court ruled that an arrest would not support a warrantless search several blocks away. The right to search incident to an arrest was further limited by Vale v. Louisiana, 394 U.S. 30, (1970) which held that an arrest in front of a residence would not justify entering and searching the premises. Coolige v. New Hampshire, 403 U.S. 443 (1971) stated Vale's inverse by holding that an arrest in a residence would not support a search outside of the home. These physical limitations to a warrantless search incident to an arrest might be avoided by delaying an arrest until the suspect is where the officer wants to search, but there is some question as to the validity of this type of procedure.

Similarly, the search must be temporally close to the arrest to be considered incident to the arrest, if it is too remote it will be illegal. Preston v. United States, 376 U.S. 364 (1964). Conversely, an incident search cannot precede an arrest considered as part of the justification of the search, Sibron v. New York, 392 U.S. 40 (1968). A prior search will more often than not be found unreasonable because of the question of whether probable cause existed prior to the search, and courts are quick to hold a search illegal where it appears that an arrest was a pretext for a warrantless search. In Warden v. Hayden, 387 U.S. 294 (1967), the Supreme Court held that searches that were prior or contemporaneous with the arrest were legal, but only within a narrowly defined area. Since Warden was more similar to a case of hot pursuit, another exception to the requirements of the Fourth Amendment, it did not greatly alter the time requirement. In Warden, the police entered the house in pursuit of a felon, the scope of the search was as broad as was reasonably necessary to prevent the dangers of resistance or escape, and the search was prior or contemporaneous with the effort to find the suspected felon.

Another aspect of the search incident to an arrest that must be followed is that the search should not be unreasonably extensive, Kremen v. United States, 353 U.S. 346 (1957). In Harris v. United States, the Court had upheld a five hour search of a four room apartment, but it justified this search on the basis that the apartment was in the defendant's exclusive control, noting that the nature of the items (two cancelled checks) made an intensive search necessary. In later cases that arose over this issue, the Court required a search warrant where an intensive search was contemplated. All three of these limitations on warrantless searches incident to an arrest existed and developed independently until Chimel established guidelines.

In Chimel, the Court held that incident to an arrest the officer could first search the arrestee to remove any weapons that might be used to resist or escape, and any evidence that might be subject to concealment or destruction. The Court then provided that the officer could search an area within arm's or lunging reach to check for any weapons or evidence that could be seized by the arrestee. Any search beyond this area, the Court said, would be unreasonable. The search of the individual could be conducted on the spot or at the jail, but this is because the police have the power to inventory any prisoner's property and because of the police's general power to act to control prisoners. The purpose of Chimel was to provide easily understood standards in order to effectively stop general exploratory searches. A related exception is that of plain view, which means that if the police, acting on a prior justification for an intrusion, inadvertently come upon evidence incriminating the accused, it can be seized. This, though, is not available if the police know of the existence of the evidence prior to the intrusion.

Two recent cases have somewhat altered what appeared to be firm guidelines established in Chimel. In United States v. Robinson, 414 U.S. 218 (1973) the defendant was convicted of a drug offense on the basis of evidence seized in a search incident to an arrest. The Court of Appeals reversed, stating that the search violated the Fourth Amendment on the grounds that a frisk was all that was permissible for a probable cause arrest for driving while one's license was revoked. Since there would be no further evidence of such a crime to be obtained by a search, the Court held that only a weapons search was justifiable. The Supreme Court, though, asserted that a probable cause arrest was not subject to the same limitations as a stop and frisk situation. The Court then said that, while the authority to search a person incident to an arrest was based upon the need to disarm and prevent the destruction of evidence, it did not depend upon what a later court would hold was probability that weapons or evidence would be found.

On this basis, the Court held:

> A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which established the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment. 414 U.S. 218, 235

United States v. Edward, 415 U.S. 800 (1974) altered the immediate search aspect of this warrantless search. The defendant was arrested and jailed. The next morning a warrantless search was made of his clothing. Evidence gained from this search was admitted into evidence at the trial over the defendent's objection, and he was convicted. The Court of Appeals overturned the conviction, holding that although the arrest was lawful and probable cause existed to believe that evidence would be obtained by a search of the clothes, the "warrantless seizure of the clothes," after the administrative process and mechanics of the arrest were finished, was unconstitutional under the Fourth Amendment. The Supreme Court did not agree. Citing the facts that the police followed their established procedure and that the delay was due to the difficulty in finding other clothing at night for the defendant, the Court reversed. The search, the Court held, was a normal incident of a custodial arrest, especially since the police were entitled to take the defendent's clothes or any other evidence of the crime in his immediate possession. A reasonable delay in effectuating this power, it was felt, did not change the fact that the defendant was no more imposed upon on the morning after his arrest than he would have been at the time or place of the arrest or upon immediately arriving at the jail. "The police did no more than they were entitled to do incident to the usual custodial arrest and incarceration," 415 U.S. 800, 805.

Automobile searches comprise another important exception to the Fourth Amendment requirement of a warrant. The first major case allowing a warrantless search of a car upon probable cause was Carroll v. United States, 267 U.S. (1925). The Court decided that such searches were permissible when a competent official has probable cause for believing that certain vehicles are carrying contraband or illegal items and where it is not practical to secure a warrant because the vehicle can be easily moved outside of the jurisdiction in which the warrant would be sought. In doing this, the Court rejected the contention that the search had to be incident to a valid arrest, and instead, the Court made the search totally dependent upon the probable cause the officer had for his belief that the vehicle carried contraband. Preston held that once the suspects were in custody, there was no longer any right to search the vehicle without a warrant, since there could no longer be any fear that the vehicle would leave the jurisdiction. Further, a warrantless search could not be justified under other exceptions either since there would no longer be a danger of resistance or of destruction of evidence. This was changed in Cooper v. California, 386 U.S. 58 (1967). There the Supreme Court upheld the legality of a search of a car held by the police while the defendant was in custody. Chambers v. Maroney, 399 U.S. 42 (1970), refurbished the Carroll doctrine, the Court holding that an auto search, based on probable cause that the car contained contraband or evidence of a crime, was valid, but it retained the concept that a delayed search was permissible as long as the Carroll requirements were met, even though the danger of the car leaving the jurisdiction was gone. This was justified by the rationale that, given an initial justified intrusion on the highway, there was little difference between a search on the highway and a later search at the police station. Coolige finally set definite standards in this area; the Court held that, absent exigent circumstances, there must be a warrant even if probable existed. Edwards and Robinson might alter this or presage a change in this area also.

If the protections of the Fourth Amendment that have developed are lost and exclusionary rule is replaced, what will be the extent of the protection of the Fourth Amendment?

Another exception to the Fourth Amendment's warrants requirement is selective wiretapping and electronic surveillance. The first time the Supreme Court heard this issue, in Olmstead v. United States, 277 U.S. 438,(1927) the Court ruled that since the wiretap was not made by trespass onto the property of the defendant, there was no Constitutional violation. The Court felt that since the information was secured by the use of ears alone, there was no entry or search and seizure, and it concluded that if this was an objectionable practice it should be regulated by statute.

To regulate this, Congress passed the Federal Communications Act, and Section 605 of the Act made it unlawful for any person to intercept or divulge the contents of any communication unless authorized by the sender (47 U.S.C. 605). The federal government, though, interpreted this to mean that both interception and divulgence were necessary for a violation, with the evidence then being excluded from trial. This was followed closely by Nardine v. United States, 302 U.S. 379 (1937) which held that information obtained as a result of a tap was inadmissible in federal court. Later the Court extended this principle further by holding that admissible evidence had to be secured from sources other than the wiretaps, (308 U.S. 388, (1939). This ruling did not limit the government in other respects. Information obtained by the use of microphones and wired informers was still fully admissible until later cases set reasonable limits for these activities. In Berger v. United States, the Court held electronic surveillance information inadmissible unless judicial authority based on necessity and probable cause could be shown, and in Katz the Supreme Court extended the Fourth Amendment to cover oral statements, 388 U.S. 41 (1967). The issue was finally regulated by statute.

In the Omnibus Crime Control and Safe Streets Act of 1968, Congress provided for the regulation of electronic **surveillance**, 18 U.S.C.A. 2150-2520. The Act established procedures for the Attorney General or his designate to obtain authorization for this type of surveillance. It limited the crimes for which these measures could be used and provided further regulations governing evidence obtained in this manner. The Act also made inadmissible evidence obtained in violation of the regulations and included penalties for actions beyond the scope of the Act. This has particular relevancy for the states because Sec. 2516 (2) permits state legislatures to grant power to the state attorneys general to seek court authorization for surveillance in conformity with the Act. Ohio has provided for this in Section 2933.58 of the Revised Code. The restrictions placed on the exercise of this power to search and seize by the use of electronic devices are statutory and are more easily subject to change than would constitutional limitations. Since it is unlikely that such a limitation will be inserted as part of the Fourth Amendment, a warrants requirement, if desired, could be placed in Art. I, Sec. 14 to ensure that Ohio citizens would have the protection of a judge's review of the necessity for surveillance before such evidence can be conducted.

Where electronic surveillance is regulated by statute, the stop-and-frisk exception to the warrants requirement is almost entirely judicially limited. Arising, largely, out of Terry v. Ohio, 391 U.S. 1 (1968) this exception allows evidence seized in a warrantless frisk of a suspect to be used against the suspect. In a decision that seemed to contradict the exclusionary rule, the Court emphatically rejected the contention that a stop-and-frisk was outside of the Fourth Amendment, but the Court did place certain specific limitations on the police officer's right to search. The officer must observe conduct that reasonably brings him to conclude, in light of his experience, that persons are engaged in criminal activities and that they are armed and dangerous. While investigating this behavior, if the officer identifies himself and makes reasonable inquiries into the

person's behavior, and there is nothing to dispel his fear for his safety, he is entitled to conduct a careful search of the outer clothing to discover weapons that could be used against him. In establishing these requirements, the court attempted to establish a balance between the extent of the intrusion upon the Fourth Amendment protections and the reasonableness of the intrusion. The officer need not be absolutely certain that the suspect is armed; the issue is whether a reasonable, prudent man in these circumstances would have believed that his safety and that of others was in danger. The officer is not entitled to search everyone he sees or questions; he must have constitutionally adequate grounds, and he must be able to point to specific facts from which he could reasonably infer that the individual was armed and dangerous.

Although there are other exceptions to the warrants requirement, as the airport or border searches, the final exception reviewed will be the consent exception. Constitutional guarantees can be waived by consent and this consent may be waived or by prior consent, as with a probationer. The Supreme Court, though, does not readily accept the waiver of rights, so it must be shown by clear and convincing evidence that the consent to search was voluntary and uncoerced either physically or psychologically, United States v. Fike, 449 F.2d 191 (5th Cir. 1972). Consent cannot easily be inferred from admitting the police into a home, or from a lack of resistance, or from the presence of signs, and coercion includes lawful coercion. Where a search is conducted with a warrant later shown to be invalid, there is no consent, since the invalid warrant coerced the individual not to resist the search and the search cannot be legalized by the product of the search. Involuntariness can also mean where trickery was used by the police to enable them to conduct searches, and in certain cases, this involuntariness can be shown by the fact of arrest or by individual character, training, knowledge, or experience, Tatum v. United States, 321 F.2d 219 (9th Cir. 1963).

Consent to search can be obtained from a third person who is lawful owner, possessor, or custodian of the property, even though this may disclose incriminating evidence, but this does not remove the prohibition against coercion, Frazier v. Cupp, 394 U.S. 731 (1969). In line with this, a spouse may consent to a search of property jointly controlled or a parent of a child's room where the parent owns the house, although a child might not be able to consent to the search of a parent's home, Davis v. United States, 327 F.2d 301 (9th Cir. 1964). Premises occupied by a tenant are also protected, even if the landlord consents, unless the owner exercises at least joint control, but where the tenant no longer exercises any control because he has moved away or has been evicted, he no longer has any protection under the Fourth Amendment from the search of the premises vacated, Chapman v. United States, 365 U.S. 610 (1961), Abel v. United States, 362 U.S. 217 (1960).

In Camara v. Municipal Court, 387 U.S. 523, (1967), and in See v. Seattle, 387 U.S. 541, (1967), the Supreme Court used a balance of interest analysis to decide Fourth Amendment issues in administrative searches. The significance of Camara and See is in the Court's recognition that a balancing of interests approach can be applied to situations of government intrusion not involving exigent circumstances and the realization that this balancing can result in the modification of Fourth Amendment protection techniques rather than in their balance. In Camara and See, the Court held that the government intrusion in administrative searches requires a search warrant, but that less than probable cause was necessary for it to issue. The decisions were based on two factors; the inability to accomplish an acceptable level of housing code enforcement with the maintenance of the probable cause requirement, and the relatively minor invasion of privacy that results from these searches. The Court held that specific information of violations or conditions was unnecessary, as would be required under traditional probable cause, and that information as to the nature of buildings, the conditions of the area, and the length of time since the last inspection would be sufficient.

Later, this modification of the Fourth Amendment was extended beyond housing inspection cases in several cases, Colonade Catering Corp. v. United States 397 U.S. 72 (1970), United States v. Biswell, 406 U.S. 311 (1972). In Colonade, the Supreme Court upheld a warrantless search ruling that the absence of a warrant was not fatal to the legality of administrative searches specifically authorized by statute. This applies where Congress has specifically authorized procedure, but where Congress has not done so, traditional Fourth Amendment requirements are in effect. The Court said that the statutes replaced warrants, and since the statutes were limited, they were only a limited invasion and provided sufficient protection to satisfy minimum Fourth Amendment requirements. Biswell was a warrantless search of a gun dealer, conducted pursuant to the Gun Control Act of 1968. The Court upheld the search, stating that the federal government had a great interest in firearms control, that inspections were central to the regulatory scheme, and that effective regulation was impractical without resort to a broad inspection power.

Another modification of the traditional Fourth Amendment requirements is in the area of home visits by welfare workers, another type of administrative search, Wyman v. United States, 400 U.S. 309 (1971). In Wyman, the Court held that an individual could properly refuse to allow a home visit. This refusal, though, would result in a cut-off of benefits, but the Court said that since there was no criminal penalty attached to the refusal, there was no coercion to allow a warrantless inspection of the home. This lack of a criminal penalty removed the search from the requirements of the Fourth Amendment, and even if the search were a Fourth Amendment search, the Court felt that it would not be unreasonable. The Court noted that the visit was not unreasonable because of advance notice and rules regulating the scope of the welfare worker's activities. It should be noted here that the extent of the intrusions allowed was limited, as it was in Camara and See, and without these self limitations, it is possible that the Court would have held that the intrusions violated the Fourth Amendment.

While the Fourth Amendment prohibits unreasonable searches and seizures, it also specifically allows for searches and seizures upon probable cause and the issuance of a judicial warrant. This serves the dual purpose of eliminating searches not based on probable cause, so that no intrusion is allowed without a careful prior determination of necessity, and that those determined necessary will be as limited as possible. An aspect of this limitation is that the objects of the warrant are confined to property that is evidence of a crime, contraband, the fruits of a crime, things criminally possessed or property intended for use or which has been used as a means of committing a crime.

The warrant is issued upon a sworn affidavit establishing the grounds for its issuance. The affidavit must set forward the facts showing probable cause, and a description of the person or place to be searched, and the property seized. To determine the probable cause, the magistrate must render judgment based on a common sense reading of the affidavit. The affidavit must state the specifics required, as well as detail the underlying circumstances upon which the belief, that probable cause exists, is based, or the reason for believing the source of information which engenders probable cause, in order for the magistrate to find probable cause, Spinelli v. United States, 393 U.S. 410 (1969). The affidavit can not establish probable cause if it only states a suspicion, or belief, rather it must state sufficient underlying circumstances so as to permit the issuing authority to perform the independent function of determining the existence of probable cause. If the warrant issues without sufficient information to provide a finding of probable cause the evidence obtained will be inadmissible under the exclusionary rule. This, however, does not mean that the offense must be proven before a warrant is issued or else the evidence will be excluded, but rather that the affiant has reasonable grounds when he seeks the warrant to believe that the law was violated on the premises to be searched or that the premises contain evidence of such a violation. Where the warrant is necessary, probable cause is the standard by which a decision to search is tested against the Constitutional mandate of reasonableness in balancing the

the
government's interests justifying the intrusion against constitutionally protected privacy of the individual, Aguilar v. Texas, 378 U.S. 108 (1964).

In addition to establishing probable cause, the warrant must be specific in order to prevent officials from engaging with unrestrained discretion in general searches with seizures of anything found. The warrant should describe the place to be searched with sufficient specificity to enable the officer, with reasonable effort, to ascertain and identify the place to be searched, and if the warrant allows selective discretion the warrant will be invalid. The warrant, though, may allow the search of more than one place if an individual occupies or controls more than one place, if each is identified. Where a person is involved he must also be described with reasonable certainty, that is, with as much specificity and accuracy as required for property, and the warrant must describe him in such a way as to leave the officer no doubt and no discretion as to the person to be searched. Items to be seized must also be described with enough certainty to identify them. Because the Fourth Amendment was intended to prevent general searches seeking to incriminate an accused by using his private papers, the requirement of particularity serves to limit searches to those items the police have probable cause to believe are involved in a crime. The test here as with persons and places is whether the warrant places meaningful restrictions on the objects to be seized. This particularly ensures that the search will be limited by judicial, not police, determination, and the exclusionary rule removes any advantage that could be gained by acting beyond the scope of the warrant.

While it appears that a warrant search may extend to whatever is covered by the warrant's description, if the descriptions meet the requirement of particularity, the Fourth Amendment confines the execution of the warrant strictly within the bounds established by the search warrant. The search will only be valid if conducted within the boundaries determined by the warrant. A search not conducted is a misuse of statutory or Constitutional process and is a deceptive assertion of authority. In addition to the requirements of specificity that must be followed, there are other legal requirements that must be observed to make a warrant search valid.

Laws who may execute a warrant and further establish the jurisdictions in which these individuals may act, (18 U.S.C. 3107). Other laws limit the length of time in which a search warrant will be good; a delay beyond the statutory period invalidates a search pursuant to a warrant which has expired. The time period is further limited by the requirement of reasonableness, and in the absence of a time limit in the warrant or in a statute, the warrant impliedly directs that the search be made without delay and within a reasonable time. Whether the search can be conducted at night is largely a matter of statutory or court rule, and generally there has to be a greater showing of need to justify a night search. In some cases a separate reasonable cause is required to justify the night search (Federal Rules of Criminal Procedure, Rule 41(c)).

As stated above, the search must be confined to the area described, any additional search or extension constitutes a warrantless search and is per se unreasonable. This applies also to the seizure of items not covered by the warrant unless it falls within one of the exceptions to the warrants requirement, as in the plain view doctrine, or if the contraband or evidence was discovered by the police while acting within the scope of a legal search warrant authorizing the search of a certain area, Marron v. United States, 275 U.S. 192 (1927). But even in an authorized area, these items can only be seized as evidence if the search is being conducted in a manner limited to searching for enumerated items, Stanley v. Georgia, 394 U.S. 557 (1969). In the absence of any statutory limitations, the Constitutional mandates of the Fourth Amendment are the only inhibitions on the execution of a warrant, but the execution will only withstand the requirements of law and justice if it is done in a manner that does not subject the suspect to unreasonable treatment.

Whenever it is determined that a search and seizure within the meaning of the Fourth Amendment has occurred and that the intrusion was a proper one either because no warrant was required or a valid one was obtained, the final inquiry in determining the propriety of the police conduct is done by reviewing the permissible scope of the search, the manner in which it was conducted, and the nature of the items seized. The search must be one in which officials are looking for specific articles and it must be conducted in a way reasonably calculated to uncover such articles. Any search more extensive constitutes a general exploratory search and violates the Fourth Amendment guarantee. For a search without a warrant, there must be a nexus between the items sought and criminal behavior, and this nexus must also exist in a warrant search although administrative searches provide an exception. It is not enough that there is a suspicion that an item may prove incriminating, to justify its seizure, but if the scope of the search is justified any material evidence discovered may be properly seized, even if it is not the item for which the officer is searching. The manner in which the search is conducted can also affect the legality of a search. If the police act in such a way as to circumvent the Fourth Amendment, in acting either with or without a warrant, the search will be invalid and the evidence seized will be inadmissible.

Federal statutes provide a civil clause of action against state officials for a deprivation of the right to be free from unreasonable searches and seizures (42 U.S.C. 1938). However, this is not available where the evidence is excluded, but the defendant is still convicted, although in this case there are still common law remedies available of trespass and replevin of the items seized. In figuring the damages, injury to a person's property, reputation, and feelings may be taken into consideration as well as the disturbance to his family, and since there is an invasion of his privacy, a recovery for mental or emotional distress is available regardless of physical injury. If the wrongful search was inspired by malice, or if the act was done with wanton and reckless disregard of the plaintiff's rights, exemplary damages are also available.

As stated above, 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 area 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." Since this decision, Ohio has a new Ohio Code of Criminal Procedure. Rule 41 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. Deming 32 Ohio Misc. 1 (Piqua, M. Ct., 1972). Of course it is not necessary to provide protection of rights only at the minimal Fourth Amendment level. Ohio courts have interpreted Art. I, Sec. 14, if it has used it all recently, in exact accordance with the Fourth Amendment. Once Mapp applied the exclusionary rule to the states, and the Fourth Amendment had been established and interpreted by a series of cases, Art. I, Sec. 14 had less importance. Ohio has fully complied with these standards by giving them a statutory authority in Rule 41, but otherwise there seems to have been a preemption of this field. The only possible way Art. I Sec. 14 could be used would be if Ohio courts decided to interpret the section in such a way as to establish higher standards. Therefore, it seems as if Ohio courts will continue to use criminal federal standards in this area, but it is unclear what would happen if federal standards were lowered, for example by distinguishing or overruling Mapp. If Ohio courts followed, Ohio citizens would be deprived of rights, but these rights could be secured, either by higher statutory or rule standards by a constitutional amendment which would permanently maintain the state standards at their present level.

Comment; Comparison With Other States

Among the Bills of Rights contained in the other state Constitutions that were reviewed, the guarantee against unreasonable searches and seizures were essentially the same. They all, to a greater or lesser degree, copied the Fourth Amendment of the United States Bill of Rights, although there are certain dissimilarities both within the specific sections and within the scope of all the rights protected.

Alaska's Art. I, Sec. 14 only provides the basic guarantee as does Montana's Art. II, Sec. 11, although Montana's section also requires that everything related to the issuance of a warrant be reduced to writing. Montana and Alaska, though, also specifically guarantee the right to privacy which one would expect would strengthen the protection of the search and seizure sections, (Mont. Const. Art. II, Sec. 10; Alas. Const. Art. I, Sec. 22). The Constitutions of Hawaii and Illinois and the Model State Constitution all contain the basic Fourth Amendment guarantee but each adds additional protection for the individual by protecting communications (Hawaii Const. Art. I, Sec. 5; Ill. Const. Art. 1, Sec. 6; Model State Const. Art. 1.03). Article I, Sec. 5 of Hawaii's Constitution enlarges the protection constitutionally guaranteed by adding the phrase "communications sought to be intercepted" to the warrants clause, to ensure that all warrant requirements are met prior to any interception of communications. Illinois includes eavesdropping in the reasonableness clause providing that people and their possessions will be secure against unreasonable searches and seizures, "invasions of privacy or interceptions of communications by eavesdropping devices or other means," Ill. Const. Art. I, Sec. 6. The fullest measure of protection against this modern version of search and seizure is contained in Article 1.03(b) of the Model State Constitution. Article 1.03(b) is in essence, an adaptation of Art. 1.03(c) and the Fourth Amendment entirely in terms of protecting various forms of communication from unreasonable interception with the additional requirement that all such seizures of information be done with a warrant that meets the specificity of the warrants clause. This differs from the warrants clause of the Fourth Amendment because in Art. 1.03(b) the warrant requirement is absolute, while normally there are certain exceptions to the warrants requirement. One other provision of the Model State Constitution is of some interest - Art 1.03(c). The exclusion rule of Mapp v. Ohio, as stated previously, is under attack, and Chief Justice Burger has stated that he would like to see the states devise some solutions to circumvent total exclusion. This raises the possibility that at some time in the future Mapp might be restricted or distinguished with the effect that violations of the Fourth Amendment will be rewarded with convictions as long as evidence is recovered. Article 1.03(c) of the Model State Constitution deals with this problem, by adding to the Model State Constitution Bill of Rights the exclusion provision of Mapp; that evidence obtained in violation of the guarantee against unreasonable and warrantless searches and seizures shall not be admissible in court against any person.

Bill of Rights
Part 7
Article I, Sections 17, 18, 20

Section 17 of Article I of the Ohio Constitution reads as follows:

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

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 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 or otherwise modified.

This section is similar to Art. I, sec. 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, 273 NYS 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, no 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).

Among the five Bills of Rights reviewed, there is no comparable provision to Art. I, section 17. Although the four states (Alaska, Hawaii, Illinois, Montana) have clauses prohibiting the irrevocable granting of special privileges or immunities, these prohibitions are closer in wording and intent to Art. I, section 2 Cl. 2 which gives the legislature the power to alter, revoke or repeal any privilege or immunity that it grants.

Section 18 of Article I reads as follows:

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

This section was Art. VIII, section 9 of the Constitution of 1802. In 1851, with the deletion of one word and the substitution of another, it was added to Art. I of the 1851 Constitution and adopted in the form it has at the present time.

This seldom cited section establishes, when read in conjunction with Art. II, section 1 of the Ohio Constitution, that the legislative power in Ohio shall be vested in the General Assembly. These sections further provide that this power shall be supreme and that only the General Assembly may pass laws, statutes or regulations that suspend, modify or affect the working of laws passed by the General Assembly. In this application, these sections have the same effect as Art. I of the United States Constitution, which states that legislative powers shall be vested in the Congress and then enumerates those powers, and Art. VI

which provides that laws made pursuant to the Constitution shall be the supreme law of the land. On the federal level, this supremacy implies the lack of power of any other legislative body to suspend laws passed by Congress. On the state level, the supremacy of state law is implied by Art. I, section 18 which expressly states that this power to suspend is not possessed by any body other than the General Assembly.

The few cases that cite this section seem to have certain common features. The cases all deal with issues of either delegation of power or modification of legislation, and they all arose in a period of change when the growing complexity of government was forcing new solutions to be developed to handle the problems. In Fox v. Fox, 24 Ohio St. 335 (1873), for example, the question appears to be whether the legislature can pass a law prohibiting certain animals from running loose and also include in the act a section that grants authority to certain individuals to issue special permits that provide exceptions to the law. The Court held that this does not violate Art. 1, section 18. Similarly, when a court ordered the state to pay certain expenses, the Attorney General of Ohio ruled that there was no violation of Art. I, section 18 when the General Assembly passed a law that directly affected an earlier law by a reallocation of a portion of the funds earlier appropriated, for a different purpose, without first repealing the earlier law, Opinion 413, 1927 O.A.G. 718. The exercise of the duty to prescribe, amend, and enforce rules by the Civil Service Commission was held not to violate Art. I, Section 18. The court ruled that those powers and duties given to the Commission did not constitute a delegation of the power to enact laws. The court also said that the provision which authorized the Commission to act under certain defined circumstances did not violate the prohibition against the exercise of the power to suspend laws, Green v. State Civil Service Commission, 90 Ohio St. 252 (1914). Green dealt with the Civil Service Commission, arguably an agency exercising delegated powers; in Hite v. Cleveland, 107 Ohio St. 144 (1925) another type of delegated power was attacked, that of local self-government. The plaintiff charged that an amendment to the city charter was a violation of Art. I, Section 18. The court ruled that when a city passes acts in accordance with its home rule powers (Art. XVIII, Section 3) and all of the provisions of these acts relate solely to the establishment and maintenance of local self-govenment, the provisions of the General Code as to such matters do not apply. However, this does not suspend nor does it constitute an exercise of state legislative power or an enactment of law of a general nature.

Today, with general acceptance of the principle of broad legislative discretion in legislation or delegation of power, this problem rarely arises. The concept of legislative supremacy is firmly established, and this section serves to guarantee the continuance of this principle.

Probably as a result of the general acceptance of the principle of wise legislative discretion in delegating powers and in formulating solutions to problems, only one of the recent Bills of Rights (Hawaii) contained a section similar to Art. I, section 18. Hawaii's Art. 1 Section 13 though states the contemporary realities of legislative supervision and activity more clearly. Whereas Ohio's Constitution provides a seemingly incontrovertible designation of power to the legislature, which formerly had to be circumvented, Hawaii's provides latitude by stating.

> "The power of suspending . . . . the laws or the execution thereof, shall never be exercised except by the legislature, or by authority derived from it to be exercised in such particular cases only as the legislature shall expressly prescribe."
>
> Hawaii Const. Art. I, Section 13

It should be noted, though, that the effect of the above section is not different from that of Art.I, section 18 of the Ohio Constitution as it has been interpreted by the courts.

Section 20 of Article I reads as follows:

> 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.

Art. I, section 20 of the 1851 Constitution of Ohio had its origins in Art. VIII, section 28 of the 1802 Constitution, which it closely resembles. The last part of the original section was copied for the last clause of Art. I, section 20, but the first clause was radically revised. The result is that Art. I, section 20 provides two guarantees, similar to the Ninth and Tenth Amendments of the U. S. Constitution, while Art. VIII, section 28 provided only one. The 1802 section said, in part: "To guard against the transgression of the high powers which we have delegated we declare, that all powers . . . " While the Tenth Amendment reserves undelegated powers to the States and to the people, Art. VIII section 28 in 1802 guaranteed that all unenumerated powers would reside in the people. The second clause of Art. I, section 20 still preserves this right, but the first clause sets out a new right, or at least one not present in the 1802 Constitution, by assuring that the listing of rights will not injure, in any way, rights held by the people, but not so listed. This is the same guarantee provided in the Ninth Amendment.

Comparison with Federal; Comment

The first clause of Art. I section 20 parallels the Ninth Amendment of the Bill of Rights:

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

While the Ohio section has few, if any, cases expounding on the nature of this guarantee, the federal Amendment has many. This does not mean to imply that the parameters of this guarantee have been established; on the contrary, it appears that courts have only begun to define it. This process has great ramifications. As the federal interpretation develops, so also will the state's even though Art. I section 20 cl.1 is rarely cited, because in areas where state and federal guarantees are worded alike or are designed to provide similar protections, Ohio courts have found federal interpretations to be highly persuasive. It is necessary, therefore, to consider the cases detailing the federal interpretation of the Ninth Amendment.

Early cases dealing with the Ninth Amendment were concerned with the Tennessee Valley Authority. In Ashwander v. T.V.A., 297 U.S. 288 (1936), the plaintiff contended that the government had no authority to build a dam, which was part of the overall project, and further, that the government lacked the right to sell power from the dams where its sale would compete with the local power company's. The plaintiff, among other things, contended that this was an invasion of Ninth and Tenth Amendment rights, depriving the power company of the right to sell electricity, and interfering with the State's control in the area. The Supreme Court, though, found that this did not

encroach upon the State's authority, because the dam was built pursuant to the federal government's powers of defense through the National Defense Act of 1916 to facilitate the production of munitions. Further, this dam was to help provide for navigation of this waterway, an aspect of the federal government's authority to act to help regulate and promote commerce. Concerning the Ninth Amendment, the Court said that in insuring rights retained by the people, the Ninth Amendment did not withdraw the rights which are expressly granted to the federal government. Here, the Court felt that government held rights which were necessary and superior to those of the company. The Court held that the government had the right to dispose of property, that the property was acquired primarily while pursuing a legitimate purpose, that the electricity was excess over the primary needs, that the government was starting no new business or industry, and that there was no prohibition against a project that would help pay for itself. In view of these and the powers of the government, the Court decided that the Ninth Amendment could not be interpreted in such a way as to restrict the actions of the government in this project. In essence, the court held that the plaintiff had no Ninth Amendment right where the exercise of such a right would interfere with the legal exercise of the powers of the federal government.

In a case similar to Ashwander, the Supreme Court held again that the government sale of power did not violate the plaintiff's Ninth Amendment rights, Tennessee Power Co. v. T. V. A., 306 U.S. 118 (1939). Here the plaintiff had contended that federal involvement in this area constituted illegal regulation under the Ninth and Tenth Amendments and interference with his right to own property and to employ it in his business. The court held that in contracting with its vendees and setting the rate at which they could sell power, the government was not engaged in regulation of the plaintiff. The rate setting was merely an incident of competition where the government lawfully sought to assure a market for the power the T.V.A. had for sale. Ashwander has established the legal basis for the same and Tennessee Power had confirmed not only that the government had the right to sell, but also that the government could use whatever legal means necessary to effectuate the right. The conclusion from this is that the Supreme Court felt that the Ninth Amendment guarantees rights, but only to the extent that their exercise did not in any way interfere with the government's rights or the government's attempts to effectuate those rights in a legal manner.

In United Public Workers of America v. Mitchell, 330 U. S. 75, (1946) certain civil service employees of the executive branch of the federal government sought an injunction to prohibit the enforcement of the Hatch Act in order that they could take part in political campaigns. While there was no case or controversy for most of the employees, one plaintiff's case did meet the requisites for review by the Supreme Court. The Supreme Court accepted his contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments was involved, but it did not hold these rights to be absolute. The court said that when the exercise of federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the Court has to look to the grant of authority which authorizes the exercise of that power. Similar cases in the past had held that Congress could regulate political activities of nonappointed government employees. These cases had been decided on the premise that this type of regulatory legislation was designed to promote efficiency, integrity, and discipline in the discharge of public duties by the public servants, and that this was clearly within the scope of the legislative power. In this case the Court decided that when the actions of civil servants, in the judgment of Congress, menaced the integrity and competency of the service, legislation to forestall such danger and to maintain the service is required. Congress had decided that political activities were such a menace and passed the Hatch Act. The

Court,recognizing the primacy of the legislation and precedent, refused to call the act unconstitutional. Here, as in the previous cases, recognized Ninth Amendment rights were not protected when their exercise interfered with the authorized or recognized exercise of government power. Nevertheless, these cases have shown that the right to engage in a business and the right to participate in political activities are properly within the unenumerated rights protected by the Ninth Amendment.

In Griswold v. Connecticut, 381 U.S. 479 (1964) the Supreme Court reversed the conviction of the appellants as accessories in violating Connecticut's law against the use of birth control means. The appellants had violated this law by giving information, instructions and medical advise to married persons about means of preventing conception. In reversing, the Supreme Court held that certain guarantees of the Bill of Rights have shadows emanating from these guarantees helping to give them life and substance, creating zones of privacy. The Ninth Amendment was held to be one of those guarantees, and together with other guarantees, it forms a zone of privacy around the marriage relationship. This relationship , the Court held, could not be invaded by a broad state statute that sought to regulate in an area constitutionally subject to state action. Therefore, the statute was unconstitutional, because it involved an area of protected freedoms.

Privacy in the marriage relationship, then is another Ninth Amendment right, but this right is protected. There are two major distinctive differences between this and the previous decision that could account for these differing treatments. The first is that privacy in marriage is an "ancient, sacred"right "fundamental to our society," more so, than the more recent right to campaign for political candidates. Secondly, the exercise of the right does not interfere with the exercise of the power of the government to conduct its own affairs. This right does limit the exercise of governmental power to regulate in this area, but this limitation doesn't interfere with governmental power over defense, commerce, the civil service, of other areas fundamental to the maintenance of the country.

Justice Goldberg, in his concurring opinion, developed the concept of a broad Ninth Amendment. He argued that the concept of liberty protects those rights which are fundamental and that those rights were not confined to the specific terms of the Bill of Rights. This, he said, is supported both by court decisions and by the language and history of the Ninth Amendment. History, according to Justice Goldberg, reveals that the first eight amendments were not meant to be exhaustive nor were they meant to imply a negation of all rights not expressly affirmed. These unenumerated rights are protected by the Ninth Amendment. He continued that to apply the Ninth Amendment to the States would not change history. While admitting, that originally the Bill of Rights applied only to the federal government, he contended that the Fourteenth Amendment, which extends much of the Bill of Rights to the states, also extends the prohibition against abridging fundamental personal liberties to the states by incorporating the Ninth Amendment. Thus, in his estimation, the Ninth Amendment, in indicating that not all liberties are specifically mentioned, is relevant in showing that other unenumerated fundamental rights are protected from the states, as well as the federal government.

The decision in Roe v. Wade 410 U. S. 113, (1973) further developed the concept of Ninth Amendment rights. The right of privacy was extended to include not only the marriage relationship, but also the right to choose whether to have children where the exercise of this right did not interfere with legitimate interests of the state. Ruling that declaratory, though not necessarily injunctive, relief was warranted, the Supreme Court declared that the abortion statute involved was void for

vagueness and over-broadly infringing the plaintiff's constitutional rights, including the Ninth Amendment, and further held that the right to privacy was broad enough to encompass a woman's decision to terminate her pregnancy. The Court said this right existed because of the great possible detriment that could be imposed upon a woman if the state were able to prohibit her from terminating her pregnancy. The Court, though, did not say that the state had no rights in this area. The state has an important interest in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point, these interests become sufficiently compelling to sustain regulation of the factors that govern the absolute decision. The right to privacy is not absolute.

Justice Douglas, in his concurring opinion, said that a catalogue of the Ninth Amendment rights included customary, traditional, and time-honored rights, amenities, privileges, and immunities that come within the sweep of "the Blessings of Liberty" mentioned in the preamble of the Constitution. Many of these, he continued, came within the meaning of the word "liberty" as used in the Fourteenth Amendment, and he divided them into three categories.

> First is the autonomous control over the development and expression of one's intellect, interests, tastes and personality.

These rights, to him, are absolute and permitting of no exception. The other two categories, while fundamental, permit state regulation where a compelling state interest can be shown.

> Second is freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the upbringing and education of children.
>
> Third, is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, and loaf.

The Ninth Amendment rights, to be applicable to the States, have to be implicit in the concept of ordered liberty, and rooted in the traditions and conscience of our people, Palko v. Connecticut, 302 U. S. 319 (1937). Their absorption through the Fourteenth Amendment indicates that neither liberty or justice would exist if they were sacrificed. But beyond privacy, what is a fundamental right as expressed in Palko? Nothing can be said with certainty at this point and future case law will have to determine the full depth and breadth of the unenumerated rights. It is possible that some type of rising scale will be used, similar to the Eighth Amendment interpretation that allows the definition of cruel and unusual punishment to change as people's attitudes become more humane, but this cannot be said with any certainty. On this basis alone, it could be argued that Art. I section 20 of the Ohio Constitution protects the right of privacy as well as other, as yet undefined, rights.

The development of absolute Ninth Amendment rights, though, is limited by the concept of "compelling state interest," as was seen in Roe , where the Court set limitations on the privacy based right to abortion. In N.A.A.C.P. v. Alabama, 357 U. S. 449 (1958), the court said that in the domain of indispensable liberties abridgement of such rights, even though unintended, may invariably follow from various forms of government action. In these cases, the courts can only uphold such actions if the government can advance sufficient constitutional reasons to justify

the acts and their consequent abridgement of rights. To determine whether there are sufficient constitutional reasons for the law, then, is not dependent upon any clearly established definition, but upon a court's balancing of respective rights. Legislative preferences or beliefs respecting matters of public convenience may well support regulations directed at certain personal activities, but these preferences may be insufficient to justify those that diminish the exercise of rights vital to the maintenance of democratic institutions. Therefore, the courts must weigh the interests of the state in a law against the interests of the individual and the concept of liberty in the right sought to be abridged or regulated.

These cases seem to establish a criteria for distinguishing Ninth Amendment rights, and by implication rights guaranteed by Art. I, section 20 cl. 1. Rights unenumerated in the other Amendments, also fundamental to the individual, to the concept of ordered liberty, and to the exercise of that liberty by the individual, are Ninth Amendment rights. Their basic character as fundamental rights makes them applicable to the states through the Fourteenth Amendment, and where their exercise does not limit or interfere with the exercise of powers fundamental to the proper working or interests or government, they are absolute and cannot be abridged.

As a practical matter, what these rights are depends upon who is defining the Ninth Amendment. Justices Black and Stewart, in Griswold, basically argue that it is not the Court's function to establish certain rights under the Ninth Amendment, and that to do so would **overextend** the Court's function. They argue this from their premise that the Ninth was enacted to protect State powers against federal invasion rather than to protect individuals from a state legislature passing laws that govern local affairs. In doing this, they reject the premise that the nacural rights doctrine is applicable to the Ninth Amendment either philosophically or historically. The natural rights doctrine, as developed by Goldberg, in his concurring opinion in Griswold, and explained more extensively by T. J. Moore, in his article The Ninth Amendment (7 New Eng. L. R. 215 (1971) is essentially that the Constitution and Bill of Rights were written by people influenced by Locke and the school of thought that held that all men were naturally endowed with certain rights. These rights could be surrendered in part to establish an effective government, but this surrender was only to insure the protection of the natural rights and the greater rights and freedoms that arose out of the organization of a government. In addition, the establishment of government was thought to limit the freedom of men only as much as was necessary to allow the government to function correctly. In keeping with this, the Constitution, as originally proposed and written, defined the extent of governmental powers, and all powers not expressly given to the federal government remained in the people either individually or in their collective representatives, the individual states. A Bill of Rights was, therefore, originally thought dangerous and unnecessary. It was felt that an enumeration of some rights might be considered to impliedly limit others not specifically named, although all rights had been reserved by implication to the people by the listing of federal rights in the Constitution. All rights not specifically delegated to the government were retained by the people. There were other framers of the Constitution who felt differently. While they believed the fundamental freedoms had been reserved for the people, they perceived that later generations might forget exactly what was intended, with the expansion of governmental power as the consequence. Consequently, they forced through a compromise: support for the Constitution in return for support for the Bill of Rights. When the Bill of Rights was written the problem of implicit limitation arose again. To settle it, the Ninth Amendment was added to protect those rights not specifically guaranteed. From the history and case law, it would seem that the Ninth Amendment can be as broad as the

imagination and certainly could cover all aspects of the freedoms set out by Douglas in his concluding opinion in Roe. Although Art. I, section 20, cl. 1 doesn't have a history like that of Amendment Nine, there is no reason why it could not have an equally broad application.

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. It appears to be an ancestor of Art. I, section 20 cl. 2, of the Ohio Constitution but where the Tenth Amendment is concerned with the balance between state and federal rights, Art. I, section 20, cl. 2 is concerned with the balance between private and state rights. Almost every case dealing with Art. I, section 20 is concerned with this balance, although in essence it contains many of the same elements contained in cl. 1. The determination of an individual's rights would by necessity also determine to what extent the state can act to affect an individual.

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 is at the foundation of our system. As expressed in Art. VIII, section 1 of the Constitution of 1802, government is founded on their sole authority and organized to protect their rights and independence, and they have complete power to alter, reform or abolish their government whenever it is deemed necessary (now Art. I, Section 2 of the Constitution of Ohio). On this basis, they have the undoubted right to delegate as much of this power and in such manner as they choose. 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, Art. VIII, section 28 in 1802 declared that nondelegated powers remained with the people (now Art. I, section 20). The Court finished by saying that by the Constitution the people have granted certain powers, to be exercised for their benefit, until they see fit to resume them, and have retained others. In those areas where power has been delegated, if there is no specific enumeration of items of power, the legality of its use must be determined from the nature of the power exercised. If the exercise of power falls within the general terms of the grant of power contained in the Constitution, it will be prohibited only if the Constitution places a limitation on it elsewhere. All actions that fail to fall within this grant constitute an illegal use of power retained by the people. Fifty years later, in State ex rel. the Robertson Realty Co. v. Guilbert, 75 Ohio St. 1, (1906) the Supreme Court of Ohio repeated the limitations of delegated governmental power. The Court held that under the Ohio Constitution, which is explicit in excluding from the legislative department the exercise of powers not delegated, the authority to act must be found in express terms or by implication in the Constitution. All powers not delegated to each house are expressly reserved to the people, and the provisions of the Constitution enumerating powers are grants of power limited by Art. I, section 20 of the Ohio Constitution. But once those powers are delegated, Art. I, section 20 will have no effect.

In State ex rel. Attorney General v. Covington, 29 Ohio St. 102, (1876) a law passed by the legislature was attacked. The law provided that in all cities with a population over 200,000 police powers and duties would be vested in and exercised by a five-member board appointed by the governor for five-year terms. According to the 1870 census this legislation only applied to Cincinnati and would continue to

do so for the foreseeable future. Objection to the bill was based, in part, upon Art. I section 20 "and all powers not here delegated remain with the people." The Court, though, said that this had the reverse implication that all powers delegated in and by the Constitution do not remain with the people, but are vested in agents and officers of the government to be exercised by them alone. Further, the Court held that whatever limitations upon delegated powers may be found elsewhere in the Constitution, it is clear that Art. I section 20 does not impose a limitation on those powers.

> That section only declares that powers not delegated remain with the people. IT does not purport to limit or modify delegated powers.

Comparison with Other States

In comparing Art. I, section 20 to similar sections in other state constitutions several noticeable differences appear. The primary variation is that none of those state constitutions reviewed contained any sectionl clause, or phrase dealing with the delegation of power. Ohio expressly provided that power not delegated remains with the people; it is possible that if required, those other states could reach this same position by implication from other sections. All have sections similar to sections 1 and 2 of Article I of the Ohio Constitution, recognizing the people as the source of all governmental power and all have a section which, in many cases, is identical to Art. I section 20, cl. 1. From this section, one could argue that to establish every individual's rights would also establish the limits of state power. Other sections provide that the people are the source of all power and can change governments at will, and one could argue that constitutions are the people's method of establishing what the powers of government will be. Combining these sections of other constitutions, one arrives at what is expressed in Art. I section 20, cl. 2 of the Ohio Constitution. Art. I, section 20 cl. 1 only differs slightly from similar sections in other constitutions, (Alas. Const. Art. I, section 20; Ill. Const., Art.1, section 24; Mont. Const., Art. II, section 34; Hawaii Const., Art. I, section 20). Illinois extends the guarantee to "individual citizens of the State" rather than to the "people," and Montana asserts that the enumeration shall not "deny, impair or disparage" rather than "impair or deny" other rights.

One great difference is a distinct right guaranteed by the other states, but not by Ohio in specific terms, privacy. Alaska and Montana provide for this in separate sections. Alaska provides that the right shall not be infringed and that the right shall be implemented by the legislature, Alas. Const. Art. I, section 22. Montana guarantees that the right of privacy shall not be infringed without a showing of compelling state need, Mont. Const. Art. II, section 10. In these two cases, the states seem to have taken a Ninth Amendment (Art. I, section 20) rights and formalized it. In Hawaii and Illinois, the guarantees of privacy have been added to the sections protecting the people from unreasonable search and seizure, Hawaii Const. Art. I, section 20; Ill. Const. Art. I section 6.

While it would seem that these clauses are also formalized expressions of the Ninth Amendment, their location appears to imply that they are more specifically designed to protect individuals from investigatory invasion of privacy than from other types as in Griswold or to act as a general guarantee. One could easily contend that privacy is a right protected in Ohio by Art. I, section 20, and this is possibly true, but if it is so protected and does have the same characteristics

as privacy as used in the context of the Ninth Amendment, perhaps it should be specifically protected, rather than only by implication. In addition, since the states originally had the responsibility for protecting individual rights, a responsibility recently assumed by the federal government, it's not beyond the state's power to resume its obligation by providing greater protections than those provided by the federal government.

Ohio Constitutional Revision Commission
Bill of Rights Committee
January 13, 1975

Research Study No. 44H

Bill of Rights, Part 8
Article I, 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.

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 copy both the Fifth and the Sixth Amendments of the United States Bill of Rights, originally appeared in Article VIII, section 11 of the Constitution of 1802. Article VIII, section 11 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. Article VIII, section 11 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 language of the remainder of Article VIII, section 11 to follow more closely that of the Sixth Amendment. The first sentence of Article I, section 10, 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 or 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 its 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. They said that the courts and the legislatures concerned themselves with coddling criminals without considering the harm being done to the country. The proponents of change cited several areas where changes could be made to help remedy this situation and 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 source of irritation to those who desired changes was the rule about testifying. Previously, if the defendant did not testify, the prosecution could not comment on the defendant's failure to do so. The reformers attributed the rise in crime to this inability to force a defendant to testify or to allow a prosecutor to comment on a failure to testify. They said that often a guilty defendant's attorney contended certain things were unclear or doubtful, enabling the defendant to obtain a verdict of not guilty on the basis of probable doubt. The reformers wanted to rectify this. A change in the law, they contended, would enable a prosecutor to force a defendant to testify to clarify issues clouded or said to be unclear by his counsel. This would also enable the prosecutor to point out or draw conclusions for the jury from the failure to testify. The result of this would be that fewer of the guilty could escape punishment by hiding behind a wall of silence and a cloud of doubt largely created by themselves.

The Convention accepted these arguments and adopted additions to Article I, section 10 allowing depositions to be taken by the state and permitting prosecutors in criminal cases to testify about the failure of defendants to testify. There have been no further changes since 1912.

Comparison with Federal Fifth and Sixth Amendments

Article I, section 10 of the Ohio Constitution largely copies similar Amendments of the United States Bill of Rights, but Ohio courts, prior to the incorporation of large parts of the Fifth Amendment and the entire Sixth Amendment through the Fourteenth Amendment generally did not interpret Article I, section 10 to give the same measure of protection that was provided by the federal guarantees. Now Ohio courts do, but with incorporation the emphasis in court cases has shifted from the use of Article I, section 10 to using the federal rights. Consequently, since the federal cases have much greater importance to the resolution of these rights in both state and federal courts and to the interpretation of the rights as set out in the state Constitution, this discussion will concentrate on the federal amendments. One point that should be noted is that the new Ohio Rules of Criminal Procedure follow the most recent United States Supreme Court decisions thereby formalizing into law for Ohio what the Supreme Court had established by decisions to be the full rights of the citizens of this and other states. Finally, the new Ohio Rules are very similar to the Federal Rules of Criminal Procedure and generally where a Federal rule is mentioned there is a similar Ohio Rule.

The first clause of the Fifth Amendment to the U. S. Constitution states:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment of indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in service in time of war or public danger;. . .

This establishes the need for an indictment or presentment as a necessary first step in a criminal process involving a capital or infamous crime with a limited exception involving the military. The Fifth Amendment indictment is a presentation, under oath, to a proper court by a duly impanelled grand jury, of a charge describing an offense against the law for which the party accused of the offense may be punished, Ex Parte Bain, 121 U. S. 1 (1887). A presentment can also be used, but it is obsolete, now, in most jurisdictions. It is also a written accusation presented to a proper court, but it is not based on a bill of indictment, but rather notice taken by a grand jury of any offense from their own knowledge or observation. This has been held to be an essential ingredient of "due process," but it has also been held not applicable to the states, Wong Wing v. United States, 163 U. S. 228 (1896), Prescott v. State, 19 O.S. 184 (1869). The states may, without denying due process, provide by their organic laws or by statute for the prosecution of felonies by information rather than by indictment, and a prosecution by information cannot be found insufficient if it is authorized by the constitution of the state, Davis v. Burke, 179 U.S. 399 (1900). In federal courts, the grant jury requirement applies to all capital and infamous crimes: those crimes which have the death penalty as punishment or those punishable by imprisonment in the penitentiary, except in certain limited cases where the crime's status is clearly indicated as noninfamous (i.e., criminal contempt). For all other crimes, the defendant may waive the required indictment in federal courts, Federal Rules of Criminal Procedure, Rule 7 (b).

Regardless of how the charge comes down, it must be specific in its allegations, so that it may inform the defendant of the charges he must face and defend against. A general statement that the grand jury has concluded that a named defendant is to be charged with a specific crime, but revealing nothing else, has been held to be constitutionally insufficient Gaither v. United States, 413 F. 2d 1061 (d.c. Ct. A, 1969). This requirement though is not extended to cases arising in military service, although in recent years the Supreme Court has limited the jurisdiction of military tribunals to service-related crimes, Kurtz v. Moffitt, 115 U.S. 500 (1885) Relford v. Commandant, 401 U.S. 355 (1971).

Double Jeopardy

In the civil court system, res judicata prevents the relitigation of claims and issues settled in earlier court proceedings that have gone to final judgment on the merits. One of the purposes of this principle is to protect a litigant from successive repetitive lawsuits and the accompanying hardships and costs. This is paralleled in the criminal law system by the Double Jeopardy Clause of the Fifth Amendment.

> . . .nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .

This principle applied only to federal courts until 1969, when, in Benton v. Maryland, 395 U.S. 284, (1969), the Supreme Court held that the Double Jeopardy Clause applied to the states through the Fourteenth Amendment. In 1970, in Ashe v. Swenson, 397 U. S. 436 the Supreme Court held that collateral estoppel, which precludes the relitigation of factual issues resolved in a final judgment in an earlier proceeding, was an aspect of this Clause. This principle applies to parties and their privies--the government and the police, but as in civil cases, estoppel only applies to parties where the defendant would have been bound by a decision in the earlier trial.

Double jeopardy, though, does not require a final judgment. Once a jury is sworn or the prosecutor presents his first evidence, the defendant is in jeopardy for purposes of barring a second trial. Once in jeopardy, regardless of the outcome of the trial, the prosecutor is barred from reprosecuting the same offense. The actual workings of the doctrine are not so clear cut because of numerous exceptions to the rule, for example when a judge declares a mistrial.

Jeopardy attaches when the defendant is placed in a procedural position which exposes him to a substantial risk of conviction. It does not attach at pre-trial proceedings because the proceedings have not advanced far enough to create that risk of conviction. Even if the proceedings have progressed to the trial state, there are circumstances, as "manifest necessity", that will halt the trial without the doctrine coming into play, United States v. Jorn, 400 U.S. 470 (1971). Generally, this "manifest necessity" is defined as an external cause that interrupts the trial: a judge becoming ill, war forcing a relocation of the trial, or some other circumstances outside of the control of the parties. Another exception allows the prosecution to retry a defendant after a trial court conviction is overturned. This is justified by the theory that throughout the trial, appeal, and retrial there has been only one jeopardy. Finally there is a "hung jury" exception that allows a retrial if the trial has been error free United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824). The effect of this rule may be modified by Apodaca v. Oregon, 406 U. S. 404 (1972), which held that the Sixth Amendment requirement of a jury trial, which is applicable to the states through the Fourteenth Amendment, does not require a unanimous verdict for a conviction. Unanimity is only required by federal statute but each state can determine for itself a reasonable procedure requiring less than unanimity.

Where none of the exceptions apply, though, once a defendant has been acquitted of a crime, he can not be retried. Further, where the defendant has been charges with two offenses and convicted of only the lesser, the Supreme Court has ruled that there was an implied acquittal on the greater charge and forbade a retrial on the second charge, Greene v. United States, 355 U.S. 184 (1957). A mistrial not caused by "manifest necessity" can also act to bar a retrial. If there is prosecutorial misconduct that results in a mistrial, a subsequent retrial will be barred, Downum v. United States, 372 U.S. 734 (1963). In the case of misconduct, the judge could allow the trial to continue and the defendant could appeal, but there the defendant runs the risk of either losing his appeal and having the conviction upheld or facing a new trial after a successful appeal. If the judge mistried the case, where there is no "manifest necessity", double jeopardy will bar subsequent prosecution of the defendant, unless the defendant consented to the mistrial.

In sentencing, on a retrial, a harsher sentence has been allowed after a second conviction for a crime following a successful appeal from a first conviction for the same crime, Stroud v. United States, 251 U. S. 15 (1919). In North Carolina v. Pearce, the Court ruled that harsher second sentences did not offend the Double Jeopardy Clause, 395 U.S. 711 (1969). The Court was concerned with the possible deterrent effect harsher sentencing could have on an appellant but it did not consider a complete prohibition necessary. Instead, the Court established a procedure to help provide protection from judicial vindictiveness. The Court ruled that in order for a judge to give a harsher sentence, he must state the reasons based upon objective information about the defendant's conduct subsequent to the original sentencing and that this must be placed in the record. The Pearce doctrine is based on the principle that the second trier of facts is not working with a clear slate

that would enable him to act completely unaffected by earlier proceedings. This, though, is not the case in a two tiered judicial system. Where a second trial is a matter of right, and the start of the second negates the outcome of the first, the second court is not bound by Pearce, Colten v. Kentucky, 407 U. S. 104 (1972).

The Double Jeopardy Clause only applies to cases where the reprosecution is for the same offense. A reprosecution for the same criminal conduct is not a retrial for the same criminal offense unless the evidence necessary to sustain a conviction in the second prosecution is sufficient to support a conviction in the first. The prosecution can therefore withhold several charges from the first trial of a multiple offender in order to try the defender on the other charges if the first results in an acquittal. Compulsory joinder might be one way to establish more just standards on the state level, requiring the prosecution to join all offenses of which it is aware at the first trial. Since the Double Jeopardy Clause only sets the minimal standard, this could be done by state law or by the state constitution. Applying a "same transaction" rule would accomplish this result, if desired, by requiring the prosecution to join all the crimes arising out of the same action in one trial and applying the Double Jeopardy rule to these crimes and any others arising out of the same actions but not prosecuted.

Self-Incrimination

The Fifth Amendment also provides that:

> . . .nor shall /any person/ be compelled in any criminal case to be a witness against himself . . .

This was added to the Constitution because of the conviction that too high a price would be paid if there were unhampered enforcement of the criminal laws, and that certain other rights and values should not be sacrificed for the sake of enforcement, Feldman v. United States, 322 U.S. 487, reh. den. 323 U.S. 811 (1944). The right against self in crimination was one of those rights thought to have a higher priority, and to effectuate its basic goals, the Supreme Court has ruled that it must be liberally construed, Hoffman v. United States, 341 U.S. 479 (1951). Further the Court has condemned the practice of imputing a sinister meaning to the exercise of this right.

This is an individual privilege; it can only be invoked by a natural person, and it can not be raised by a corporation or unincorporated association, George Campbell Printing Corp. v. Reid, 392 U. S. 286 (1968). Accordingly, the privilege can not be invoked to protect the papers and records of a corporation nor can an individual use his own right to protect those records. Papers and effects which are private or held by an individual in his personal capacity are protected, but if the individual holds them in a representative capacity for an organization, the individual cannot shield them even if they tend to incriminate him, Hale v. Henkel, 201 U. S. 43 (1906).

The Supreme Court has long recognized this right and has extended its applicability much beyond the literal language of the clause. As a result, the right is available to witnesses as well as to defendants and in more than criminal cases alone. The right is available in civil litigation, before grand juries, before legislative committees and before administrative agencies Graham v. United States, 99 F. 2d 746 (9Cir. 1938), Blau v. United States, 340 U.S. 159 (1950) Emspak v. United States349 U.S. 190 (1955). In 1964, this right was extended to the states through the Due Process Clause of the Fourteenth Amendment and thereafter applied

in the states in the same manner as applied in the federal courts, Malloy v. Hogan 378 U. S. 1 (1964)

The right enables an individual to refuse to take the stand in a criminal prosecution, and it further protects him from suffering any consequences from his refusal by forbidding comments on his refusal as an implication of guilt. This has led the Supreme Court to find harmful error in a prosecutor's or judge's comments on such a refusal to testify where the comments are extensive and infer guilt and there is evidence that would have supported acquittal, Fontaine v. California, 390 U. S. 593, rem. den.,391 U.S. 929 (1968). A witness in a criminal case, though, does not have the same broad privilege, and must invoke the privilege in response to specific questions. Otherwise the right is considered waived.

The privilege against self-incrimination is most clearly available when an individual is asked in court if he is guilty of a crime, but it is also available if he is asked if he committed one of the elements of a crime or if an answer to a question could be used to furnish a link in the chain of evidence. This does not mean that an individual can freely invoke the privilege on his own estimation of the hazard of an answer. A court must determine if the risk truly exists, and if it does not, the judge may require that the defendant answer the question. To maintain the right, though, it need only be apparent from the implication of the question and the setting in which it was asked that an answer would result in an injurious disclosure, Hoffman v. United States, 341 U.S. 479 (1951). This is the federal standard, but since Malloy it applies with equal force to the states. Similarly, this standard applies to possible incrimination in either state or federal courts for other crimes in the case of a witness, although not to testimony in state courts concerning possible incrimination in another state, Murphy v. Waterfront Commission of New York, 378 U.S. 52 (1963).

A person cannot claim the right to protect himself against civil liability or public scorn. Nor is the right available if the statute of limitations has run or if the offense has been pardoned or tried, and it cannot be used to protect others. In the area of papers, the Supreme Court held in Shapiro v. United States, 335 U. S. 1, reh. den., 335 U.S. 836 (1949), that the privilege cannot be maintained for records required by law to be kept in order that there is information of transactions which are subject to government regulation and validly established restrictions. This exception was upheld and applied to income tax records in Couch v. United States, 409 U.S. 322 (1973). The Court's decision emphasized the necessity of both ownership and possession, by the taxpayer, of any records that the taxpayer sought to protect. Without these, personal compulsion is lacking and there is no violation of the right. In this type of situation, the expectations of the individual cannot be absolute in the face of a compelling government interest, since the government has an overriding need to collect revenues and insure that each taxpayer meets his tax liability.

Another area not protected by this Fifth Amendment right is that of real evidence. In Schmerber v. California, 384 U.S. 757, (1965), the Supreme Court held that forcing a drunk driving suspect to give a blood sample did not violate his right against self incrimination. In doing this, the Supreme Court distinguished between what was communicative evidence from the accused and the accused as a source of real or physical evidence. Later cases dealing primarily with the Fourth Amendment have established guidelines in this area. The distinction between the person himself as a source of evidence and his communicated statements also extends to other aspects of the accused's physical appearance and physical evidence distinct to the individual. In essence, a defendant can be made to stand, grow a beard,

or wear certain clothes--all without violating his right against self-incrimination. The Supreme Court extended this even further in two cases in 1973, United States v. Dionisio, 410 U.S.1, and United States v. Mana, 410 U.S. 74, holding that a person called before a grand jury may be required to supply voice and handwriting samples.

An individual may also voluntarily waive this Fifth Amendment right. In voluntarily taking the stand, the defendant waives his right to silence about the specific crime in question, and if he voluntarily reveals incriminating facts, he may not claim the right to avoid releaving the details. Where there is coercion, though, there can be no waiver, and possible disbarment or firing cannot be used to force a defendant to give up his rights, Spevack v. Klein, 385 U.S. 511 (1967); Gardner v. Broderick 392 U. S. 273 (1968).

To effectuate the right against self incrimination, the Supreme Court held in Miranda v. Arizona, 384 U.S. 436, (1966), that an individual in a custodial situation under arrest or detention by police, must be informed by the authorities of this right to remain silent. The Court held that, without this warning and a waiver of the right that was made voluntarily, knowingly, and intelligently, evidence obtained as a result of a confession would be excluded at trial. In Miranda, the court established that certain things must be told to the defendant in order to guarantee that he would be fully aware of his rights and hence be able to effectively utilize them to protect himself. The Court required that the authorities inform the person that he had the privilege against self-incrimination, that he had the right to remain silent, that any statement he made could be used against him as evidence, and that the accused had the right to an attorney and if he could not afford one, one would be provided for him. Only a statement made after these have been explained will be admissible at a trial. Coercion or undue delay that acts as coercion will result in a prohibition of the use of the confession or any evidence that is a product of information obtained from a coerced confession, Escobedo v. Illinois, 378 U. S. 478 (1964). This case reflects the basic mistrust that the Supreme Court has for confessions, but the Burger Court has started to reverse this trend. In 1971, in Harris v. New York, 401 U. S. 222, the Court held that the failure to give the Miranda warning would make the confession involved inadmissible as evidence of the crime, but that if the defendant took the stand to deny that he committed the crime, evidence of the confession would be admitted to impeach the credibility of the witness.

Speedy Trial

The Sixth Amendment, which also forms a large part of Art. I, section 10 of the Ohio Constitution, says,

> 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 until Klopler v. North Carolina, in 1967 386 U.S. 213 did the Supreme Court hold that the guarantee of a speedy trial is a fundamental right binding on the states through the due process clause of the Fourteenth Amendment. For several years thereafter, this right was explained on a piecemeal basis until Barker v. Wingo, 407 U. S. 514 (1972), dealt with this issue on a comprehensive basis. The Court reasoned that a Sixth Amendment speedy trial claim must be decided by using a balancing test composed of at least four factors: the length of the delay, the

reason for the delay, the defendant's assertion of his rights, and prejudice to the defendant. No one of these factors, though, is conclusive or exclusive, and all must be considered, together with other relevant information.

The length of delay is relevant but it depends on circumstances and the Supreme Court has not required the States to adopt any specific time limits for acting, although federal statutes, as well as Ohio statutes, have established definite time periods to insure a speedy trial. The Court in Barker recognized the freedom of the States to prescribe a reasonable time consistent with constitutional standards. In determining if there has been a violation of this right, the length of time acts as a catalyst. Unless the delay is presumptively prejudicial, the courts need not inquire further. The basis for analysis of this in a specific case is the nature and complexity of the crime charged. If the court determines from these factors that the delay is unreasonable, it must then inquire into the reasons for the delay.

If a delay has been caused by actions of the defense, the defendant must bear the consequences. If the delay was caused by a neutral factor as court congestion, the defendant must bear this burden also, King v. United States, 265 F 2d 567 (D.D. Cir.) cert. den. 359 U.S. 998 (1959). The defendant can only utilize his right if the delay resulted from purposeful and oppressive acts of the prosecution, United States v. Marion, 404 U.S. 307 (1971). This right, though, must be demanded.

A defendant raising this right must have previously demanded a speedy trial, and even after a demand has been made, the defendant is deemed to have waived objection to any delay occuring prior to the demand. The Court in Barker felt that failure to raise the issue would make it difficult for a defendant to prove he had been denied a speedy trial and would serve to raise a strong presumption of consent to the delay. In addition, the Court added the frequency and the force of these demands as a material element in showing a lack of waiver. This would help show the prejudice to the defendant which might not otherwise be on the record. Traditionally, only a detriment to the defendant's ability to mount a defense was considered prejudicial, but in 1966 in United States v. Ewell, 383 U. S. 116, the Court recognized other sources of prejudice: pre-trial incarceration, restraints on liberty, and hostility or suspicion of the community: impairment of a defense is still, however, the most important factor. The effect of a violation of this right is the release of the accused, and a prohibition against subsequent re-indictment for the same offense whether the defendant has had the indictment dismissed or a conviction reversed.

Public Trial

The accused in a criminal trial also has a right to a trial that is public, as well as speedy. This, though, is not an absolute right, and courts seem to agree that the right to a public trial does not mean that everyone who wishes to attend a trial may do so. Administrative necessities may dictate certain limitations on the right, for example, the capacity of a courtroom or the necessity of preserving order, United States v. Kobili, 172 F. 2d 919 (3rd Cir., 1949). Certain other factors may also prompt the judge to limit this right, as the embarassment or emotional disturbance of a witness or the salacious nature of a case where children are involved. But where there is no reason for excluding anyone, the right attaches to all parts of the trial, United States v. Sorrentino, 175 F. 2d 721 (3d. Cir. 1949). Although this right seems so fundamental, it does not seem to have even been specifically incorporated through the Fourteenth Amendment to apply to the states. In 1968, in dictum in Duncan v. Louisiana, 391 U. S. 145 the Supreme Court gave the probable result of a ruling on this issue when it said that many of the rights in the first eight Amendments were protected from state interference by incorporation through the due process

clause of the Fourteenth Amendment and that the clause protected the right to a speedy and public trial.

Trial by Jury -

The right to a trial by jury in criminal cases is provided by Article III, section 2 and Amendment VI of the Constitution and Bill of Rights respectively. In federal courts, this has been held to mean that the jury should consist of twelve persons, neither more nor less, that the jury be in the presence or under the supervision of a judge, that the verdict be unanimous, Patton v. United States, 281 U.S. 276 (1930). Until 1968, this was held not to be applicable to the states. Then in Duncan v. Louisiana, the Supreme Court held that a defendant had the right to a jury trial in a state court in any case where he would have this right in a federal court, but there was a limit to this. The Court said that it was unlikely that the decision would require widespread changes in state criminal processes since the Duncan interpretation could be reconsidered, and in addition most state processes were broad enough to meet the Sixth Amendment's standards. The federal rules, though, are in keeping with the Patton definition of a jury trial while state procedure does not always adhere to the definition.

In federal courts, the Federal Rules of Criminal Procedure and specific statutes establish the procedures followed. Rule 23 provides for a jury of twelve, and although it permits a waiver of this right of trial by jury by a defendant, this can be done only with the approval of the court and the consent of the government. It further provides that there may be a jury of fewer than twelve, but this applies only where both the defendant and the government have so stipulated in writing and have the approval of the court. Rule 31 requires that the verdict be unanimous.

A variation of this procedure is the trial before a magistrate. Under 28 U.S.C. 631, district courts can appoint magistrates to hear the cases of persons charged with lesser offenses. In order for a defendant to have his case heard before a magistrate he must first give his written consent after being informed that he can have a jury trial tried by a judge. In essence, it is an informed waives similar to Rule 21. Without this waiver, the defendant retains his right to a jury trial with a unanimous verdict.

The place of the trial is also established in the Federal Rules of Criminal Procedure. Rule 18 provides that the prosecution shall be in the district in which the offense was committed and that the place of the trial shall be set with due regard to the convenience of the defendant and the witnesses. This placing does not include the finding and return of an indictment. The practice of impaneling a grand jury for the entier district for the session in some division and then distributing the indictments to the various divisions has been deemed legal. Only holding the trial in the division in which the offense took place has been deemed necessary to effectuate the requirement of the Sixth Amendment, Salinger v. Loisel, 265 U. S. 224 (1924).

These Rules, though, are modified somewhat by Rules 20 and 21. Rule 20 (a) provides that a defendant arrested in another district than that where the indictment is pending may in writing state that he wishes to plead guilty or nolo contendere, to waive trial in the district where the indictment is pending, and to consent to disposition where he is held. Upon the prosecutor's acquiesence, the prosecution can be conducted where the defendant is held. If the defendant is arrested on a warrant, with a similar written statement, subject to the approval of the prosecutor and a filing of an information or the return of an indictment, the defendant may be tried in the district where he was arrested, Rule 20 (b). A juvenile arrested in another

district, if he has not committed a crime punishable by death or life imprisonment, may also consent to a proceeding where he is held. First, though, he must be advised by counsel and by the judge of his rights and then he must have the judge's consent to his written request. Rule 21 (a) allows the court to transfer a proceeding to another district whether or not specified upon a defendant's motion if the court believes that prejudice in the district is no great that the defendant cannot get a fair and impartial jury. Also upon motion of the defendant, the court may transfer the trial to another district for the convenience of a defendant or witness or in the interests of justice, Rule 21 (b).

The Court further defined this Sixth Amendment right in In Re Winship, 397 U.S. 358 (1970). Here the Court held that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary for conviction and that this standard was applicable to all criminal trials. Following this decision, the Court decided a series of cases that helped define the procedural requirements for the states in keeping with the Sixth Amendment, to guarantee the right to a trial by jury.

In Williams v. Florida, 399 U. S. 78, (1970), Justice White, in reviewing the history of the Sixth Amendment, found that it showed no intent to require a twelve-man jury. Its purpose was to interpose the commonsense judgment of a group of laymen between the accused and the accused and to share the responsibility for the determination of guilt or innocence. This interposition, he found, was not a function of jury size. The requirements of size on the jury to provide for this guarantee were only that it be large enough to provide a cross section of the community. But this decision did not deal with unanimity. In Johnson v. Louisiana, 406 U.S. 356, (1972), the Supreme Court held that a majority verdict did not dilute the requirements of proof beyond a reasonable doubt. The Court felt that a finding of no reasonable doubt by a majority (9-3) did not imply that the majority ignored evidence sufficient to raise reasonable doubt. Instead, the Court felt that the failure of the minority to carry the vote suggested that its doubts were not reasonable. The reasoning is that the state is presumed to have convinced the majority beyond a reasonable doubt, since reasonable men can differ, the disagreement of the minority does not imply a failure of the proof. Apodaca v. Oregon 406 U. S. 404, (1972), confirmed the basic premise of Johnson, but while Johnson held that a nonunanimous verdict did not violate due process, in Apodaca the Court sustained nonunanimous verdicts as not being violative of equal protection. The Court ruled that the nonunanimous verdict did not interfere with the rights of minorities. The Court said that minorities simply had the right not to be excluded from the jury selection process, rejecting the contention that minority group members who constituted a minority in the jury could be excluded from being heard in the process. The Court refused to accept the possibility of jury misconduct by discriminatory or prejudicial behavior. As a further basis for this opinion, the Court noted that a defendant doesn't have the right to have minority group members in a jury. They only have the right not to have them excluded from consideration for selection for the jury.

Informed of the Charges

The third clause of the Sixth Amendment which allows the defendant to be informed of the charges against himself also applies to the states through the Fourteenth Amendment, Cole v. Arkansas, 333 U. S. 196 (1948). A person charged with a crime has the Constitutional right to receive from the government a written statement indicating with particularity the offense to which he must plead and prepare a defense. The accusation which begins the prosecution must relate sufficient fact and detail to inform the defendant of the exact charges placed against him including, usually, the time, place, and mann in which the offense was committed,

so that he will not be misled while preparing a defense. This also serves to protect the defendant from the risk of prosecution for the same offense at a later time by providing sufficient evidence to identify the specific act charged. The sufficiency of the indictment is to be determined by practical rather than technical considerations, United States ex rel. Harris v. Illinois, 457 F. 2d 191 (1972).

If the prosecution fails to specify what constitutes a violation of the statute or fails to provide the defendant with details of the pattern of conduct or opens him to double jeopardy, the accusation is vitiated. The indictment must be specific and contain all of the essential elements of the crime, therefore such facts couldn't be discovered at the trial to convict the defendant since the indictment would have violated the Sixth Amendment, United States v. Cruikshank, 92 U.S. 542 (1875). The courts have jurisdiction to convict the defendant only for crimes actually considered by the grand jury. If an essential element does not appear in the indictment, there would not be evidence that the element had been found by the grand jury and the courts could not allow a conviction, Ex Parte Bain, 121 U. S. 1 (1887).

Regardless of whether there has been prejudice, an objection to the lack of an essential element may be made at any time including after a verdict, Hagner v. United States, 285 U.S. 433 (1932). If the defendant objects to a defect in the indictment because of a lack of specificity, regardless of prejudice, the court must dismiss and the indictment must be resubmitted to the grand jury, Stirone v. United States, 361 U.S. 212 (1960). In the case where a specific fact is absent from the indictment and the jury has already reached a verdict, the disposition depends on whether there has been prejudice, and unless real prejudice were shown after a verdict, the objection would do no good. Objections that the indictment was so general as to leave the accused unable to prepare his defense must be raised by some preliminary motion or by a demand for a bill of particulars, Dunbar v. United States, 156 U. S. 185 (1895). These basic rules have been codified for the federal courts in the Federal Rules of Criminal Procedure, Rules 7, 12, 34, 52.

Rule 7 provides that any capital crime or crime punishable by imprisonment for more than one year must be prosecuted by indictment. Any other crime may be prosecuted by indictment or information, but the defendant may waive his right to indictment for a crime punishable by more than one year if he has been informed of the nature of the charges and his rights prior to such waiver. Rule 7(c) deals with the problem of an insufficient accusation by requiring that the indictment or information be a plain, concise, and definite written statement of the essential facts constituting the offense charged. It allows incorporation by reference among the courts but requires that each court state the statute, rule, or regulation which the defendant is alleged to have violated. Error in the citation or their omission is harmless error unless it misleads or prejudices the defendant. Rule 12 requires that defenses or objections based on defects in the indictment or information, other than that it fails to show jurisdiction or to charge an offense, may be raised by motion only before trial. Failure to do so constitutes a waiver although the court for cause may grant relief from the waiver. Lack of jurisdiction or failure to charge can be noticed by the court at any time. This power of the court can even be recognized subsequent to the verdict if there is a motion to arrest judgment within five days after the verdict or whatever time period the court may fix within this five day period, Rule 34. Finally, Rule 52 allows the court to disregard any harmless error which affects no substantive rights, while allowing it to notice any error affecting substantive rights that is not brought to the attention of the court.

Confrontation

The fourth right guaranteed by the Sixth Amendment is that of confrontation with accusers. This clause was written to provide the defendant the opportunity to face the witnesses against him and to question them under oath on cross examination. Despite the absolute language, though, this guarantee has been subject to exceptions. When a witness to an event or his testimony is shown to be unavailable, others will be allowed to testify as to information which the witness has related about the issue in question, Mattox v. United States, 156 U.S. 237 (1897). Because of this, the clause fosters the same general policies as the hearsay rule, which apparently arose from the gradual recognition by English judges that out-of-court testimony was less reliable than in-court testimony. In neither case does the judge and jury have the opportunity to watch the demeanor of the declarant under oath nor the cross examination.

Until 1965, the right to confrontation as guaranteed by the Sixth Amendment was a right limited solely to federal courts. In 1965 in Pointer v. Texas 380 U. S. 400 the Supreme Court held that the confrontation clause applied to the states. The question that had vexed the courts--what are the constitutional limits of hearsay and indirectly then what is the full extent of the defendant's right to confront his accusers--was beginning to be answered. In Pointer, the Court ruled that the defendant had had only meager opportunity to confront the witness against him. The defendant without counsel or cross-examination had observed the witness at the pre-trial hearing. The Court sais this was not enough to satisfy his right. A companion case, Douglas v. Alabama, 380 U. S. 415, (1965), further established the breadth of the Clause by finding a denial of the right by the use of a confession for the ostensible purpose of refreshing a witness's memory. The confession which implicated Douglas was not introduced into evidence and did not refresh the witness's memory, so Douglas was indirectly accused without an opportunity to respond to the accusation, a violation of his Sixth Amendment rights. Bruton v. United 391 U. S. 123, (1968), broadened the protection of Pointer and Douglas. In Douglas, the confession of a witness where there was no cross-examination possible had been used to try to implicate the defendant. In Bruton, a co-defendant's confession was introduced at the joint trial. The evidence was hearsay and inadmissible as to Bruton and the co-defendant refused to testify so no cross-examination could even be attempted, but the trial court ruled that the evidence was admissible against the co-defendant. Bruton had no way to counter or question this overt implication of guilt, but the trial court said that a limiting instruction would prevent the jury from considering the testimony against Bruton. The Supreme Court, recognizing that the jury could disregard the instruction, and consider the hearsay against Bruton, held that the evidence was inadmissible unless there was an opportunity to cross-examine because of the possibility of prejudice to the defendant. The Court handled another hearsay problem in Barber v. Page, 390 U. S. 719 (1968). There the Court ruled that before the prosecution could introduce out-of-court testimony of an allegedly unavailable witness, as an exception to the hearsay rule, the Confrontation Clause required that he make a good faith effort to produce the witness.

Hearsay and the Confrontation Clause were again issues in California v. Green, 399 U. S. 149 (1970). Following a disputed California ruling on evidence, the Court ruled that the introduction of a witness's prior unremembered statement to prove the truth of the matter asserted did not violate the defendant's right to confrontation when the witness also testified to cross-examination. The difficulty for the defendant arose from the facts that the matter sought to be proved was his commission of a crime and the unremembered statement was incriminating. The defendant

was effectively cut off from cross-examination because the witness could not testify to the accuracy of the statements other than that he had made them and had believed them to be true. Where the lack of cross-examination and confrontation had decided earlier cases for the defendant, it did not do so here, and the Court further noted that the right to confrontation might not be violated by out-of-court testimony of an absent witness if the witness had testified under circumstances that fully protected a defendant's right to cross-examination.

Shortly thereafter, though, the Court approved testimony under a Georgia hearsay exception where the witness had never been subject to cross-examination, Dutton v. Evans, 400 U. S. 74 (1970). The exception permitted statements of one co-conspirator, uttered during the course of a conspiracy to conceal a crime or the identify of the criminals, to be admitted against the other co-conspirators. The Court did not feel that the admission of this statement violated the defendant's rights even though the person who made the remarks, rather than someone who overheard them, could have been produced at the trial and his statements were never subjected to cross-examination. It was felt that if the hearsay evidence contained the indicia of reliability it would satisfy the Confrontation Clause since the Clause seeks only to insure that all evidence, regardless of source, contained sufficient information to enable the trier of fact to evaluate its truthfulness. The opinion suggested, though, that if the evidence were crucial, Barber might still require that the state make a good faith effort to produce the witness.

Nelson v. O'Neal, 402 U.S. 622 (1971), more carefully defined the Bruton decision. In Nelson, there was no lack of opportunity to cross examine the witness although this did little good. The witness was alleged to have made an oral confession implicating the defendant, but the witness denied making it. The trial court allowed this in and the defendant appealed, but the Court held that Bruton only applied where there could not be a full and effective cross-examination to fulfill the requirement of the Sixth Amendment. Where the defendant could cross-examine even though it would only be a reiteration of previous denials, the Court believed a limiting instruction would be sufficient to protect the defendant.

In Chambers v. Mississippi, 410, U. S. 284 (1973) the Supreme Court ruled that mere technicalities in the rules of evidence should not be allowed to interfere with the defendant's right to cross-examine a witness, 410 U.S. 284 (1973). Although not specifically confrontation, in Chambers the witness repudiated his earlier confession that had exculpated the defendant. Since the witness had been put on the stand by the defendant, according to Mississippi procedure, the defendant was not allowed to cross examine him or to bring a witness forward who had heard his confession. The Court reversed saying that since the testimony was so adverse to the defendant, and since there was ample support for the truthfulness of his position, the defendant should be allowed to cross-examine his witness and introduce other witnesses.

Briefly the Confrontation Clause as defined by Supreme Court cases means that the defendant has the right to fact his accusers and question them under oath with the assistance of counsel in a trial or some adversary procedure most importantly where the evidence is crucial to the prosecutor's case. Where the witness is not available for cross-examination by the defendant, there must be

sufficient information to allow the judge to make a determination of the truthfulness of the evidence. Finally, where there is a hearsay confession or statement that implicates the defendant, there is no Sixth Amendment violation where the defendant can both cross-examine and get a limiting instruction.

Compulsory Process

Compulsory process is available to the defendant for obtaining witnesses in all crucial cases under the Sixth Amendment, and it is up to the defendant and his attorney, not the prosecutor or the trial judge, to determine which witnesses are to be subpoenaed for the defense. The Circuit Court of Appeals said in United States v. Davenport, 312 F. 2d 303, C.A.7, cert. den. 374 U.S. 841,(1964), that the Sixth Amendment reserves the right to compel witnesses for the defense to the defendant and he cannot be deprived of this right. This right not only covers the person and his oral testimony, but also documentary evidence that may be held by another individual, United States v. Schneiderman, 160 F. Supp. 731 (D.C., Cal., (1952). But there are several cases where this right may be denied. The defendant can be denied a continuance when his witness is unavailable, but only upon the prosecutor's admission of the truth of the facts about which the witness would have testified. The indigent defendant can have the government pay for the expenses of witnesses, but only if the need is not frivolous. The right is further limited by public policy or by the immunity of certain offices (ambassadors) and others outside the jurisdiction of the United States, although process can be served on American citizens abroad, and in state courts the defendants can secure witnesses absent from the state through the Uniform Act to Secure the Attendance of Witnesses From Without the State in Criminal Cases, United States v. Cooper, 4 U.S. 341 (1800). Informers, where they have not participated in the crime, and their presence was not crucial to the defendant's case, have also been excused from compliance with the defendant's process without any violation of his rights, People v. Williams, 45 Ill. 2d 319, 260 NE 2d 1, cert. den. 400 U.S. 1010 (1970). Finally, when the witness refuses to testify because of his own privilege against self-incrimination, the refusal has been held not to be a denial of the accused's constitutional rights, Murdock v. United States, 383 F.2d 585; cert. den. 366 U. S. 953 (1960).

Rule 17 of the Federal Rules of Criminal Procedure codifies the interpretation of the Court on some of these issues providing that a subpoena shall command the person to whom it is directed to appear (17 (a)) and failure to do so without adequate excuse may be deemed contempt of court (17(g)). Rule 17 (b) provides that upon an ex parte application and the showing of the inability to pay the fees of a witness deemed necessary for an adequate defense, the court shall issue a subpoina, and costs and fees will be paid in the same manner as costs and fees for a government witness. Books, papers, documents, and other objects may also be compelled to be produced if the request is not oppressive, upon subpoena of the court, (17 (c)). Finally, Rule 17 (e) provides for nationwise service and service abroad upon an American national if the court finds the particular testimony or document to be necessary in the interests of justice.

In 1967, this right, although not the federal rule, was made applicable to the states through the Fourteenth Amendment in Washington v. Texas, 388 U.S. 14 (1967). The Supreme Court ruled that the defendant's right to present his own witnesses to establish his defense was a fundamental element of due process and essential for a fair trial. The Court said that the right to offer the testimony of witnesses and to compel this attendance was basically thr right of the defendant to present his version of the facts to allow a jury to choose where the truth lies.

Right to Counsel

The Sixth Amendment further provides for the right to counsel in criminal prosecutions, "to have the assistance of counsel for his defense."

In the 1932 case of Powell v. Alabama, 287 U. S. 45, the Supreme Court ruled that the failure to appoint effective counsel for a capital offense violated due process of law. In doing so, they applied the Sixth Amendment right to counsel to the states through the Fourteenth Amendment saying that the right to be heard in many cases is of no avail or little use where the defendant is not represented by counsel. Ten years later, in a felony case, the Court refused to extend the rationale of the Powell case to noncapital cases, Betts v. Brady, 316 U.S. 455 (1942). The court reasoned that the absence of an attorney was not necessarily a denial of fundamental fairness, therefore, the states were not bound to provide counsel in all criminal cases. Instead the Court placed the burden on the state courts by saying that they should appoint counsel where they determined fundamental fairness required it. This fairness doctrine continued for noncapital cases in state courts until Gideon v. Wainwright, 372 U.S. 335 (1963)

In Gideon, the Supreme Court reconsidered the Butts doctrine and specifically overruled it. In doing this, the Court held that in felony cases due process requires the appointment of counsel for indigents, regardless of the lack of special circumstances, but Gideon did not delimit the scope of the right to counsel. Following Gideon, came a large number of cases that substantially enlarged the accused's right to counsel.

As early as Powell, the Supreme Court had recognized that the defendant should have counsel at the critical stage of the proceedings because of the possibility of irretrievably losing certain rights. The Court recognized this critical stage to extend from the arraignment to the trial. Escobedo v. Illinois, 378 U.S. 479 (1964), furthered this idea by extending the right of counsel to custodial questioning, where the accused sought legal advice before answering questions. This was formalized in 1966 in Miranda v. Arizona 384 U.S. 436, which established guidelines about advising defendants of their rights before questioning. The Miranda Rule was designed to inform the defendant of his right against self-incrimination and his right to counsel in order to protect his rights at this critical period. The Rule also incorporated the Gideon ruling by requiring that the individual be informed that if he could not pay for a lawyer one would be provided for him. Identification at lineups was also later considered another crucial period that required that the defendant be able to have an attorney as were certain other periods where formerly the right to counsel has not existed, Gilbert v. California, 388 U. S. 263 (1967); United States v. Wade, U. S. 218 (1967). Mempa v. Rhay 389 U.S. 128 (1967) extended the convicted felon's right to an attorney to the probation revocation hearing where a deferred sentence could be imposed because the individual could lose his freedom in this proceeding. This potential loss makes this type of proceeding a critical stage where rights could be lost if not properly exercised. In Rhay, the defendant had pleaded guilty without a trial and without aid of counsel, and the Court felt that this situation provided a basis for certain considerations that would inure to the benefit of the defendant, but that these benefits could only be properly utilized at sentencing or probation revocation (a form of delayed sentencing) if the defendant were represented by counsel. If the defendant were not represented, the Court felt that these rights or benefits would be irretrievably lost.

In Re Gault the right to an attorney was extended to juvenile proceedings through the Due Process Clause of the Fourteenth Amendment. The Court said that in proceedings to determine delinquency, because they could result in institutionalization or curtailment of freedom, counsel should be appointed (if one could not afford to hire counsel). In doing this, the Court rejected the argument that the judge and juvenile officer protected the rights of the juvenile and worked for his own best interests--recognizing that juvenile proceedings were more similar to adult court actions than a paternalistic administrative action.

The preliminary hearing stage was also deemed critical enough for the protection of a defendant's rights to warrant that the Sixth Amendment right to counsel be extended to that phase of the proceedings, Coleman v. Alabama, 399 U. S. 1 (1970). In the space of eight years the right to counsel had undergone a great deal of change, first applied to the states then expanded to include all aspects of the criminal process from the first custodial interrogation to the appeal, (right to counsel on appeal--Douglas v. California,372 U. S. 353 (1963)).

Frank v. United States, which held that petty offenses (offenses with penalties of six months and $500 fine or less) required no jury trial or counsel, seemed to signal an end to this expansion of the Sixth Amendment right to counsel. The adoption of this rule in 18 U.S.C. 1(3), and in the Rules of Procedure for the Trial of Minor Offenders before United States Magistrates appeared to institutionalize it 400 U. S. 1037-42 (1971). Then came State ex rel. Argersinger v. Hamlin, 407 U. S. 25, 1972, in which the Supreme Court reversed a Florida Supreme Court decision which had held that an indigent misdemeanant was only entitled to counsel if he could be sentenced to more than six months imprisonment. In reversing, the Court said that absent a knowing and intelligent waiver, no person could be imprisoned for any offense unless represented by counsel. The Court rejected the argument that because jury trials had been limited in Duncan the same principle should be applied here. Instead, the Court found that the right to counsel like the right to public trial, confrontation, and compulsory process had not been limited to felonies or lesser serious offenses. Recognizing that the legal or constitutional issues could be just as complex in misdemeanor cases as they could be for a more serious crime, and the changes for injustice just as great, the Court ruled that the denial of counsel precluded the imposition of a jail sentence.

The Ohio Constitution - Article I, Section 10

The first sentence in Art. I, section 10 of the Ohio Constitution deals with grand juries and the necessity of an indictment or presentment. The Ohio section provides that, except in certain cases, all felonies must be prosecuted by indictment. The Ohio Rules of Criminal Procedure provide for prosecution on information in felony cases if the defendant agrees. The new Ohio Rules also set out the legislative will concerning grand juries.

Rule 7 (A) states that a felony punishable by death or life imprisonment must be prosecuted by indictment. All other felonies shall also be prosecuted by indictment except that a defendant may make a knowing, voluntary waiver of this right in open court. Where there is such a waiver, the defendant may be prosecuted by information although a prosecutor can choose to prosecute by indictment. A misdemeanor may be prosecuted by indictment or information in the court of common pleas or by complaint in inferior courts. In these cases an information may be filed without leave of the court.

Rule 7 also orders that the basic state and federal requirements for the indictment or information be met. Rule 7(B) requires that the indictment or information be signed by the prosecutor, and that it contain a statement, and that the defendant has committed some public offense. The statement may be made in ordinary and concise language or in the language of the statute as long as there is an offense charged and the charge gives the defendant notice of all of the elements of the offense with which he is charged. Briefly stated, Ohio follows the federal practice closely. Differences exist concerning grand juries but the states need not follow the federal practice in this area. In Ohio, the size and number to return an indictment are set out in Rule 6 of the new Criminal Rules.

The next series of guarantees in Article I, section 10 follow those of the Sixth Amendment which has been made applicable to the states through the Fourteenth Amendment. While it is not necessary for Ohio courts to interpret the Ohio Constitution in the same manner as the Supreme Court of the United States has interpreted similar federal guarantees, generally where two similar sections from both the state and federal Bills of Rights have been raised together they have been interpreted to provide the same guarantee, State v. Herold, 30 Ohio Op. 2d 135, 197 N.E. 2d 906 (Cuyahoga Co.,Ct. A., 1964). In addition, state statutes and rules have given formal recognition of principles elucidated by the United States Supreme Court. Rule 7 (B), for example, satisfies the Sixth Amendment requirement that the defendant know the nature and cause of the accusation. Rule 44 sets out the requirements for providing counsel including those set down in the Argersinger case which said that in misdemeanor cases a defendant could not be sentenced to jail unless represented by counsel or having made a knowing, voluntary waiver of that right.

The Ohio section, though, contains two provisions not contained in the federal Bill of Rights; those added by the Convention of 1912. The first guarantees the right of both the state and a defendant to take depositions. It could be considered unnecessary since this right is provided in other jurisdictions without a specific guarantee, but its presence insures that it cannot be easily changed. Consequently, its presence ensures greater protection to the individual and establishes a similar firm guarantee for the state. Rule 15 of the Ohio Rules of Criminal Procedure outlines the parameters of this right in a manner similar to 18 U.S.C. section 3503, which establishes procedures to take depositions in federal courts.

The second provision added by the 1912 Convention permits comment on the failure of a defendant to testify. The Supreme Court, in Griffin v. California, 380 U.S. 605, 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 acquiescense 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. In light of ruling, it might be desirable to remove the clause from Article I, section 10.

Comparison with Other States

In comparing Art. I, section 10 of the Ohio Constitution with similar sections in other state constitutions several things become quickly apparent. Several phrases or clauses in the Ohio section are not found in the other stat bills of rights, and the rights, in the other constitutions, are usually contained in several sections rather than in one. Neither of the parts added by the Constitutional Convention of 1912 is present in the more modern constitutions. Depositions are generally provided for by rule and s tatute elsewhere and the failure to testify phrase is unconstitutional under the Federal Bill of Rights. While it may be of some importance that depositions are guaranteed in the Ohio Bill of Rights rather than only by statute or rule, and may even constitute an added protection of this right, the Ohio section does not really provide any greater protection than could be established by statute since the actual guarantee is less than absolute. Article I section 10 only establishes that provisions for depositions may be made by law. Retaining the "comment" phrase would allow the practice of court or prosecutional comment to begin again if the Supreme Court of the United States altered its ruling.

Among those other rights guaranteed by Art. I, section 10 and similar rights guaranteed in other bills of rights there is little substantive difference. Alaska (Art. I, section 8), Hawaii (Article I, section 8) Illinois (Article I, section 7), and Montana (Article II, section 20) all in some manner establish the guarantee of a presentment, indictment, or information for those accused of felonies or capital crimes although they vary the actual guarantee. Hawaii's guarantee copies the Fifth Amendment but with modernized language. Alaska's adds that the indictment may be waived and an information substituted, establishes the size of grand juries, and further provides that the power of grant juries to investigate and make recommendations for the public welfare and safety shall not be suspended. Illinois provides with the guarantee of indictment that the legislature can abolish the grant jury or further limit its use, and Montana sets out the specifics of the guarantee in modern language eschewing the antiquated phraseology of Art. I, section 10.

The double jeopardy and self-incrimination guarantees of the Fifth Amendment are copies in all five bills of rights. Alaska (Art. I, section 9), Illinois (Art. I, section 10), and Montana (Art. II, section 25) set out these rights in separate sections. The Model State Constitution has the self-incrimination clause as a separate section (Section 1.04) and the double jeopardy clause in Section 1.06 (c)--a section entitled "Rights of Accused Persons." Hawaii retains the format of the Fifth Amendment in its Art. I, section 8.

The Sixth Amendment rights are also guaranteed in all of the bills of rights reviewed but with variations. One common factor though is that in each, all of the Sixth Amendment guarantees are together. Alaska, in Article I, section 11 sets out the basic rights of the accused adding a provision about the size of the juries and a bail provision, but it does not include the right to be tried in the district where the offense was committed. The size of the state and the distribution of the population may be the reason for this. Hawaii's Article I, section 11 provides the same basic guarantees but it also has several variations. Hawaii formalizes the right to a change of venue, but in the same manner that Ohio's Art. I, section 10 allows for depositions, and also establishes a specific provision guaranteeing counsel for indigent defendants. Illinois provides only the basic Sixth Amendment rights in Art. I, section 8. Montana has a similar basic guarantee but it provides a venue clause similar to that contained in Hawaii's Bill of Rights, giving

both the state and the defendant the right to request a change of venue, Art. II, section 24. The Model State Constitution does not differ radically from any of these, Section 1.06. It provides a change of venue clause, but it has another clause not contained in any of the others. It provides a general statement of when an attorney will be available. Following the general right to counsel guarantee, the Model State Constitution continues,

> . . . the accused shall enjoy the right . . . to have the assistance of counsel for his defense, and to the assignment of counsel to represent him at every stage of the proceedings unless he elects to proceed without counsel or is able to obtain counsel.

Ohio Constitutional Revision Commission
Bill of Rights Committee
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Research Study No. 44I

Bill of Rights
Part 9
Article I, Section 19a

Article I, Section 19a, is as follows:

> 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.

Summary

Article I, Section 19a was adopted in 1913 and has not been amended. It prohibits the General Assembly from limiting the amount of recovery in suits based upon wrongful deaths. The basic tenet behind the adoption of the Section is that the survivors of one wrongfully killed should be allowed as full a recovery of their damages as possible. Most opposition to Article I, Section 19a in the Convention of 1912 was founded upon the concern that the threat of unlimited liability would discourage manufacturing and make liability insurance prohibitively expensive.

Eight other states than Ohio have constitutional bars to statutory limitation of the amount recoverable in wrongful death actions. Each such provision was adopted between 1874 and 1915. The Ohio section is relatively simple in comparision to the similar provisions in other states. Several of the other sections extend exceptions to workmen's compensation type acts, and some prohibit limitation of recovery in property damage actions or personal injury actions not involving death of the victim.

No-fault insurance systems appear to be incompatible with Article I, Section 19a, only if a threshold amount of damages is imposed in the insurance below which no cause of action for damages would exist. If the insurance scheme were set up so that a wrongful death would give rise to a cause of action regardless of the amount of damages, Article I, Section 19a would not render part of the system unconstitutional.

History of Article I, Section 19a

The prohibition of limitation on recovery for wrongful death was proposed by the Convention of 1912 and adopted by the electorate in that year as Article I, Section 19a.[1] Neither the text of the provision nor its place in the Bill of Rights has been in any way changed since the original ratification.

As a point of background to state constitutional bars on limiting the amount of recovery for wrongful death, such as Article I, Section 19a, it should be noted that 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, Lord Campbell's Act[2] 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[3] is a death act for the benefit of th surviving spouse, the children, and other next of kin.[4]

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.[5]

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.[6] Advocates of prohibiting limitation upon recovery went on to argue that a limitation prevented any reasonable consideration of future increases in the living expenses of the victim's survivors.[7] 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.[8] Proponents of the section went so far as to say that limiting compensation to pecuniary loss only denied full compensation and offended the sense of natural justice.[9]

The delegates who opposed adoption of a prohibition upon limiting the amount of recovery in wrongful death actions based their arguments on two propositions. First, it was asserted that the potential of unlimited liability for contributing to the wrongful death of an employee would greatly discourage manufacturing businesses.[10] 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. Secondly, opponents argued that the possibility of unlimited loss would cause the necessary premiums on casualty insurance to be so exorbitant as to make coverage impractical.[11]

Debate of the suggested prohibition on limitation of the amount recoverable in wrongful death was sincere but not extended. The proposed constitutional amendment was finally passed by the Convention with approval of approximately 80 per cent of the delegates.[12]

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.

Comparison with Similar PRovisions of Other State Constitutions

Ohio is among nine states[13] which have constitutional prohibitions upon statutory limiting of recovery in actions based upon a wrongfully caused death. Each of the nine provisions was acopted in original form within a period of approximately forty years, the Ohio section being among the most recent. Pennsylvania, in 1874, was the first state to make the bar on statutory limitation of recovery in wrongful death a constitutional provision. Although the Ohio section has never been amended, several states have seen fit to expand the similar sections of their constitutions.

The nine constitutional provisions may be readily grouped for comparative purposes in several ways. Among the most obvious divisions is between constitutional sections which explicitly provide for an exception in the form of workmen's compensation type acts, and those, like Ohio's,[14] which do not, but rather, leave workmen's and other special compensation as the subjects of separate constitutional provisions.

Article XXIII, Section 7 of the Oklahoma Constitution serves as an example of the provisions which both prohibit a limitation on recovery for wrongful death and allow an exception in the form of workmen's compensation. It reads:

> The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, provided however, that the Legislature may provide an amount of compensation under the Workmen's Compensation Law for death resulting from injuries suffered in employment covered by such law, in which case the compensation so provided shall be exclusive.

A second distinction among the nine different state constitutional provisions may be drawn between those which expressly prohibit abrogation of the cause of action itself along with prohibiting a limitation on recovery, and those which only speak to limiting the amount of recovery. While the issue has not been confronted, it could easily and forcefully be argued that prohibiting limitation on amount of recovery effectively prohibits abrogation of the right to recover itself. Ohio's Article I, Section 19a does not expressly exclude abrogation of the right of action. For an example of a state constitutional provision which also explicitly preserves the right to an action for wrongful death, Article I, Section 16 of the New York Constitution may be referred to. It reads:

> The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation.

A third comparison of Article I, Section 19a of the Ohio Constitution with other state constitutional prohibitions upon limitation of recovery in wrongful death may be made by looking to whether or not the particular provision also prohibits limiting the amount of recovery for wrongful injuries which do not result in death or for injuries to property. The Kentucky Constitution specifically prohibits the statutory limitation of recovery for personal injuries which do not result in death and for injuries to property. Section 54 of the Kentucky Constitution reads:

> The general assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.

The Arizona Constitution extends its prohibition on limiting recovery to personal injuries, but does not expressly affect damage to property. Arizona's Article II, Section 31 states:

> No law shall be enacted in this State limiting the amount of damages to be recovered for causing the death or injury of any person.

This comparison of Ohio's Article I, Section 19a to the similar provisions of other state constitutions may be summarized, as the examples above indicate, by saying that Ohio has a relatively simple constitutional prohibition upon statutory limitation of the amount of damages recoverable in wrongful death actions. Article I, Section 19a does not express an exception for workmen's compensation acts, or the like. It does not explicitly say that the right of action itself may not be abrogated. It does not extend his prohibition upon limiting recovery either to

actions based upon personal injuries which do not result in death or to actions based upon tortious damage to property. In short, the Ohio provision is nothing more than the basic statement of the principle that survivors should be able to recover judgments for the full extent of their injury which is occasioned by wrongful death. Of the eight comparable provisions in other states, none is as simple as Article I, Section 19a. The Ohio Constitution does, it should be noted, provide most of the same protections and exceptions in other sections as do the single, more complex, provisions of other state constitutions, but the prohibition of limitation itself remains unadorned in Ohio.

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 reformations of casualty and liability, particularly automobile, insurance laws from traditional systems to plans which have been popularly styled "no-fault" insurance. There are several fundamental approaches to no-fault insurance and many permutations upon each basic theme, but practically every approach rests upon the same proposition. This 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, of "threshold". The cause of action for damages about 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 thresthold amount is a violation of the constitutional bar on limiting recovery. The suggested dilemma occurs when a no-fault act has been passed and the damages arising from the wrongful death are less than the threshold amount imposed by the insurance statute. The no-fault bar to suing the tort-feasor appears clearly to run afoul of the Article I, Section 19a admonition that "damages recoverable by civil actions in the courts . . . shall not be limited by law."

This conflict is recognized by most serious commentators on no-fault insurance plans.[15] Robert E. Keeton and Jeffrey O'Connell, authors of the Basic Protection plan of no-fault insurance, grant that in a state with a prohibition on limiting the amount of recovery in wrongful death, a no-fault insurance scheme with a rigid threshold would, indeed, violate the constitutional guarantee when damages did not exceed the threshold amount.[16] The Keeton-O'Connell plan, a modification of which has been enacted in Massachusetts, therefore, includes in its prototype policy an alternative provision[17] for use in Ohio and the eight other states with constitutional prohibitions similar to Article I, Section 19a. This alternative provision preserves the cause of action in every case involving a wrongful death, regardless of the amount of damages.

If the action for wrongful death were always saved, the threshold concept of no-fault insurance systems would be compatible with Article I, Section 19a. Another, albeit more complex, solution to the conflict would be in adopting an amendment to the Constitution allowing no-fault insurance to be an exception to Article I, Section 19a.

Before the best manner of accommodating no-fault insurance with its threshold feature to constitutional prohibitions on limiting the amount of recovery in wrongful death actions could be determined, it would be essential to decide a basic policy question. The policy issue is whether in cases of wrongful death the constitutional prohibition or a full no-fault insurance plan is more desirable. It has been suggested that the advantages of no-fault plans, including expedition of compensation, elimination of multiple recoveries caused by insurance payments overlapping with tort recoveries, and, limitation on recovery for controllable disbursements such as funeral expenses, would outweigh the value of prohibiting the limitation of recovery in wrongful death actions where damages were small, and that the public interest would ultimately mandate preference for no-fault insurance with a threshold.[18]

Potential Constitutional Revisions Directly Affecting Article I, Section 19a

Based upon the discussion contained herein and the options for constitutional change presented, the following is a delineation of possible courses of action by the Committee.

- leave the section unchanged
- combine the section with the Workmen's Compensation provision of Article II, Section 35
- expressly prohibit abrogation of the cause of action based upon wrongful death
- extend the prohibition in Article I, Section 19a upon statutory limitation of recovery to cases based upon personal injury not resulting in death and and property damage
- provide a specific exception for no-fault insurance acts
- repeal the section.

FOOTNOTES

1. Yes- 355,605; No-195,216.

2. 9 & 10 Vict. c. 93.

3. Revised Code, Section 2125.01.

4. Revised Code, Section 2125.02.

5. State of Ohio, Proceedings and Debates, Constitutional Convention, 1912, p. 1411 (April 25, 1912), and pp. 1707-1714 (May 8, 1912).

6. Ibid., p. 1707.

7. Ibid.

8. Ibid., p. 1709.

9. Ibid., p. 1712.

10. Ibid., p. 1708.

11. Ibid., p. 1709.

12. Ibid., p. 1959 (May 31, 1912).

13. Arizona, Arkansas, Kentucky, New York, Ohio, Oklahoma, Pennsylvania, Utah, and Wyoming.

14. Constitution of the State of Ohio Article II, Section 35.

15. E.G., Ruben and Williams, The Constitutionality of Basic Protection, 1 Conn. L.R. 44 (1968); and, Comment, The Constitutionality of Automobile Compensation Plans in Wyoming, 5 Land & Water L. Rev. 191 (1970).

16. Robert E. Keeton and Jeffrey O'Connell, Basic Protection for the Traffic Victim, (Boston: Little Brown and Company, 1965), pp. 506-507.

17. Basic Protection Plan section 4.2

18. American Insurance Association, Report of Special Committee to Study and Evaluate the Keeton-O'Connell Basic Protection and Automobile Accident Reparations (New York: 1968)

Ohio Constitutional Revision Commission
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Research Study No. 44J

Bill of Rights-Part 10
Article I, Section 15

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

The guarantee of section 15 occupies an important place in the history of the development of the original colonies. Imprisonment for debt, a feature of early English law, was hated by many people. In response to and because of this law, many came to the colonies. When presented with the opportunity to alter this practice after independence, they not only abolished it but guaranteed that people would be forever freed from its application. Strangely enough, neither the Federal Constitution nor its Bill of Rights contains this guarantee, perhaps reflecting the creditor position of many of the influential early leaders of the colonies, but its absence could also be an example of the early conception of the position of the states in protecting the individual. According to the early compromises worked out in drafting the Constitution, one of the ways in which the federal nature of the government was to be guaranteed was by the state protecting individual rights rather than the federal government. In any event, a guarantee that there will be no imprisonment for debt is a common feature of state bills of rights.

The Ohio guarantee in Article I, section 15 of the Ohio Constitution of 1851 is a shortened version of its predecessor in the 1802 Constitution, Article VIII, section 15. The major difference between them lies in the fact that the earlier version explains what the later version implies about the full extent of this right--that one may not be imprisoned for debt unless the debtor refuses to deliver his property to the creditor as prescribed by law.

In the Convention of 1850-51, the Committee dealing with the Bill of Rights originally struck this guarantee out, believing that the legislature should handle this and retain some forms of imprisonment for debt. Those favoring the removal of the guarantee argued that in cases of malicious trespass by a judgment-proof individual there was no real remedy without imprisonment. They further contended that the difficulties in obtaining a writ of replevin allowed property to be removed from the jurisdiction of the court before action could be taken; imprisonment for debt would provide another remedy. The Convention, though, valued the guarantee and passed it in its present form.

Section 15 has needed little interpretation by the courts to ensure that all benefit from its guarantee. Article I, section 15 means exactly what it says and early cases established its meaning. The only question that has arisen deals with the meaning of "debt."

140. S. 213 (1863)

In Spice and Son v. Steinruck,/the plaintiff sued the defendant before a justice of the peace for the balance of an account. The summons was issued and served and the defendant counterclaimed. The plaintiff then applied to the justice of the peace for an order for the arrest of the defendant. The order was given and the defendant was detained untill he conferred a judgment in favor of Spice and Son for the amount claimed. Steinruck brought suit for wrongful

arrest and imprisonment. The question in the case involved whether the order of arrest was void or voidable. The question turned on Article I, section 15 about which the Ohio Supreme Court said,

> This constitutional provision clearly contemplates legislation before any arrest could be made in civil actions, though fraud may have intervened. Courts, therefore, whether of general or limited jurisdiction, have now no common law power to authorize arrests in such cases, and the power, if it exists at all, must have been conferred by express legislation.

The Court further said that the legislature had established specific criteria that had to be met in order for a justice of the peace to act. Here, Spice and Son had not supplied the necessary proof of fraud to justify seeking the order for arrest, and the Court declared the order void.

Presently, the statutes that allow an arrest of a debtor are contained in Chapter 2331. of the Ohio Revised Code. In order for an arrest to be made and the debtor to be imprisoned until he pays the judgment or is discharged according to law, the court must be satisfied by a creditor's affidavid, and such other evidence as is presented, that: the judgment debtor has removed or has begun to remove his property from the jurisdiction of the court with intent to prevent collection of the money due; the debtor has assigned or disposed of property or has converted it into money with intent to defraud creditors or to prevent execution against it; the debtor fraudulently contracted the debt or incurred the obligation upon which judgment was rendered; the judgment was rendered for money, or other valuable thing, lost by gambling, or the debtor was arrested on an order before judgment and has not been released, or the order not set aside. (Sections 2331.01 et seq.)

While the statutes set out the basic situations where the otherwise broad Article I, section 15 would apply, it is not always a simple process to apply such rules. In White v. Gates, 42 Ohio St. 109 (1884) A had money which he claimed was a gift from B who was a judgment debtor to C. In proceedings in aid of execution, prosecuted by C before the probate judge, the judge found that the money had been placed in the hands of A by B to defraud the creditors. The judge then ordered A to deliver the money to a received to be applied to the judgment, but A refused. The judge ordered A jailed for contempt. A then filed a habeas corpus petition claiming the protection of Article I, section 15. The Supreme Court held that a judge could order a third person to deliver property of a judgment debtor or face contempt charges. A, though, claimed a right to the money, therefore A was not a debtor falling under Article I, section 15, but since A had a claim to the money, A could not be jailed for contempt for failing to deliver the money. The Court said that the respective rights would have to be determined by a court in an action by C against A.

Contempt charges formed the basis for The Second National Bank of Sandusky v. Becker, 62 Ohio St. 289 (1900). The plaintiff brought an action on two notes and at the same time sued out an attachment against the defendant's property. The plaintiff recovered judgment and obtained an order for the defendant to deliver his property to the sheriff for sale. The defendant failed to comply and the plaintiff instituted another proceeding in contempt. The judge found the defendant guilty and ordered him to pay or go to jail. Before the contempt hearing began, the defendant had made an assignment of the property to other creditors and was therefore unable to pay the bank. Consequently, the defendant appealed the order.

The principal question was whether the contempt order was incompatible with Article I, section 15, where no bad faith or fraud was imputed.

The proceedings in contempt on the order were entered as part of the judgment of the Bank in the action to recover two notes. The purpose of the order was to get delivery of the property to the sheriff for sale to satisfy the notes or alternatively to get payment. In the contempt hearings, the court was satisfied that the property could not be delivered and ordered payment or jail. The court sought to coerce payment from the defendant and his sureties.

The Supreme Court, reversing the contempt order, said that "debt" within the Constitutional inhibition, includes not only debts of record, judgments and specialities, but generally all obligations arising from contract, express or implied, and imprisonment for contempt cannot be given merely for failure to pay, because it would violate Article I, section 15. The Court held that the order was not to deliver property or a fund held by the defendant; it was strictly an order to pay or else, therefore, it was erroneous.

Alimony and contempt charges to enforce it comprise another area where the meaning of Article I, section 15 has been raised. In a divorce action a lower court found the wife entitled to alimony and ordered the husband to pay, Cook v. Cook, 66 Ohio St. 566, 1902. The husband failed to pay. The Court then ordered his arrest and that he be brought to the court to show cause why he should not be punished for contempt of court. A hearing was held on the charges, and the Court ordered the husband's imprisonment until he complied with the court order. The husband appealed. One of his contentions was that the court did not have the power to punish for contempt one who fails to pay a final judgment for alimony because alimony constituted a debt and Article I, section 15 forbade imprisonment for failure to pay a debt.

The Supreme Court did not accept this argument, holding that the husband's obligation is not a debt. The Court said the obligation arises from a duty the husband owes to the public and to the wife, but it is not based on a contract and the adjudication is not obtained in a civil action. Alimony is an allowance in the nature of a partition. The court does not decree alimony as a debt to the wife, or as damages to be paid to her by her former husband, but as part of the estate standing in his name in which she has a right to share, in an amount established by the court to be paid to her, to which she becomes legally entitled. The failure of the husband to pay, when able to pay, is a refusal to obey the order of a court which can be punished by a contempt charge upon the same grounds that orders and decrees of courts of equity are enforced. Ohio courts have the power to do this now, under Section 2705.06 of the Revised Code.

The Franklin County Court of Appeals used similar reasoning in a case of failure to provide child support, State v. Ducey, 25 Ohio App. 2d 50 (Franklin Co., Ct. A., 1970). In this case, the appellant was appealing his conviction for the failure to provide for the care, support, maintenance and education of his children under Section 2151.42 (since repealed). Failure to do so was an offense punishable by fines and imprisonment. The appellant argued that the money owed was a debt and a conviction and imprisonment for failure to pay this debt violated his rights under Article I, section 15. The Court held, however, that the duty of the parent to support his child is an obligation owed by the parent to the body politic which is enforceable by the latter. This liability

arises out of an unfinished omnipresent responsibility of changeable weight as opposed to a debt which is the residuum of a past and finished transaction. A debt is dischargeable, but the duty to support is not; it continues and then falls of itself, while a debt continues.

Another area where the meaning of "debt" and the applicability of Article I, section 15 has been raised is a tax obligation. In Cincinnati v. DeGolyer, 25 Ohio St. 2d 101 (1971), the defendant was charged with a failure to pay city income tax for 1966. The defendant moved for an order to quash the affidavit on the ground that the tax ordinance makes a tax a debt and that the provision for criminal liability including fine and imprisonment violates Article I, section 15. The trial court sustained the motion, but the Court of Appeals reversed.

The Supreme Court said that it has long been held that imprisonment for debt does not apply to taxes on the basis that debt, within the meaning of the constitutional provision ordinarily arises out of a contractual or consensual obligation. A tax, it said, is not such an obligation, but is one imposed by the sovereign by virtue of its sovereign powers. The general rule though was founded primarily upon license cases with an excise tax involved. Imprisonment was not for a failure to pay the tax but for engaging in business without paying the tax which gives one the right to engage in business. The Court then declared that the general rule that a tax is not a debt within the meaning of the Constitutional prohibition is unrealistic. The Court, continued by saying that a debt is an obligation to pay money. Whether this arises by contract, by judicial determination of tort liability or by imposition of a tax by a sovereign, it is an obligation to pay money, and nothing in section 15 indicates or would require that the word "debt" as being used should have anything but its ordinary meaning. Article I, section 15 provides that one cannot be imprisoned for a debt and the section makes no distinctions. Only debts arising out of fraud are exempted from the protection of the clause. A tax, like court costs in a criminal case, is a civil obligation, and if one cannot be imprisoned for failure to pay beyond the maximum, it does not stand to reason that an ordinary taxpayer whose only fault is his failure to pay taxes, in the absence of wilfull refusal or fraud, should be imprisoned for his failure. The Court held that one could not be imprisoned for the mere failure to pay taxes in the absence of willful refusal or fraud. The sovereign may impose sanctions to enforce the payment and may provide that a willful failure or refusal to pay constitutes a crime punishable by imprisonment, but if the taxpayer is indigent or there is honest debate about the amount owed, and if there has been no arbitrary refusal to pay, the taxpayer may not be imprisoned.

Article I, section 15 has also been at issue in criminal cases where the defendant has been unable to pay a fine or court costs. An early case was Kohler v. State 24 Ohio App. 272 (Cuyahoga Co., Ct. A., 1927).The case involved the sentencing of a misdemeanant unable to pay the fine: the defendant was confined to jail until he paid the fine or worked it out. He appealed the sentence arguing that the statutes that provided for this violated Article I, section 15, but his argument failed. The Court said that Article I, section 15 excepted those in jails or workhouses. Thirteen years later the Attorney General maintained this exception, Op. Att. Gen., 2424 (1940). He said that clearly a fine arising from a violation of the penal laws of the state was not a debt in the sense of an obligation incurred by express or implied contract. Therefore, they were not debts within the meaning of Article I, section 15 and imprisonment for failure to pay a fine was not an unconstitutional imprisonment for debt.

In Strattman v. Studt, The Court began to show a modification of this doctrine but only as it applied to court costs in a criminal proceeding, 20 Ohio St. 2d 95 (1969). The appellant was found guilty of making a false report to the police and given the maximum sentence--six months in jail and fined $500 plus costs. He was unable to pay and the judge applied the work-off provision. Six months later the defendant filed a petition of habeas corpus alleging a denial of due process and equal protection in the application of the work-off statutes. At the same time the petitioner filed his petition of habeas corpus, he filed a pauper's affidavit.

The question to be resolved by the Supreme Court was whether there was an abuse of discretion where the trial court imposed a fine which, in effect, confines a prisoner longer than the maximum sentence.

The Court held that as applied to an indigent defendant, who has served the maximum sentence, the work-off statute was unconstitutional as violative of the Fourteenth Amendment. The Court said that the work-off provision has the dual purpose of either allowing a defendant to pay or work off his fine by laboring for the state. The solvent criminal has the choice; the indigent has none. Because of the inability to pay, a law which requires a defendant to pay must reasonably equate the amount of work required and the cash amount of the fine so as not to offend our legal tradition of fundamental fairness. On this basis, the Court held that the three dollars a day was so unreasonable that it unfairly discriminated against the indigent defendant and denied him equal protection punishing him more severely because he was unable to pay.

The Court distinguished between fines and court costs. The Court said that in both criminal and civil cases costs are taxed against certain litigants to lighten the taxpayer's burden of supporting the court system. Statutory provisions for the payment of court costs were not enacted to serve a punitive, retributive, or rehabilitative purpose. Article I, section 15 prohibits imprisonment for civil debt so an indigent defendant required to pay court costs in a civil action is not jailed to work off this obligation. In criminal cases, court costs are also subject to the same prohibition. The purpose of assessing costs in both types of action is the same and there is no justification for imprisonment for a failure to pay costs in criminal cases but not in civil cases. A judgment for costs in a criminal case is a civil obligation and may be collected only by methods provided for the collection of civil judgments. "To hold otherwise would permit that which is constitutionally prohibited."

One year later, the United States Supreme Court extended the protection against imprisonment for debt to fines. In Williams v. Illinois, the defendant was given the maximum penalty for petty theft--one year and $500 fine plus $5 court costs, 399 U.S. 235 (1970). At the end of his one-year sentence, if he did not pay the fine, he had to work it off at $5 a day. While in jail, the defendant petitioned for release alleging indigency, but his petition was rejected by the Illinois Supreme Court. The Supreme Court vacated and remanded. The defendant argued primarily that the Equal Protection Clause of the Fourteenth Amendment prohibits imprisonment of an indigent beyond the maximum term authorized by statute where that inprisonment flows directly from his inability to pay a fine and court costs. The State asserted its interest in the collection of revenues produced by fines and contended that the work-off system was a rational means of implementing that policy. In response the Court said that the interest was substantial and legitimate but was not unlike the

State's interest in collecting fines where there would be no imprisonment. The Court concluded that, when the aggregate imprisonment exceeded the maximum period set by statute and resulted directly from an involuntary nonpayment of fines or court costs, there was impermissible discrimination. Once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies it may not subject a class of defendants to confinement beyond the statutory maximum solely because of indigency.

> A statute permitting a sentence of both imprisonment and fine cannot be parlayed into a longer term of imprisonment than is fixed by the statute since to do so would be to accomplish indirectly as to an indigent that which cannot be done directly.

One year later, the Court expanded this decision Tate v. Short, 401 U. S. 395 (1971). The defendant was unable to pay fines on convictions for traffic offenses and was ordered to be held at the prison farm a sufficient time to satisfy the fines at the rate of $5 for each day. The Court held that this denied equal protection overruling the Texas Court of Criminal Appeals' holding that the defendant's poverty did not make the imprisonment unconstitutional. The Court rules that this situation constituted precisely the same unconstitutional discrimination as found in the Williams case. The Court adopted the view stated in Morris v. Schoonfield, 399 U. S. 508, 509 (1970), that

> the same constitutional defect condemned in Williams also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine. In each case, the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.

Following the Williams, Tate, and Morris 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) so long as failure to pay the fine was based on indigency and not refusal.

In neither case had the Supreme Court ruled on alternative sentencing (i.e. thirty days of $30 sentences), but in 1972 the Fifth Circuit dealt with the problem Frazier v. Jordan, 457 F. 2d;726, (5 Cir., 1972) Frazier appealed from an alternative sentence on the basis that this was an unconstitutional violation of equal protection because appellee and those similarly situated were treated as a separate class different from those who could pay. The State of Georgia argued that the prison sentence was not merely a collection device as in Tate, but that the State's penal interests would only be served by immediate payment of the fine or by imprisonment. The Circuit Court disagreed saying that the alternative fine created classes; those who could pay the fine immediately, and those who could only pay the fine over a period of time, with this latter going to jail. The Court said two state interests were served by default imprisonment. The first was collection of fines and imprisonment serves to coerce a defendant with marginal or concealed assets to pay or to go to jail, but the Court said that far less onerous means could be used to achieve this.

As a result, however, compelling the State's interest in collecting its fines, imprisonment of those without the money to pay immediately is not necessarily achieving the State's goals. The other interest is the State's penal interest, but the Court said that imprisonment of those who cannot immediately pay a fine is not necessary to promote the State's punitive and deterrent penological interests. The alternative sentence implies that the State's punitive or deterrent interests can be served by requiring the defendant to pay a fine, and the judge refused to accept the contention that the immediate fine served interests not adequately protected through an extended payment plan. Alternative devices for the payment of fines could be structured, he felt, to require the defendant who pays over time to pay an amount which if discounted would be equal to the present value of the fine.

> Imprisonment of those who cannot pay their fines immediately is not necessary to promote the State's compelling interest in effective punishment and deterence of crime.

Between those sections dealing with imprisonment for debt the Bills of Rights of those states reviewed, there is little substantive difference--indicating the basic nature of this guarantee. Alaska, Art I, section 17, guarantees the right then adds that it does not prohibit civil arrest of absconding debtors, an exception explicit in Ohio's 1802 Constitution and implied in its 1851 Constitution, but Alaska does not mention fraud, although this may be implied. Article I, section 17 of Hawaii's Constitution merely states "There shall be no imprisonment for debt. Exceptions for fraud and failure to deliver property to a creditor may be inherent and regulated by court decision." Montana's Bill of Rights specifically includes both of these exceptions in Article II, section 27 which is not otherwise different from similar sections. The Model State Constitution fails to include this section at all.

The Illinois Constitution in Article I, section 14, alone of the five reviewed, provides more than the basic guarantee. In its first sentence, it guarantees the right in a manner similar to that of Montana, language which is also reminiscent of the 1802 Constitution of Ohio. The second sentence goes farther. It formalized explicitly the commands of the Supreme Court in Williams v. Illinois and Tave v. Short by saying,

> No person shall by imprisoned for failure to pay a fine in a criminal case unless he has been afforded adequate time to make payment, in installments if necessary, and has wilfully failed to make payments.

It should be recalled that the Supreme Court rulings are dependent upon the Federal Due Process and Equal Protection Clauses and not any state provisions. These are subject to change and hence their applicability to the states is also subject to change. While these rulings now apply to the states, if they are to be firmly guaranteed by the state, they will have to be included in the State Bill of Rights in a manner similar to the Illinois Bill of Rights.

Bill of Rights, Part 11
Article I, 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 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.

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. A large portion 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 theory of the sovereignty of the state lay behind this move, which was vigorously resisted. The supporters of this clause, though, 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 Bill of Rights of the United States Constitution, Amendment 14, section I. Because the fact that federal law and judicial interpretation of the Fourteenth Amendment, which applies to the states, has largely pre-empted the states in this area, this memorandum will only deal with those parts of Article I, section 2 of the Ohio Constitution which are unique. Equal protection will be discussed within the context of the federal right. Due to the complexity of the concept of equal protection, it will only be handled in a very general manner.

The major portion of Article I, section 2, as noted above, is derived from the Declaration of Independence and is basically a statement of principles, according to the Ohio Supreme Court. In Ohio v. Covington, 29 Ohio St. 102, 1876 the Court said 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 last clause was effectively explained in Railway Company v. Telegraph Association, 48 Ohio St. 390 (1891). The Telegraph Company obtained grants from the state and the City of Cincinnati to operate a telephone service. The operation required that the lines be grounded in the earth. Later the Railway Company also obtained grants to operate an electric trolley line. The trolley system worked by sending electricity through lines to the cars. The current then passed through the motor and on into the tracks, returning to the generating plant. The case arose because the Railway Company current was interfering with the operation of the telephones. Current was

traveling through the soil from the tracks to the grounds of the telephone company producing static on the telephones. To correct this the Telegraph Company sought to have the Railway Company convert its system of powering its vehicles to prevent interference with the operation of the telephones. The Telegraph Company contended that by virtue of its grants, acquired before the Railway Company had a right to use electricity as a motive power, it had obtained a vested interest in the telephone system as it operated and that not even the legislature of the state could limit, reduce, or injure this franchise on the faith of which it had expended capital and labor. The Court disagreed saying 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. The Court held that it was clearly within the power of the legislature to authorize one class of corporation to use electricity, with grounded circuits in the streets, as a source of power, and another class to use the same or a similar agency for the transmission of telephonic messages. And, if the proper exercise of rights granted one under general law was irreconcilable, and plainly interfered with, a prior grant to a corporation of the other class, it could 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 subject to the constitutional grant of legislative power to control the exercise of those franchises in the future as the public good might require.

The Court further said that a franchise, if granted by the state with a reserved right of repeal, must be regarded as a mere privilege. The legislature can take it away at any time, and the holders of the franchise must rely solely upon the state's good will for its perpetuity and integrity. In the absence of such a reservation, the force and effect of the grant may be altered through the constitutional power vested in the legislature to alter or repeal all general laws governing corporations and the power to alter, revoke, or repeal all special privileges or immunities that may have been granted.

In the past twenty years, the equal protection clause has been used to decide an increasingly large number of cases in which diverse areas as race relations, state legislative reapportionment, and criminal process, and there have been a number of commentaries suggesting that the principle is applicable in an even larger number of areas. The Slaughter-House Cases, 83 U. S. 36, 1873, stated that the clause was clearly a provision for "(the Negro)race" and that it did not apply to economic affairs; by 1886, such restrictions had disappeared. The Court then not only applied the clause to different racial groups, but extended it to economic affairs and allowed corporations to assert the right.

The clause is directed to the states: "No State shall . . . deny any person within its jurisdiction the equal protection of the laws," and the Court has interpreted it to apply to a broad area of "state responsibility" which is difficult to delimit. In the Civil Rights Case, in 1883 (109 U.S. 3) the Court held that the State had violated the clause only when legislation had been passed that operated to deny equal protection. Since then, the Court has recognized a wide variety of state involvement, but the most obvious is still the formal operation of a state agency e.g., state legislation, city ordinances, officials acting under color of law. A second approach to state involvement identifies state action in the activities of a normally private party where the state directly or indirectly exercises

control, e.g., substantial state funding, significant state regulation, or appointment of state agents as administrators. A third approach looks to the various indicia of state involvement. State action is found by "sifting facts and weighing circumstances," as in Burton v. Wilmington Parking Authority, 365 U.S. 715, 1961, where the Court, in dealing with a privately owned restaurant, noted that its premises were leased from and maintained by the state and that the premises were an integral part of a state parking facility. A final form of state action is manifested by apparently private parties that carry on a public function ordinarily performed by a governmental agency, e.g. party primaries.

Section five of the Fourteenth Amendment gives Congress the power to enforce the provisions of this amendment by appropriate legislation, but early after its passage, Congressional power was limited in this area so that it could only act when state activity denied equal protection. This changed, though, when Congress passed the Voting Rights Act of 1965. Then, in 1966, the Supreme Court in Katzenbach v. Morgan, 384 U. S. 641, 1966, upholding the legislation, construed Congress's power to adopt any "appropriate legislation" to enforce the Amendment as including the regulation of state activity not itself violative of equal protection, where the regulation could rationally be said to serve the purpose of enforcing equal protection in another context. The freedom to adopt "appropriate legislation" seems to also weaken the demand that congressional legislation be directed only at state action. Further, in Katzenbach, the Court ruled that Congress could independently determine a violation of equal protection in order to activate its powers and that the Court would uphold such determination if it could perceive the basis upon which Congress might predicate a judgment that an action violated the clause even if the Court might not have found a violation.

Equal protection decisions recognize that a state cannot function without classifying its citizens for various purposes and treating some differently from others. According to a common formula, a classification is valid if it includes "all and only those persons who are similarly situated with respect to the purpose of the law." This test, though, is too simplistic to deal adequately with this area, so there have been many refinements. In statutory interpretation cases, where equal protection is an issue, a court's concern is to assess the constitutional validity of a statute whose coverage is not usually at issue. The court is expected to safeguard constitutional values while maintaining proper respect for the legislature. To resolve this, some courts have used a method similar to that used commonly in statutory interpretation. When the purpose of the classification is in doubt, they have attributed to the classification the purpose thought to be most probable. However, other courts have attributed to the legislature any reasonably conceivable purpose which would support the constitutionality of the classification.

A classification which relates rationally to a discriminatory purpose will deny equal protection because this purpose is impermissible, not because the classification is arbitrary. Whenever a classification is made one of its purposes is to treat one class differently from another. However, the courts will ordinarily require the showing of a purpose which works in some way to promote the general welfare. When one industry is favored over another, there seems to be a presumption that promoting the favored one works to advance the general welfare, but a similar judgment made about the worth of individuals would require clear justification.

Once a purpose has been attributed to a statutory classification, equal protection analysis still demands a decision on whether all and only those persons similiarly situated with respect to the purpose of the law are included in it--"the courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose," McLaughlin v. Florida, 379 U. S. 184 191 (1964). Only when the lack of correspondence between classification and purpose is

gross or when the classification is otherwise objectionable should courts intervene on equal protection grounds.

Under-inclusion occurs when a state benefits or burdens persons in a manner that furthers a legitimate public purpose but does not confer this same benefit or place this same burden on others who are similarly situated. Sometimes courts will find the under-inclusion so arbitrary as to deny equal protection. Under-inclusion does not always deny equal protection, however, abandoning the strict theory that the classification must include all those similarly situated with respect to purpose. Courts explain this by saying that the legislature is free to remedy parts of a mischief or to recognize degrees of evil and to deal with it where it is most acute. An Over-inclusive classification includes not only those who are similarly situated with respect to the purpose of the act but others who are not so situated as well. Thus a military order whose purpose was to restrict the activities of those who posed a threat of sabotage or espoinage was over-inclusively applied to all persons of Japanese lineage, since only a small segment of that group posed such a threat, Korematsu v. United States, 323 U.S. 214 (1944).

In regulatory matters, judicial deference to legislative determinations is considerable and has increased over the last thirty years. The Supreme Court has adopted a deferential position towards legislative determinations of economic matters as well, although equal protection arguments are still powerful where suspect classifications or fundamental interests are present. In fiscal and regulatory matters, the Court has not only entertained a presumption of constitutionality and placed the burden on the challenging party to show that the law has no reasonable basis, but has almost abandoned the task of reviewing questions of equal protection in these areas.

Certain classifications are said to be "suspect" (i.e., race, religion, country of origin) and a heavy burden of justification may be demanded of a state which draws such distinctions, Loving v. Virginia, 388 U. S. 1 (1967). In reviewing these classifications, the Courts have required they bear more than a merely rational relationship with a legitimate public purpose. An aspect of this is the doctrine of the "color blind" Constitution and the Court holdings that any governmental action which draws distinctions between burdens or benefits conferred on individuals because of their race is impermissible. Prior to Brown v. Board of Education, the Court did not always maintain this (as in Korematsu); however, since then, although the Court has not ruled that classification according to race is invalid per se, it has ruled that racial classification is valid only if necessary for some overriding purpose, 349 U.S. 294 (1965). If the sole purpose of a measure is to discriminate against individuals because of their race, it may be held unconstitutional because it has an impermissible, discriminatory purpose, and this may be true even when the enactment does not explicitly employ racial classifications.

A suspect classification must bear a higher degree of relevance to purpose than other classifications. Thus, although not all racial and other suspect classifications are absolutely forbidden, they are much less likely to be upheld than other classifications. For example, the ordinary presumption of validity is reversed when a suspect classification is made. The burden is placed in the state rather than the person challenging the law. A demonstration of possible rationality in the classification is deemed insufficient to support a racial distinction although it will support others. In order to be sustained the classification must be a necessary means of achieving a legitimate state purpose. This means that under- and over-inclusiveness are less acceptable in a suspect classification than they would otherwise be. Consequently, departures from strict reasonableness in relation to purpose

will not be readily tolerated when state action is guided by suspect distinctions. A state must demonstrate a much greater justification for imposing burdens or denying benefits on the basis of race than is required when distinctions are drawn on non-suspect lines. This higher burden requires that a state show not only that its objective could not be obtained by a measure that did not draw distinctions, but also that the public interest involved outweighs the deteriment that will be incurred by the affected private parties. In calculating the magnitude of the public need for the measure, the courts must consider both the extent of the benefits accruing to society and the degree of risk which will be incurred if a measure of that nature is not permitted. Similarly, the actual cost of the measure must be determined by examining both the importance of the individual or group rights infringed and the extent to which the measure will have long-term adverse effects on those interests.

Interests which have been identified as fundamental and therefore deserving of special treatment under the equal protection clause include voting, procreation, rights with respect to criminal procedure, and to a lesser degree education, but it is difficult to articulate a general formula to distinguish interests regarded as "fundamental" from other interests for purposes of the equal protection clause. The Court seems to have treated the cases on an ad hoc basis, occasionally pointing out reasons for regarding particular interest as important, but not formulating a comprehensive theory. Sometimes an individual suffers severe detriment when he is not treated as well as others are treated, just as in some contexts an individual may suffer severe detriment when the treatment he receives falls below a certain absolute standard. Thus, there is an obvious analogy to formulations of "due process" based on perceptions of "fundamental fairness" or "ordered liberty." However, although the process of identifying these interests may be similar, the conclusions reached are not always identical. Probably every interest protected by due process will also be protected under equal protection, but the reverse is not true. For example, due process does not require states to grant appeals as of right, but equal protection requires that if the state provides an appeal to some it cannot deny it to others because of their inability to pay even where this could be rationally defended, Douglas v. California, 372 U.S. 353 (1963).

The Supreme Court's conception of judicial competence to create and administer adequate remedies has played an important role in the development of equal protection doctrine. In 1946, the Court refused to hear a case involving an alleged denial of equal protection in legislative districting, in part because it felt it was unable to fashion a suitable remedy, Colegrove v. Green, 328 U.S. 549 (1946). When the Court heard a similar case sixteen years later it said that it had "no cause . . . to doubt the District Court will be able to fashion relief . . .", Baker v. Carr, 369 U.S. 186, 198 (1962).

What may be called traditional remedies are those which a court might use whenever relieving a denial of constitutional rights, but the actual form of the remedy depends on the case. If a denial of equal protection infects the process of litigation in a lower court where a judgment has been entered against the person whose rights have been infringed, the remedy is generally reversed. For example, a Black's conviction will be reversed if other Blacks were barred from the jury by statute or practice. If procedurally fair litigation has resulted in the denial of equal protection, reversal here is also the remedy. The person or class discriminated against is entitled to such relief as is necessary to make the remedy effective. A court has the "power . . . (and) duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future, " Louisiana v. United States, 380 U.S. 145, 154 (1965).

In some situations a person denied equal protection must institute suit to obtain relief either by seeking damages or an injunction. Traditional forms of injunctions may prohibit enforcement of a discriminatory statute or administrative order, prevent discriminatory administrative practices, or give the plaintiff specific relief in the form of what has been discriminatorily denied him. Relief in the form of damages is appropriate when the discrimination has caused the plaintiff compensable monetary harm. However, the difficulty of finding a defendant who can be required and is able to pay substantial damages limits the usefulness of this remedy. Another difficulty with this is the doctrine of sovereign immunity, although recent Supreme Court decisions in this area have more narrowly restricted the scope of this doctrine. Where a statute denies equal protection by making an unconstitutional classification, the classification can be abolished by making the statute operate either on everyone or on no one.

Until the school desegregation cases, judicially authorized delay had seemed to be inapplicable to cases involving Constitutional rights. There, instead of immediate relief, the Court ordered that relief be granted "with all deliberate speed," Brown, 394 U.S. et 301. When ordering relief to proceed in this manner, the Court was holding, at least in school desegregation cases, that continuing infringement of Constitutional rights would be tolerated so that some other interests might be protected. The factors that can justify this delay are: the need for time to study the existing situation, determine various ways to correct the denial of equal protection, and choose the best comprehensive plan; the need for time to formulate remedial plans, and the need for time to solve administrative problems related to implementing the plans.

Although the Supreme Court has suggested that schools present a unique case where delay is justified, lower courts have allowed delay where changes in public institutions would be so complex that immediate changes would cause disruption, but not all facilities have characteristics that make delay necessary as in public parks or recreational areas. Delay has also been allowed in reapportionment. Because of the large amount of data and detail necessary to be taken into account in formulating complex apportionment plans that will meet constitutional standards, delays have been allowed in implementing orders.

Comparison with Other States

Among all of the sections of the Ohio Bill of Rights, nowhere are the differences between Ohio's sections and those of other newer bills of rights more apparent than in Article I, section 2. The main reason for the disparity here arises from radical changes over the last twenty years in the doctrine of equal protection. Newer state bills of rights consequently reflect changing attitudes and court decisions while Ohio retains a section adopted in 1851--a time when men seriously proposed to amend the first sentence of Article I, section 2 and substitute "white citizens of Ohio over twenty-one" for "people."

Alaska's Bill of Rights contains four sections that set out rights similar to those provided in Article I, section 2 of the Ohio Constitution. Article I, section 2 of the Alaska Constitution says basically that all power is inherent in the people and that government originates in the people and is instituted for their good. Article I, section 1 in a statement of inherent rights, states that all people are equal and entitled to equal rights, opportunities and protection. The language in these sections is reminiscent of Article I, sections 1 and 2 of the Ohio Constitution and they are similar because both are derived in part from the Declaration of Independence. A major difference, though, is that equal protection is guaranteed in a separate section reading,

> No person is to be denied the enjoyment of any civil or political right because of race, creed, color, sex, or national origin. The legislature shall implement this section
>
> Alas. Const., Article I, section 3

Alaska also prohibits making irrevocable grants of privileges in a section that combines several rights, Article I, section 16.

Hawaii spreads the rights contained in Article I, section 2 of the Ohio Constitution through six different sections. Hawaii's Bill of Rights begins, as does Alaska's, with two sections setting out basic principles. Article I, section 1 states that all power of the state is inherent in the people. Section 2 sets out basic rights among which is that all men are "free by nature and are equal in their inherent and inalienable rights." There are four sections dealing with equal protection. Article I, section 4 guarantees due process and equal protection in traditional language with an added phrase that states,

> No person shall . . . be denied the equal protection of the laws, nor be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.
>
> Hawaii Const., Article I, section 4

Article I, section 7 of the Hawaii Constitution adds a specific application of the right of equal protection in the area of military service. The last section is the most recent; it provides a specific guarantee against discrimination on the basis of sex,

> Equality of rights under the law shall not be denied or abridged by the State on account of sex. The legislature shall have the power to enforce, by appropriate legislation, the provisions of this section.
>
> Hawaii Const., Article I, section 21

Finally, Hawaii also limits special privileges in Article I, section 19.

Illinois has seven sections covering those guarantees of Article I, section 2. Article I, section 1 of the Illinois Bill of Rights is another statement of basic principles including that government derive their just powers from the consent of the governed. Article I, section 2 states the basic guarantee of due process and equal protection.

> No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.
>
> Ill. Const., Article I, section 2

Article I, sections 17, 18, 19, and 20 further develop this basic guarantee. Section 17 states that all persons have the right to be free from discrimination in the hiring and promotion practices of any employer or in the sale or rental of property

and makes these rights enforceable without action by the legislature although it may provide exceptions or additional remedies. Section 18 guarantees that equal protection shall not be denied on account of sex by the State, local governments, or school districts; and Section 19 specifically extends this protection to the handicapped in the sale and rental of property and in hiring and promotion practices unrelated to ability. Section 20 could be considered auxiliary to these other sections. It is strictly hortatory and is not legally operative nor does it vest any rights; rather it seeks to encourage moderation in the use of language that impairs the dignity of individuals by disparaging groups to which they belong.

> To promote individual dignity, communications that portray criminality, depravity or lack of virtue in, or that incite violence, hatred, abuse or hostility toward, a person or group of persons by reason of or by reference to religious, racial, ethnic, national or regional affiliation are condemned.
>
> Ill. Const., Article I, section 20

Article I, section 16 forbids irrevocable grants of special privileges.

Montant also provides for the Article I, section 2 guarantees but in fewer sections. Like the other Constitutions it begins with basic principles. In Article II, sections 1 and 2 it states that all power in inherent in the people and that the people have the exclusive right of governing themselves with the power to alter or abolish the government whenever they deem it necessary. Article II, section 4 of the Montana Constitution provides for equal protection,

> The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition or political or religious ideas.
>
> Mont. Const., Article II, section 4

Article II, section 31 prohibits irrevocable grants of special privileges, franchises or immunities.

The Model State Constitution in keeping with its express purpose to promote the brevity of state bills of rights does not contain any introductory section nor does it have a section or clause that prohibits irrevocable grants. It merely contains an unelaborate due process/equal protection section,

> No person shall be deprived of life, liberty, or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of his civil rights, or be discriminated against in the exercise thereof because of race, national origin, religion or ancestry.
>
> Model State Constitution, Article I, section 1.02

Ohio Constitutional Revision Commission
Bill of Rights Committee
April 10, 1975

Research Study No. 44L

Bill of Rights
Article I, 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.
>
> Ohio Const., Art. I, Sec. 8

This section was originally in the Constitution of 1802 in Art. VIII, Section 12 where it was combined with a bail provision. The Constitutional Convention of 1850-51 removed the bail provision and combined it with another to form what is now Art. I, Sec. 9. The remaining clause was untouched and included in its original form in the Bill of Rights of the Constitution of 1851. In 1874, another Constitutional Convention sought to provide increased protection for this right and those who would be affected by it by adding at the end of the section,

> ...and then only in such manner as may be provided by law.

The proposals of the 1874 Convention, though, failed to receive voter approval. Since then there has been no change in this section.

History of the Writ of Habeas Corpus; the Federal Constitution

The precise origin of the writ of habeas corpus is not known but as early as as 1199 A.D. orders were issued to English sheriffs to produce parties before courts. Originally, the writ was a process by which courts compelled attendance of parties to facilitate the adjudication of litigation. The writ, though, was constantly changing and by the 1660's it had evolved into an independent writ, a device whereby a court could inquire into the legality of detention and order a release if detention was illegal. The writ also assumed several new forms, the most important of which was habeas corpus ad subjuciendum, used where the petitioner was being held under criminal charges.

The first major test of habeas corpus in this form came in Darnel's Case, 3Cobbett's St. Tr. 1 (1627). There, four persons, imprisoned for refusing to make loans to Charles I, sought release on the grounds that the King lacked authority to hold them solely on his special command. The Court accepted the jailer's return and refused to look behind it although it acknowledged that, where the cause of commitment appeared in the return, the court had the power to review the legality of the detention. Parliament responded to the situation with the Petition of Right, and thirteen years later struck again at the power of the King by abolishing Star Chamber and the power of the King to arrest without probable cause. Upon restoration of the monarchy, following the conflict over habeas corpus and King's powers erupted again, and Parliament responded with the Habeas Corpus Act of 1679. This did not correct all the problems, but it strengthened the powers of the common law courts to release prisoners arbitrarily detained by King and council. The Act specifically excluded persons confined as a result of criminal conviction. The old test of judicial detentions -- the jurisdictional competence of the committing court -- was the sole point of inquiry in cases of this nature.

In the United States, in the years following ratification of the United States Constitution, practically all the states incorporated into their constitutions provisions patterned after the federal suspension clause, Article I, Section IX: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require." The mention of the writ in the federal Constitution serves only to limit the power of Congress, but more may not have been necessary since each state had the writ available, and any person, including federal prisoners, confined within the state was afforded its protection. In any event, nothing in the historical background of the writ in 1789 indicated that a prisoner convicted by a court of general criminal jurisdiction was even entitled to the writ. On the federal level, the framers were concerned about the misuse and abuse of executive power, although the first Congress did not view the clause as implicitly establishing an affirmative right to the writ. If they had, they would not have deemed it necessary to give the federal courts explicit power and jurisdiction in the Judiciary Act of 1789 to issue the writ.

Early cases recognized the statutory rather than the constitutional origins of the power, Turner v. Bank of North America, 4 U.S. (4 Dall.) 8 (1799). Eight years later, Chief Justice Marshall dealt with the power of the Court to issue the writ and he concluded that the power to issue the writ must be given by written law, Ex Parte Bollman, 8 U.S. (8 Cranch) 75, 1807. In 1830, in another case dealing with the writ, he said that the scope of the writ was delineated by the common law, and he denied the writ on the ground that the prisoner was committed under a criminal conviction and "an imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it could be erroneous." Ex Parte Watkins, 28 U.S. (3 Fet.) 193, 203 (1830). This was essentially the status of the writ in 1867 when the Habeas Corpus Act was passed, and it remained so for several years, both in federal and state courts.

Ex Parte Lange, 85 U.S. 163 (1873), represented the first departure from these historical boundaries when the Court granted relief to a prisoner who had been convicted of a federal offense, and paid the fine imposed only to be resentenced to a year's imprisonment. The Court, in granting its writ, used the argument that the satisfaction of the original sentence had terminated the lower court's jurisdiction. Later, using the same lack of jurisdiction concept, the Court ruled that the constitutionality of the statute under which a prisoner was convicted could be examined and that the total absence of any indictment would entitle a prisoner to relief.

An expanding view of due process rights for state defendants coupled with a concern for deference to state judiciaries caused continual problems for the Supreme Court in deciding habeas corpus petitions. In Frank v. Mangum, 237 U.S. 309 (1915), the Court rejected a state petitioner's claim that he had been denied due process by an allegedly mob-dominated trial and affirmed the denial of the writ. This, though, introduced some new concepts. Mob domination of a trial could result in a denial of due process, in which event the conviction would have been entered by a court without "jurisdiction" and relief could be granted. This represented a change in what had earlier been meant by "jurisdiction". The result in Frank was dictated by the Court's view that the ultimate question under the 1867 Act was whether the prisoner was in custody "in violation of the Constitution" and the resolution of that test was determined by the fairness of the state "corrective process" to test federal constitutional claims. The essential inquiry focused on

the state's panoply of procedures for adjudicating such claims rather than the substantive claim itself.

Moore v. Demsey, 261 U.S. 86 (1923), raised the same issue of mob domination but, despite the fact that the Arkansas Supreme Court had considered the prisoner's federal claim, the Court reversed and ordered the district court to determine the merits of the allegation. The Court continued to discuss due process claims in terms of "jurisdiction" and it reiterated the caveat that habeas corpus could not be used as a substitute for a writ of error. Later, the Court abandoned the "jurisdiction" fiction and expressly acknowledged that constitutional claims, as well as jurisdictional questions were cognizable on habeas corpus review, Waley v. Johnson, 316 U.S. 101 (1942).

Under Frank there could have been no federal habeas corpus review on the merits and the sole question would have been the adequacy of the state corrective process. Brown v. Allen, 344 U.S. 443 (1953), a later decision, treated that prior ultimate question as irrelevant and established that in federal habeas corpus filed by a state prisoner, the federal courts could review and decide the merits of the alleged federal claim without initial resort to the question of adequacy of state process. In addition, the federal district judge was not limited to the state record; he could hold an evidentiary hearing and make new findings of fact.

Brown had no immediate impact despite the contemporaneous enlargement by the Supreme Court of due process and equal protection rights in part because of Daniels v. Allen, 344 U.S. 443 (1953). The defendant in Daniels raised the same issues raised in Brown, but the prisoner had not previously perfected an appeal of his conviction to the state Supreme Court. The Supreme Court denied relief solely on the grounds that the petitioner had waived the claims by failing to assert them in accordance with state law and his custody was therefore " not in violation of the Constitution." The Court's holding had the effect of giving immunity to a state conviction in federal habeas corpus appeal if it was similarly immune from review in direct appeal because it rested on an adequate state ground. As long as Daniel stood, state criminal procedural rules could effectively bar federal collateral relief, and there was a high degree of finality to a conviction where no federal question was raised in the course of trial and appeal. Finally, the issue was resolved in Fay v. Noia, 372 U.S. 391 (1963), and its companion cases; Townsend v. Sain, 372 U.S. 293 (1963); Sanders v. United States, 373 U.S. 1 (1963); Jones v. Cunningham, 371 U.S. 263 (1963).

In Fay and Townsend, the Court formulated a rule that said: habeas corpus may be invoked by a state prisoner, after the exhaustion of available state remedies, to review alleged violations of federal constitutional claims in state criminal proceedings, regardless of any prior state court determinations of those rights. The federal district court must hold an evidentiary hearing when: the merits of any factual dispute were not determined at a state hearing; the state adjudication of the merits of any such dispute is not fairly supported by the record; the fact finding procedure utilized in the state courts is not adequate for a full and fair hearing; there is a substantial allegation of newly discovered evidence; the material facts were not adequately developed at state hearings; or if, for any reason, the prisoner was not afforded a full and fair hearing in the state courts. Even under this rule, though, the prisoner may be deemed to have waived his federal claims if he understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in state court whether for strategic, tactical, or other reasons.

Sanders holds primarily that res judicata does not serve to bar successive

habeas corpus petitions, although the rejection of the same claim in an earlier proceeding may be considered by the later court. In Jones, the Court retreated from its earlier position that habeas corpus could be used only to test actual physical custody, and extended habeas corpus to allow relief to a prisoner released on parole.

The Ohio Provision

Soon after the passage of Art. I, §8 the Ohio Supreme Court interpreted it. In Ex Parte Collier, 6 Ohio St. 55 (1856), a case dealing with the power of a judge to issue a writ of habeas corpus, the Supreme Court said that the privilege of the writ was secured by our national and state constitutions for every citizen. It could only be suspended or withheld in cases of rebellion or invasion, when the public safety requires it. Limited only by this reservation, each citizen is "vested with this ancient and sacred shield of liberty", and the judiciary is delegated the duty of enforcing applications for its invaluable benefits when a citizen properly demands it. When the appropriate state statutes give a judge jurisdiction to act, the judge has the duty to issue the writ when a person who has been unlawfully deprived of his liberty applies. Every case of unlawful imprisonment may thus be reached and examined. It can make no difference whether the detention is by color or authority from a United States Court; or from any officer, commissioner, agent, or other functionary of the federal government; or by virtue of any writ issued, or claimed by any state, or by a foreign government. The true test of jurisdiction is whether the relator is detained or imprisoned without legal authority. The authority behind the imprisonment or the authority which enforces it operates as no barrier to the allowance and validity of the writ. The power exists to make inquiry into the cause of the capture and detention, and it may be pursued without regard to the origin or condition of the imprisonment.

> No matter where or how the claims of captivity were forged, the power of the judiciary, in this state, is adequate to crumble them to the dust, if an individual is deprived of his liberty contrary to the law of the land.
>
> 6 Ohio St. 55, 59

Despite this claim of breadth, in actual practice, habeas corpus in Ohio was more limited than the Collier court contended. The Ohio Supreme Court narrowly construed the availability of habeas corpus as a post conviction remedy. By invoking the doctrines of comity and waiver in judicial construction the Court narrowed the scope of the writ to a preconviction remedy -- with several important exceptions. The basis of this action was that appeal from conviction was an adequate remedy which should not be replaced by habeas corpus, and that habeas should only be available to raise the issue of errors that go to the jurisdiction of a court. Although the Court was not always consistent in the application of the writ, the weight of the cases held that there could be no attack upon a criminal conviction by the use of a writ of habeas corpus if the sentencing court had personal and subject matter jurisdiction. This inconsistency stemmed in part from United States Supreme Court decisions.

In 1949, the Supreme Court in Young v. Ragen, 337 U.S. 235 (1949), told the States that they must develop a clearly defined method by which convicted persons could raise claims of denial of federal rights. Subsequent cases established guidelines for acceptable procedure. Prior to 1965, Ohio did not provide this requisite protection. The writ of error coram nobis had never been recognized in Ohio and the

Ohio Supreme Court, as mentioned above, had limited the scope of state habeas corpus. Constitutional error could only be redressed through direct appeal, although after appeal, federal habeas corpus was available. After Young, the Ohio Supreme Court began to allow collateral attack through habeas corpus on the grounds of an alleged denial of constitutional rights. Over-crowded dockets resulted. In response to this over-crowding and a likely decision from the United States Supreme Court that states must establish an orderly procedure to deal with constitutional rights, Ohio passed the Ohio Post-Conviction Remedy Act, Ohio Revised Code Sections 2953.21, .22, .23, .24.

The Ohio legislation was similar to a law enacted in Nebraska. The stated purpose of the Act was to provide the best method of protecting the state and federal constitutional rights of an individual and at the same time set out a more orderly method of hearing such matters substituting it for the habeas corpus procedure, at least as a post-conviction remedy, Kott v. Maxwell, 3 Ohio App. 337 (1965). In Freeman v. Maxwell, 4 Ohio St. 2d 4 (1965), cert. den. 382 U.S. 1017 (1966), the Ohio Supreme Court restricted habeas corpus relief to persons challenging the legality of confinement before conviction, persons challenging their confinement ongrounds unrelated to the conviction, and persons challenging the jurisdiction of the Court. This finally halted the flood of habeas corpus petitions to the Court and made the Statute the exclusive method for asserting constitutional claims by collateral attack. Section 2953.21 of the Act provides that any person convicted of a criminal offense or adjudged delinquent claiming a denial or infringement of his rights that would render the judgment void or voidable under the Ohio Constitution or the United States Constitution, may file a verified petition with the sentencing court stating the grounds for relief and asking the court to vacate or set aside the judgment or sentence or grant other appropriate relief. The clerk must then promptly bring this to the attention of the court. Before granting a hearing, the court determines if there are substantive grounds for relief by considering the petition, other affidavits, the files and records, journal entries and transcripts. If the judge finds grounds to grant a hearing, the prosecutor has 10 days to respond unless the petitions and records show the petitioner is not entitled to relief. The court then promptly proceeds to hear the issues. If the court finds grounds for granting relief, it shall, by its own judgment, vacate and set aside the judgment, and shall, inthe case of a prisoner in custody, discharge or resentence him, or grant a new trial as may appear appropriate. Section 2953.22 provides for personal appearances at hearings. Section 2953.23 allows a second or successive petition for similar relief based on the same facts or on newly discovered evidence, and Section 2953.24 provides for the appointment and compensation of counsel for indigent defendents.

The Ohio Supreme Court delimited these sections in State v. Perry, 10 Ohio St. 2d (1967). Here, the Court dealt with a number of appeals from judgments denying petitions and affirming convictions under sections 2953.21 et seq. of the Revised Code of prisoners in custody under sentence after conviction. The Common Pleas Courts, denying relief, stated that they had made the requisite "search" and "that there was no denial or infringement of the rights" of the prisoners "so as to render the judgment void or voidable" under the Ohio and United States Constitutions. Under the Act the trial court has the mandatory duty to make findings of fact and conclusions of law if the petition raises a properly cognizable issue requiring the determination of facts. If such facts cannot be determined from an examination of the court records, the court must conduct a hearing to obtain the necessary information, by deposition or otherwise to make the required findings of fact and conclusions of law, State v. Jones, 8 Ohio St. 2d 21 (1966). But the Common Pleas Courts in Perry did not notify the prosecutor or grant a hearing; this, though, is not necessary if the petition does not allege facts which, if provided, would entitle the prisoner to relief. Thus, the trial court can summarily dismiss. If the petition does allege such facts, but

the files and records of the case negate the existence of facts sufficient to entitle the prisoner to relief, the court may find so and dismiss the petition. In this case, the court must specify those portions which negate the existence of alleged facts that could otherwise entitle the prisoner to relief.

A prisoner is entitled to relief only if the court finds a denial or infringement of the prisoner's rights which renders the judgment void or voidable under the Ohio or United States Constitutions. A court renders a void conviction only if it has no personal or subject matter jurisdiction, but where such jurisdiction exists, the judgment is not void and the cause of action merged therein becomes res judicata between the state and the defendant. An erroneous judgment that is not "void" can be considered "voidable" so long as it may be set aside on appeal. This should not be interpreted to mean that constitutional issues can be considered and litigated in post conviction proceedings even though they have been or could have been litigated either before conviction or on direct appeal and have been litigated either before conviction or on direct appeal and have been adjudicated against the defendant. This, the Perry court said, would be totally inconsistent with the doctrine of res judicata. Under this doctrine, a final judgment of conviction bars the convicted defendant from raising and litigating, in any proceeding except an appeal from that judgment, any defense or claimed lack of due process that was raised or could have been raised by the defendant at the trial in which he was convicted or on an appeal from that judgment.

A Constitutional claim that could not have been raised by the prisoner before judgment of conviction and could not therefore have been waived by or adjudicated against the prisoner can make the conviction "voidable" and thus can be raised under the Act. The Act does not contemplate relitigation of those claims in post conviction proceedings where there are no allegations to show that the claims could not have been fully adjudicated by the judgment of conviction or by an appeal from that judgment. This position was later affirmed in State v. Duling, 21 Ohio St. 1d 13 (1970).

The Act, though, is limited. The Act applies solely to convictions entered as the result of state prosecution. The Supreme Court said in Dayton v. Hill, 21 Ohio St. 1d 125 (1970) that the Act clearly shows that no logical or reasonable procedure has been provided for the handling of post conviction petitions filed in a Municipal Court as the result of a conviction and sentence for violating a municipal ordinance. Another limitation is in the types of issues that can be raised under the Act.

In Armstrong v. Haskins, 363 F. 2d 429 (6 Cir, Ct. A., 1966), the Court said that the post conviction remedies provided in the Ohio Statutes must be exhausted before resorting to the federal courts. One would assume that the federal doctrine of exhaustion would also require appeal from a trial court decision under sec. 2953.21, but this is not always the case. In Coley v. Alvis, 381 F. 2d 870 (6 Cir., Ct. A., 1967), the defendant appealled from a dismissal of his application for a federal writ of habeas corpus. The District Court had dismissed his application because of his failure to exhaust his state remedies, but under the Perry decision the defendant would have been precluded from raising the issues on which his application was based because of res judicata, under the Ohio Post-Conviction Act. As a consequence, the Circuit Court overruled the District Court saying that because of the narrow limits placed on the Act, there was no longer any effective state remedy to exhaust.

Allen v. Perini, 424 F. 2d 134 (6 Cir, Ct. A., 1970) also dealt with the failure to exhaust state remedies. Here, the Court said that the exhaustion requirement is not absolute. Where there are circumstances rendering the State's corrective procedure

inefficient to protect a prisoner's rights, habeas corpus may be granted without requiring a futile exhaustion of remedies. Allen's petition to the trial court under the Act was dismissed without an evidentiary hearing on the authority of the decision in Perry. The District Court had dismissed the petition for federal habeas corpus on the grounds of a failure to exhaust all state remedies. On appeal to the Circuit Court, the State raised that issue again, but the Circuit Court said that it was convinced that an appeal would be futile under the Ohio Supreme Court decision in Perry as construed in Coley. The State also contended that the relief available under the Act was broader than indicated in Perry, but the Circuit Court did not agree. The Court said that it would like to agree with the State's contention and that it would be highly desirable for Ohio prisoners to have all of the relief available in the state courts as contemplated by Townsend, but since the Ohio Supreme Court had given no indication that it did not mean what it said in Perry the Circuit Court felt compelled to adhere to Coley and hold that Allen was not required to appeal from the dismissal of his state post conviction action as a prerequisite to pursuing a federal remedy.

Comparison With Other States

This section is another basic right commonly found in state bills of rights. It is so basic that even the words are the same in most of the parallel sections reviewed. Of the five sections reviewed: Alaska, Art. I, Sec. 13; Hawaii, Art. 1, Sec. 13; Illinois, Art. 1, Sec. 9; Montana, Art. II, Sec. 19; Model State Constitution, Art. I, Sec. 2.05; only Hawaii's and Montana's differ from the format found in Ohio's section. Hawaii's Bill of Rights first sets out the basic guarantee then provides that the power to suspend habeas corpus rests entirely with the legislature or those who derive their authority from the legislature and then only in such particular cases as the legislature shall expressly provide. Montana's section states

> The privilege of the writ of habeas corpus shall never be suspended.

Ohio Constitutional Revision Commission
Bill of Rights Committee
21 July 1975

Remittitur:

Inviolability of the Right of Trial by Jury
Article I, Section 5

In studying Article I, Section 5, the provision which guarantees the right to trial by jury, several questions have been raised concerning the meaning of the term "inviolate" and the limits of permissible control over the size of verdicts in civil actions for damages. Specifically, a development of the constitutional limits on remittitur, in light of Article I, Section 5; an explanation of the differences, if any, between term "remittitur" and the phrase "reduction of a verdict"; and, an analysis of the anticipated constitutionality of a revision of Article I, Section 5, which would require that damages in a civil action be determined by the judge hearing the dispute have been requested. This memorandum responds to each inquiry.

Article I, Section 5, states:

> 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 a concurrence of not less than three-fourths of the jury.

Summary

There appears to be no substantive distinction between "remittitur" and "reduction of a verdict", although the former seems to be the preferred term. Remittitur is a consent procedure for reducing verdicts which are excessive and does not offend the "inviolate" provision of Article I, Section 5.

For the right to a jury's determination in civil damage actions to be withdrawn so that only a judge could assess damages, a revision of Article I, Section 5, would be required. Even if such an amendment were adopted, it might fail under the federal Constitution.

Remittitur - or Reducing a Verdict

Remittitur is a procedure by which the monetary amount of a jury's verdict, thought by the trial judge or a reviewing court to be excessive, may be reduced before judgment is entered or affirmed. As this very simple definition suggests, "remittitur" is the process of "reducing a verdict". The cases draw no distinction between"remittitur" and "reducing a verdict". Although "remittitur" appears to be the preferred term, it is used interchangeably, even in leading cases, with the phrase "reducing verdicts".[1]

The basic rule for the application of remittitur is that no court has the power in suits for unliquidated damages to reduce the verdict of a jury absent the express consent of the party to the action in whose favor the verdict was returned.[2] The rationale for this rule is that reduction of a jury's verdict without the assent of the person benefited by the verdict would constitute a violation of the Article I, Section 5, right to have a jury decide the case. The element of the prevailing party's approval is so central to reducing a verdict that the procedure is often referred to as "consent remittitur".

That a court may not reduce a verdict without the assent of the party in whose favor the jury rendered its verdict by no means leaves the trial or reviewing court without authority to remedy an excessive verdict. The potential use of the remittitur principle is raised by the losing party making a motion for a new trial, or appealing the denial of such a motion, upon the grounds that the verdict rendered by the jury is excessive and against the weight of the evidence. If a trialor reviewing court finds the verdict of a jury acting within the scope of its charge to be excessive, the court may make the assent to a remittitur of a given amount by the party for whom the verdict was rendered the condition upon which it will deny a motion for a new trial or affirm a judgment. If the party enjoying the benefit of the verdict does not so agree, a new trial may be granted or the judgment reversed. However, if the court ruling on the motion for a new trial or reviewing on appeal the denial of such a motion finds that the jury's verdict is so palpably or outrageously excessive as to indicate that the jury rendered its decision under the influence of passion or prejudice, the court may not employ remittitur and must set the verdict aside and grant a new trial.[3]

The requirement that a consent remittitur be agreed to in order to avoid the granting of a new trial or the reversal of the judgment in a case where a jury's excessive verdict is not the result of passion or prejudice is held not to violate Article I, Section 5, or the mandates of due process.[4]

The courts have consistently ruled that the remittitur procedure does not violate the Article I, Section 5, direction that "(t)he right to trial by jury shall be inviolate" for two reasons. First, the reduction of a verdict results in a judgment that is within the limits of what a jury, acting judiciously, has found to be an appropriate amount of damages. (Additur, or the increase of a verdict beyond the limit found by a jury, presents very different constitutional questions, ones which are beyond the scope of this memorandum.) Further, it may be argued that in as much as a party may waive his constitutional right to a jury trial altogether, he should not be prohibited in the remittitur situation from waiving, to avoid a new trial, some portion of the monetary benefit the jury has bestowed upon him. Secondly, the jury right has traditionally been interpreted to allow the finding of facts by the panel of laymen and to leave the determination of matters of law in the discretion of the judge. It is a conceded aspect of this principle that a finding of fact outside certain liberal but reasonable limits will be against the manifest weight of the evidence as a matter of law.

A corollary rubric of the law relating to juries is that the right to a jury's determination does not extend to guarantee a decision by a panel which acts outside its role as an unprejudiced finder of fact and that a jury may be acting within its proper role and still fail to properly calculate the damages. Thus, when a court asks for a consent remittitur as a condition to refusing a new trial, the Article I, Section 5, right to a trial by jury is not being violated by a substitution of judge for jury, but, rather, the court is saying that the verdict is excessive and should be modified because the jury has, in the court's opinion, erred in the calculation of damages to the extent of the reduction suggested. When the court finds that the verdict is so blatantly in excess of the limits which are as a matter of law supported by the evidence that the influence of passion or prejudice may be inferred, the verdict may be overruled and a new trial allowed without violating the right to a jury. No violation of the jury right is perpetrated because no jury as uninfluenced by passion and prejudice as is required by the law has passed its judgment on the facts.

This distinction between what is a miscalculation by the jury and does not invade its province, and, what is the result of a jury acting under undue influence and outside its charge is not really clear. Indeed, it has been suggested that if remittitur was not an historic and efficient practice but was before a court on first impression, a different rule would very likely be set, one invalidating remittitur.[5]

Judicial Determination of Civil Damages Absent a Right to Jury Trial

The basic rationale for the right to trial by jury is founded in the desire to allow a litigant the determination of the facts in his case by a group of persons with everyday experiences and background, and, thereby, to protect the party from any arbitrary decision by an individual representing the power of the sovereign. This principle extends beyond mere procedural guarantee and is a major substantive right of our society. The right may, however, be waived by a party who desires no jury.

A general definition of "inviolate" as used in Article I, Section 5, would assist in determining the constitutional latitude available for any effort to remove the right to have a jury ascertain the extent of damages in a civil suit. Unfortunately, the Ohio courts have not reported a definition. Turning to judicial explanations of the term "inviolate" in other states having constitutional provisions nearly identical to Article I, Section 5, a serviceable definition can be synthesized. The use of "inviolate" in Article I, Section 5, denotes that the right of trial by jury shall be free from any substantial impairment, sacred, and shall continue as before the adoption of the provision. It further connotes that the procedural details of the administration of the jury right may be changed. Clearly, the right to have factual questions decided by a jury is a

substantial right which goes beyond a procedural guarantee.[6] Further, the Article I, Section 5, guarantee protects jury trial in those causes of action in existence at the date of the provision's adoption and does not extend inviolate to causes authorized since.[7]

The right to a jury trial may, as noted above, be waived and it may be excluded in any new civil cause of action recognized after the adoption of the original "inviolate" provision, Article VIII, Section 8, of the Constitution of 1802.

To withdraw the substantive right of having a jury determine damages in the prior existing civil causes of action and to place the determination solely within the province of the judge would offend the meaning of "inviolate" in Article I, Section 5, and could only be successfully accomplished by a revision of the provision which would limit the existing right.
A revision of Article I, Section 5 could be drafted which would constitutionally allow the legislation which could require civil damages to be determined by the judge in a case without the assistance of the jury. But, while the Ohio Constitution, if so revised would no longer bar the absence of a right to trial by jury, the federal Constitution might be interpreted to do so.

The guarantee in the United States Constitution of the right to trial by jury in civil cases is found in the Seventh Amendment, which states:

> 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.

The Seventh Amendment applies, presently, only to cases arising under the federal laws, and, unlike certain other provisions of the Bill of Rights, has not been extended to the several states. However, in light of the long and honored position of the right of jury trial in our legal system, it would seem possible that the Seventh Amendment will eventually be found to be binding upon the states. Such a ruling by the federal courts would, most likely, be based upon the doctrine of extending Bill of Rights protections to the states by virtue of selective incorporation of the rights into the due process clause of the Fourteenth Amendment which expressly applies to the states.

The United States Supreme Court has carefully guarded the right to trial by jury in civil cases. The following quotation from the Court is illustrative:

> "(m)aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."[8]

Given such a view of the sanctity of the substantive right to trial by jury as the Supreme Court has expressed, it would seem possible that the Court might when confronted in a due process case with a state's removal of the existing right find that the trial by jury right is an essential element of the due process requirements incumbent upon the states and not subject to removal.

Footnotes

1. See, e.g. Chester Park Co. v. Schulte, 120 O.S. 237, 166 N.E. 186 (1929).
2. Ibid.
3. Ibid.
4. Alter v. Shearwood, 114 O.S. 560, 151 N.E. 667 (1926).
5. Dimick v. Schiedt, 293 U.S. 474, 55 S. Ct. 296 (1935).
6. Cleveland Ry. Co. v. Halliday, 127 O.S. 278, 188 N.E. 1 (1933).
7. Belding v. State, 121 O.S. 393, 169 N.E. 301 (1930).
8. Dimick v. Schiedt, supra. at 486

Ohio Constitutional Revision Commission
Education and Bill of Rights Committee
November 19, 1975

Report: Article I
THE BILL OF RIGHTS

The Education and Bill of Rights Committee hereby submits its recommendations to the Commission on all sections of Article I of the Ohio Constitution, the Bill of Rights, and on section 5 of Article XIII, as follows:

Article I

Section	Subject	Recommendation	Page
Section 1	Inalienable rights	No change	7
Section 2	Where political power vested; special privileges	No change	13
Section 3	Right to assemble	No change	16
Section 4	Bearing arms; standing armies; military power	Amend	19
Section 5	Trial by jury	Appointment of a special committee to study civil juries, especially the question of verdict amounts	24
Section 6	Slavery and involuntary servitude	No change	26
Section 7	Rights of conscience; the necessity of religion and knowledge	No change	29
Section 8	Writ of habeas corpus	No change	32
Section 9	Bailable offenses; bail, fine and punishment	Amend	33
Section 10	Trial for crimes; witness	Amend; appointment of a special committee to study the grand jury	40
Section 11	Freedom of speech; of the press; of libels	Amend	47
Section 12	Transportation for crime; corruption of blood	Amend	53
Section 13	Quartering troops	No change	56
Section 14	Search warrants	No change	57

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.

Most commentators who have written about bills of rights in American constitutions agree that the protection of individual freedoms against government encroachment is the general purpose of the provisions. Drafters of the Federal Constitution argued that it was unnecessary to write specific protections into the Constitution - that the Federal government was one of limited powers, and it was inherent in the form of the Federal government that it could not encroach upon individuals in the absence of a specific provision in the constitution granting power to the government. However, this argument 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, no state shall pass 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 addition 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, provisions of the Federal Bill of Rights as guarantees of individual rights against state governmental encroachment.

In view of the fact that many of the federal provisions are applied to the states today, and most of the significant rights cases involve interpretation of the federal, and not the 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 federal courts and ultimately by the Supreme Court. 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:

> 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 immeasureably 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.

The Bill of Rights Committee reviewed each section of Article I, and a section in Article XIII related to section 19 of Article I, and considered the

points raised in research memoranda covering each section. The research 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 also heard testimony from any person interested in commenting on any section, or in proposing additions to the Ohio Bill of Rights.

The committee 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, omitting obsolete provisions, rearranging, and similar matters are not recommended. The only amendments proposed in the testimony that come under this category were that sex-specific words - for the most part, the use of the masculine gender - be changed to neutral words or the sections otherwise rewritten so that references to a particular gender could be eliminated. The committee rejected this proposal. The only changes of a purely corrective nature that are recommended are spelling corrections.

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. These included an equal rights amendment and an amendment giving people the right to know and the right to participate in governmental affairs. Committee members felt that too little was known about the meaning of some of the terms used, and about the potential effect and meaning of the proposals.

Each section of the Bill of Rights and Section 5 of Article XIII is discussed in this report, with the committee recommendation, a brief Ohio history, comparison with the Federal Constitution, and a comment in which an attempt is made to explain the meaning and interpretation of the section and its federal counterpart, if any, and the rationale of any changes proposed by the committee.

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

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

Article I

Section I

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.

Committee Recommendation

The committee recommends no change in this section.

History; Comparison with Federal Constitution

This section is an original section of the 1851 Constitution, unchanged from the date it was adopted. It is derived from Article VIII, section 1 of the 1802 Constitution and was adopted in 1851 with minor modifications of the language. 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, and falls within the category of sections 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 of 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. See, for example, D. P. Supply Co. v. Dayton, 138 Ohio St. 542 (1941). The decision in that case also identifies 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.

Comment

Article I, section 1 guarantees inalienable rights and freedoms, whether to live as one wishes or to run a business as one desires. These freedoms are absolutely given but they are not absolute in their scope and they are limited in a manner that is in accord with due process and the police power.

Among these freedoms, an individual has the right to treat his health as he deems best; as a parent, he has the right to rear and care for his children; he has the right to be free from medical experimentation on his person, and the right to freedom of religion. In Kraus v. Cleveland, 55 Ohio Op. 6 (Cuyahoga Co. C. P., 1953), dealing with the issue of water fluoridation, the Court held that these freedoms must yield to a public health measure adopted pursuant to an exercise of the police power. The exercise of this power includes everything which is reasonable and necessary to secure 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 power of governmental bodies to regulate professions or businesses enables them to limit the freedom of individuals to hold certain positions or jobs (Bergman v. Cleveland, 39 Ohio St. 651, 1884).

Personal freedom may be curtailed as punishment for crime. Guardians may be appointed, thus giving, under certain circumstances, exclusive control over an individual's freedom or power to handle his own property to another. Certain freedoms may be voluntarily given up to guardians under specified conditions (In Re Guardianship of H. B. Faulder, 1 Ohio Op. 63, Auglaize Co. C. P. 1934). Thus, although not securing absolute freedom, this part of Article I, section 1 guarantees a freedom subject only to the police power and other constitutional limitations and in so doing gives the Declaration of Independence, at least in part, force of law in Ohio (Fidelity and Casualty Co. v. Union Savings Bank Co.,

29 Ohio App. 154, affd. 119 Ohio St. 124, 1928).

Similarly, the individual has the right to enjoy and defend his liberty. In Palmer v. Tingle, 55 Ohio St. 423 (1886), 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." Liberty is not license, but liberty regulated by law. The personal liberty of each person is subject to reasonable regulations determined by the legislature to be necessary to promote not only the peace of society, but also its well-being. Freedom of conduct may be restrained only so far as is necessary to protect all others (State v. Powell, 58 Ohio St. 325, 1898). This is not intended to imply, though, that all liberties can be curtailed by the exercise of the police power. The Supreme Court of Ohio has established guidelines to evaluate the exercise of the police power; in City of Cincinnati v. Cornell 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.
>
> 141 Ohio St. 535 (1943)

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 does not change, thus satisfying the requirements of due process.

In Frecher v. Dayton,88 Ohio App. 52, affd. 153 Ohio St. 14 (1950) 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. In Kroplin v. Truax, 119 Ohio St. 610, 1929, the appellant, a cattle owner, attacked a provision providing for the inspection of livestock which, if found diseased, could be destroyed, and the owner indemnified. The statute provided for summary destruction upon a positive finding of disease and indemnification upon appraisal

but not appraisal by a jury. The appellant contended the chapter violated all three due process clauses of the Ohio Constitution; his right to possess and protect property under section 1,his right under section 19 to have compensation assessed by a jury, and, since the chapter provided for no appeal or determination by a court and jury of the right to compensation, his right to due process under Article I, section 16. The Court held, however, that destruction or summary abatement of public nuisances inimical to public health may be ordered in measures providing for the public health. This destruction was not a taking for public use, but merely the abatement of a public nuisance under the police power of the state. The fact that the legislature provides only partial indemnification for the owner of the destroyed cattle does not render the act unconstitutional either under the 14th Amendment or the State Constiution. The indemnification provided is merely a gratuity and the legislature might have directed the slaughter of the cattle without compensation.

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 had 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).

Oberlin's open housing ordinance was also upheld against the argument that it interfered with property rights under Article I, sections 1 and 19 (Porter v. Oberlin, 1 Ohio St. 2d 143, 1965).

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, unless it is unreasonable or arbitrary or that it has no real relationship to the public health, safety, or welfare. The sole restraint is that it 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

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 granted, that may not be altered, revoked, or repealed by the General Assembly.

Committee Recommendation

The committee 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. A large portion 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 theory of the sovereignty of the state lay behind this move, which was vigorously resisted. 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 Bill of Rights of the United States Constitution, Amendment 14, section I. 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 expression of an enforceable right or guarantee. In Ohio v.

Covington, 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 effectively explained in Railway Company v. Telegraph Association, 48 Ohio St. 390 (1891). The Telegraph Company obtained grants from the state and the City of Cincinnati to operate a telephone service. The operation required that the lines be grounded in the earth. Later the Railway Company also obtained grants to operate an electric trolley line. The trolley system worked by sending electricity through lines to the cars. The current then passed through the motor and on into the tracks, returning to the generating plant. The Railway Company current was interfering with the operation of the telephones. Current was traveling through the soil from the tracks to the telephone company lines producing static on the telephones. The Telegraph Company sought to have the Railway Company convert its system of powering its vehicles

to prevent interference with the operation of the telephones. It contended that it had obtained a vested interest in the telephone system as it operated and that not even the legislature could limit, reduce, or injure this franchise on the faith of which it has expended capital and labor. The Court disagreed, saying 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. The Court held that it was clearly within the power of the legislature to authorize one class of corporation to use electricity, with grounded circuits in the streets, as a source of power, and another class to use the same or a similar agency for the transmission of telephonic messages. 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 in the future as the public good might require.

The Court further said that a franchise, if granted by the state with a reserved right of appeal, must be regarded as a mere privilege. The legislature can take it away at any time, and the holders of the franchise must rely solely upon the state's good will for its perpetuity and integrity. In the absence of such a reservation, the force and effect of the grant may be altered through the constitutional power vested in the legislature to alter or repeal all general laws governing corporations and the power to alter, revoke, or repeal all special privileges or immunities that may have been granted.

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

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

Committee Recommendation

The committee 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 . . . prohibiting. . . or abridging . . . the right of the people peacefully 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. Butler, 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. Public officials may act to curtail the exercise of the freedom of association only to enforce statutes

reasonably designed to protect life and order, and actions that exceed those required by the situation cannot be lawfully enforced. What is required is a balancing between the individual's right to associate, and to protest if he chooses,and the state's duty to preserve order. This freedom cannot be restricted in any way because of possible dissatisfaction or hatred of the ideas expressed at assemblages, of the avowed intentions of an association, or of the membership of an association.

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.

Certain types of government restriction are regularly placed on activities, though, largely through statutes requiring permits for gatherings and marches, disorderly conduct laws, and similar statutes. These latter statutes are often legally used in situations that develop out of assemblies where there is a threat of violence. The presence of this threat 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 for governmental officials to selectively or discriminatorily enforce statutes that deal with disturbances, to use these laws to either allow or prohibit constitutionally protected activities at their discretion, violates the individual's right to equal protection, as well as his right to assemble, 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. Finally, the state must also have a statute, narrowly and fairly drawn, authorizing such interference with the right to assemble if the state expects its actions to withstand a constitutional attack.

Ohio's section allows similar freedom and restriction. In Toledo v. Sims, (14 Ohio Ops. 2d 66, 1960), a municipal court said 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). The freedom guaranteed by section 3 is not absolute, and it may be restricted by legislative bodies through laws passed on the basis of the police power. This legislation, though, has to be narrowly defined so as not to arbitrarily or discrimatorily deny the right of assembly to the people. But even if state courts failed to curtail the use of the police power in this area, the State's actions would be circumscribed and limited by the overriding interest of the federal courts in protecting First Amendment rights.

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.

Committee Recommendation

The committee recommends the amendment of Section 4 as follows:

Section 4. The people have the right to bear arms for their ~~defence~~ DEFENSE 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.

The proposed amendment is for the purpose of correcting the spelling of the word "defense" and is not intended to make any substantive change in the meaning of the section.

History; Comparison with Federal Constitution

Section 4 has not been altered since its 1851 adoption. It was taken with minor alterations from the Constitution of 1802, Article VIII, section 20. The second and third clauses of both are identical in content; the 1851 Constitution merely modernized the language. The first clause was altered in 1851. In the 1802 Constitution, clause 1 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 Amendment II 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 allows a large number of restrictions to be placed on this right.

In view of the position of Ohio courts on Article I, section 4, a fuller understanding of this section can be obtained by analyzing the Second Amendment." The definition of 'bearing arms', as the phrase was used in legal instruments prior to the Revolutionary War, was serving in an organized armed force," Levin, The Right to Bear Arms: The Development of the American Experience, 48 Chi.-Kent L. Rev. 148 (1971). It did not imply any personal right to possess weapons, but rather the right to bear arms in defense of the community. During this period, the need to keep arms for defense was so great that some colonies passed statutes requiring people to carry arms or keep guns. These statutes were intended to fill the void created by the colonies' inability to pay for the costs of arming and maintaining regular troops, (Vir.) Acts of the Grand Assembly, 1623-24 Nos. 24, 25; 1658-59 No. 25. Later statutes regulated arms by controlling the sale or disposition of weapons to prevent them from falling into the wrong hands, and others were passed to prevent fires and injuries by prohibiting the discharge of firearms within the boundaries of towns or near inhabited dwellings.

During and after the Revolutionary Period the concept of bearing arms was redefined to meet the changing needs and perceptions of the people. Having fought to gain their liberties, the people sought a balance between themselves and their newly formed government. Fearing possible abuses of power by the central government through the instrument of a national army, the people felt that only by insuring the right to bear arms could the liberties of the people and the individual states be maintained. The opposition to standing armies as seen in state constitutions written in the late eighteenth century also illustrates this fear. The correct balance, it was thought, would only be insured by an armed populace and a state militia; but the bearing of arms was intended to be within the context of an organized armed force. The fear of a national army and the belief that the rights of individuals and states could only be protected by force of arms came into direct conflict with the growing belief among many leaders that national sovereignty could only be protected by a standing army. Since Congress would

control the army through appropriations, a compromise was reached which permitted the federal government to have a standing army and the power to call out the state militia while the states would control the militia except when federalized, U. S. Const. Article I, section 8. Many felt this gave too much military power to the federal government, so the Second Amendment was passed to restore the balance and was designed to ensure that the federal government would not be able to destroy the militias of the various states through the use of the federalization process.

Since its passage, the federal courts have narrowly interpreted the Second Amendment. No longer recognizing the need for a military balance between the individuals, the states and the federal government, courts have held that the interests of order and stability must be balanced against the need for revolution and such interests may outweigh it. Therefore, there could be restrictions upon rights subsidiary to the right to revolution--the right to bear arms.

In Cody v. United States, 460 F. 2d 34 (8th Cir. 1972), the Circuit court said that the Second Amendment guarantee extends only to the use or possession of arms which has some reasonable relationship to the preservation or effectiveness of a well-regulated militia. The purpose of the Second Amendment is not to confer a right but instead to preclude infringement of the right of the people to keep and bear arms by the federal government alone. Whatever rights the people may have in this respect are conferred by state constitutions and local legislatures, although the limitation in the federal government is not absolute. The federal government can limit the keeping and bearing of arms by single individuals, but it cannot prohibit the possession or use of any weapon which has a reasonable relationship to the preservation or effectiveness of a well-regulated militia, United States v. Miller, 307 U. S. 174 (1939). This though, is only a general rule and does not apply to state or local legislation nor does it assume the privilege of any individual to bear arms. Photos v. City of Toledo, 19 O. Misc. 147 (Ct. C.P. 2969).

The right guaranteed is not to bear arms on all occasions and in all places,

but rather to bear them in a usual way or to keep them for ordinary purposes, as for the defense of personal property or of the state, State v. Dawson, 272 N.C. 535, 159 SE 2d 1 (1968). The arms referred to in the Second Amendment mean those adapted to the effectiveness of the citizen as a soldier and which are carried openly. The Supreme Court, in Miller, ruled that in the case of certain arms and in the absence of a showing of any reasonable relationship between the weapon and a well-regulated militia, legislation or regulations restricting the use of the arms does not violate the Second Amendment. The federal government, then can regulate but not destroy the right. Similarly in Ohio, although the Second Amendment is not applicable, it has been held that the right can be regulated but not destroyed (City of Akron v. Williams, 113 Ohio App. 293, app. dism., 172 Ohio St. 287, 1961). In the reasonable exercise of its police power and with the purpose of preventing crime and preserving the health and welfare of the public, a government, acting under a constitution or legislative grant of police power, may pass certain statutes. As long as the governmental body is not acting in a manner inconsistent with the general law, it may pass criminal or regulatory statutes to control the use or possession of arms regardless of the lack of an express constitutional provision authorizing the legislature to regulate the exercise of the right. Consequently, regardless of constitutional protections, statutes forbidding possession of concealed weapons or weapons of certain types or possession by certain people have all been upheld. Nor has a constitutional guarantee been held to operate to prevent the enactment of legislation regulating the manufacture, sale, gift, loan, or use of weapons, Miller, United States v. Fleish, 90 F. Supp. 273 (D. C. Mich. 1949).

The second clause of Ohio Constitution Article I, section 4 provides for civilian control of the military. The fundamental nature of this principle of subordination of military power is demonstrated by the fact that every state except New York has a comparable provision. The United States Constitution not only implies this concept through making the President the Commander-in-Chief of the armed forces but also through the prohibition of making military appropriations of more than two years, assuring regular Congressional reviews of military spending (Article I, section 8, cl. 12).

Article I

Section 5

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.

Committee Recommendation

The committee recommends the appointment of a special committee to study civil juries, especially the question of reduction of verdict amounts.

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 3/4 of the jury - was proposed by the 1912 Constitutional Convention and subsequently adopted by the people. No changes have since been made in the section.

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 such problems as: under what circumstances is there a right to a jury trial? what are the 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 size of verdicts. No testimony was presented to the committee on this subject, and the members of the committee believe that no conclusions on this subject should be reached until a number of well-informed persons are consulted and asked to discuss the issues with the committee

Therefore, the committee recommends that a special committee of the Commission consider the problems relating to civil trial juries.

Article I

Section 6

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

Committee Recommendation

The committee 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 1850-51 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 Thirteenth 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 Fourteenth and Fifteenth, 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 (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 Thirteenth 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, which has no parallel in Ohio's Article I, section 6, 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 Thirteenth 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. The Court in United States v. Shackney, summarized these principles, 333 F. 2d 475 (2 Cir. 1964). After reviewing the history of the Amendment, the Court said that the purpose of those who outlawed involuntary servitude in the Thirteenth Amendment and in statutes to enforce it was to abolish all practices whereby subjection having some of the incidents of slavery was legally enforced. This applied to direct subjection, by a state using its power to return the servant to the master, as had been the case in the peonage system, 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 Thirteenth Amendment, although where the employee has a clear choice about leaving even when the alternative is unappealing there can be no violation .

Article I

Section 7

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 beliefs; 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.

Committee Recommendation

The committee 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. The Constitutional Convention added three new clauses to the old section to expand the guarantee of rights. The one provision that is truly different from the Federal, establishing an affirmative obligation in the legislature to promote education, existed in the 1802 Constitution. 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 . . ."

Comment

The First Amendment's constitutional religious freedom guarantee and inhibition has a broad and double aspect. It forestalls compulsion by law of any creed or form of worship. Freedom of conscience and freedom to adhere to the religious organization or form of worship of one's choice cannot be restricted by law. Not only does the Amendment protect freedom of conscience, but it also safeguards the free exercise of the chosen form of religion, embracing freedom to believe and freedom to act. Freedom to believe is absolute but freedom to act is not, because conduct, even religious actions, can be regulated for the protection of society. This power to regulate, though, to help attain the permissible goals of society, cannot be exercised in a manner that infringes upon a protected freedom.

The First Amendment's religious freedom provision has been applied to the states through the due process clause of the 14th Amendment (Cantwell 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 hand-off policy towards religion and requires that each religious denomination maintain that same policy towards the others. It also recognizes that men have the constitutional privilege to worship God according to the dictates of their consciences, and the right to teach these beliefs to their 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 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 (1878). 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. Accordingly, the courts felt that they were not allowed to interfere with decisions of local school administrators about their policies of either allowing or prohibiting some religiously oriented activities, as Bible reading. 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.

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.

Committee Recommendation

The committee 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 problems requiring alteration of the constitutional 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.

Committee Recommendation

The committee 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 ~~offenees~~ 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 THATWAS 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 guaranteed the right of bail in all but capital offenses and also guaranteed the writ of habeas corpus. The first clause of that section guaranteeing the right of bail was combined with Article VIII, section 13, which prohibited excessive bail and fines, and cruel and unusual punishments, to form what is now Article I, section 9. 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 committee'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. 440, 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 8th 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, and 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 punishment" provision of the Eighth Amendment has clearly been so applied.

In the federal courts, the contemporary bail system evolved from four sources: the Judiciary Act of 1789, the Eighth Amendment, the Fifth Amendment and the Bail

Reform Act of 1966. The Judiciary Act laid the groundwork for the federal system by providing that bail will be admitted in all criminal arrests, except where the punishment is death, making bail in capital cases discretionary. In applying this discretion, the judge was to base his decision upon his evaluation of the nature and circumstances of the offense, the evidence, and the usages of law, Jud. Act 1789; ch. 20, section 33, 1 Stat. 73, 91. Discretion of federal judges to deny bail in noncapital cases was regarded as nonexistent leading to the belief that bail in noncapital cases was an absolute right, which it is not (Stack v. Boyle).

The Judiciary Act was followed two years later by the Eighth Amendment which reads in part, "Excessive bail shall not be required." This clause, while prohibiting excessive bail, does not establish the right to bail, nor does it distinguish between capital and noncapital crime. The absence of express language 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 where the Court ruled that neither the Eighth nor the Fourteenth Amendments require that everyone charged with an offense must be given his liberty or the right to bail pending trial (326 F. 2d 708, cert. den. 376 U. S. 965, 1964). 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 committee'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, 1954).

After considerable discussion about the right to bail, the committee concluded that a limitation to Ohio's absolute right to bail is advisable in order that a person accused of committing a felony while released on bail prior to trial for commission of another offense can be denied bail for the second offense, if the General Assembly deems this advisable. One committee member cited statistics to the effect that approximately 19% of all felonies are committed by "repeat" offenders.

The final portion of the committee's proposal 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, 1962)). 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 its policy saying that where federal rights were affected, they could be raised in federal courts. Soon thereafter, the District Court of Arkansas found that conditions at the Arkansas prison farms violated the Eighth Amendment rights of the prisoners (Holt v. Sarver, 309 F. Supp. 362, aff'd 442 F. 2d 304, 8 Cir., 1970). In condemning the deplorable living conditions and the trustee-guard system with its concomitant abuses and failings, the Court said that confinement itself may result in cruel and unusual punishment where the prison is characterized by conditions and practices shocking to the conscience of reasonably civilized people even though a

particular inmate may never be disciplined. To correct the abuses, the judge ordered reforms of the prison farm system. Another federal judge took stronger action in Hamilton v. Schiro, 338 F. Supp. 1016 (E. D. La. 1970). He enjoined the use of a parish (county) prison rather than try to fashion relief because he felt that the prison conditions shocked the conscience as a matter of elementary decency. In Ohio, in James v. Wittenburg (323 F. Supp. 93, N. D. Ohio, 1971), a district court, following the earlier decisions, found that jails were properly within the control of the state authorities but that federal courts could intervene when paramount federal constitutional and statutory rights were involved. Here, the judge found conditions that violated the Eighth Amendment, and foreseeing no relief because of fragmented administrative control, the judge retained jurisdiction in the matter to guarantee that ordered improvements were carried out. In Gates v. Collier (349 F. Supp. 881, N. E. Miss., 1972), another judge established and oversaw a timetable of ordered administrative and physical improvements. In so doing, he gave recognition to the principle that prisoners have a constitutional right to adequate provisions for their physical health and well being.

Courts have expanded these new concepts even further in dealing with juveniles. Not only have courts extended to them the rights available to adults, but the courts have recognized the rights to a higher standard that must be met in the confinement of juveniles. The most important of these is the right to receive rehabilitation from an on-going effectively run program, Inmates of Boy's Training School v. Affleck, 346 F. Supp. 1354 (D. R. I. 1972), Baker v. Hamilton, 345 F. Supp. 435 (W. D. Ky. 1972).

Courts have also intervened to stop specific prison practices. Corporal punishment of prisoners has been held to be cruel and unusual punishment, in part because the standards of the people have changed and they have rejected it(Johnson v. Bishop, 404 F. 2d 571 (8 Cir. 1968), Wyatt v. Stickney, 325 F. Supp. 781 (M. D. Ala. 1971).

While solitary confinement has not been found objectionable, strip cells have been determined to be inhuman and to have the tendency to debase and degrade the individual in violation of his humanity and dignity according to contemporary standards (LaReau v. MacDougal, 473 F. 2d 974, 2nd Cir., 1972).

Even prior to the incorporation of the clause through Amendment XIV, 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 Zeny v. Alvis, (66 Ohio Law Abs. 606 Franklin Co. Ct. A.) 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 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 can 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.

Committee Recommendation

The committee 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 committee recommends that a special committee be appointed 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 copy 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 language of the remainder of Article VIII, 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 its 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 source of irritation to those who desired changes was the rule about testifying. If the defendant did not testify, the prosecutor could not comment on the defendant's failure to do so.

The Convention accepted these arguments and adopted additions to Article 1 section 10 allowing depositions to be taken by the state and 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. Research Study No. 42 explores the history of the grand jury, comments about it, and provisions in other states. The Judiciary Committee heard witnesses argue both that it should be abolished and that it should be retained, but made no recommendation, preferring to defer the topic to the Bill of Rights Committee.

The Bill of Rights Committee, after considerable discussion about the grand jury, concluded that it should be studied further by a special committee. Members of the Bill of Rights Committee felt that they did not have sufficient information or testimony upon which to base a recommendation for change, and were divided in their opinions about what kind of change should be proposed. They noted, however, that no person came before them to suggest any change. However, the committee felt that the opinions of interested persons and groups should be sought by a special committee and the matter studied in more depth, in order that a determination could be made about recommending any changes in the Ohio provisions.

Comment - the Sixth Amendment Rights

Following the provision for a grand jury, 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. Rep. 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 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 the subject of comment by counsel." This clause was added in 1912. The United States Supreme Court, in Griffin v. California, 380 U. S. 605, 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 acquiescense 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 committee 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 or limb."

In 1969, in Benton v. Maryland (395 U. S. 284), 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.

Committee Recommendation

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~~ LIBELOUS is true, and was published with good motives, and for justifiable ends, the party shall be ~~acquited~~ ACQUITTED.

The changes recommended are for the purpose of correcting spelling and are not intended to have any substantive effect.

History; Comparison with Federal Constitution

The predecessor of this section was Article VIII, section 6 of the 1802 Constitution. Article I, section 11 of the Constitution of 1851 altered the rights protected under the original section and subtly changed its focus. The original section seems to have been largely 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. It 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' 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 right 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. 562, 1925).

Once again, 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. It does not seem relevant to the committee's inquiry into whether changes should be made in the Ohio Constitution to review the history and effect of First Amendment decisions as such. However, because it is an important topic, a portion of Chapter 13 of the Third Edition of Tresolini and Shapiro's "American Constitutional Law" is reproduced as Appendix A to 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. This interchangeability, though, obscures some basic differences as does the contemporary reliance upon the federal guarantees in lieu of the state rights. The

incorporation of the First Amendment through the Fourteenth to apply to the states has made it more attractive to those wishing to exercise their rights of speech or press, because generally it is read more expansively than comparable state guarantees.

In Cincinnati Gazette Co. v. Timberlake, 10 Ohio St. 549 (1860) the Court said that the guarantee of the right to freely speak, write, and publish sentiments on every subject was 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 the Federal Amendment was much more sweeping in its provisions than its Ohio counterpart. The Ohio provision did not guarantee the rights freely and without restraint, but recognized the responsibility for the abuse of that right and established a limit beyond which one could not go. Exceeding that limit made the individual responsible for the abuse. Given this difference, the Court concluded by saying that the Federal Bill of Rights was nevertheless the proper basis for interpretation of the Ohio Bill of Rights because the former was stated without exception, while the Ohio section had a reservation.

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. While the right of freedom of expression may have neared the realm of the absolute, the exercise of the right was necessarily limited by the circumstances, and the right of freedom of expression and of communication, as enjoyed by others.

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. Ct., N. D. Ohio, (1953) A censorship that suppresses books in circulation was an infringement of that freedom. 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 publications or violations of the obscenity laws to determine if there were probable cause to prosecute.

Licensing has also been attacked by the Ohio courts when it acts to restrain section 11 rights. Bowling Green v. Lodico, 71 Ohio St. 2d 135, 1967, involved a conviction for failing to obtain a license to sell a purely political magazine. The Court overturned the conviction 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. Censorship, when done in the guise of determining moral character, is no less censorship and may not be employed as a basis for inhibiting freedom of expression. An ordinance requiring a license to sell a political magazine in the streets is a prior restraint on speech and publication.

Door to door canvassing involves a balancing of convenience between some householder's desire for privacy and the publisher'r right to distribute publications in the precise way that is thought to bring the best results. 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.

The constitutional guaranty of freedom of speech and press, though, does not deprive the state of its police power to enact laws for the protection of the public health, safety, and welfare. If a statute regulating its exercise 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). In addition to constitutional limitations of these freedoms, through the use of the police powers, there are other limitations that arise out of the nature of the right. A Dayton newspaper claimed that the freedom of the press conferred upon it an absolute freedom of access to any meeting, regardless of its character, of public officials or employees, and that its representatives could not be refused admittance or access if any incident of public operation was discussed, Dayton Newspapers, Inc. v. Dayton, 23 Ohio Misc. 49 (Montgomery Co., C.P., 1970 aff'd 28 Ohio App. 2d 95 (Mont. Co., Ct. A., 1971). The courts disagreed, saying that the Ohio Constitution provides for freedom of speech and press, but that the Ohio document is more explicit, recognizing responsibility for an abuse of the constitutional freedom while restraining the legislature from passing laws that restrict

either freedom of speech or press. The right, though, it continued, includes no right to freely collect, acquire, or appropriate information with or without compensation. It includes no right to represent anyone else and no duty of any kind. It also does not include the right to enter uninvited on to property or into gatherings of people. The Constitution grants the press a freedom, shared by all, but no special or other right to insure its success. The press has no special rights over and above those of other citizens, and the "right of the public to know" is a rationalization developed by the Fourth Estate to gain rights not shared by others. This "right", the Court asserted, was an attempt by the press to usurp an ultra-legal and self-appointed position on behalf of the people from which to assert incidents of sovereign power in order to improve its private ability to acquire information which is the asset of its business. Freedom of the press is subordinated to public and private rights as well as to any abuse of the freedom, the Court concluded. The press may not print all it considers news. When privacy or restricted information is violated, the press is responsible to those injured. Writings, correspondence, and photographs are private property and may not be appropriated by the press without consent, and surveillance by phone or wire, without lawful justification, and other forms of spying are as reprehensible when done by the press or by the government or by other people.

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.

Committee recommendation

The committee recommends that section 12 be amended as follows:

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

The recommendation is for the purpose of correcting the spelling of "offense," and is not intended to have any substantive effect.

History; Comparison with Federal Constitution

The first clause of section 12 originally was Article VIII, section 17 of the 1802 Constitution. The Constitutional Convention added the second clause of Article VIII, section 16 to that section to form the present section 12. The section was then adopted as a part of the Constitution of 1851 and has remained unchanged.

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 de-naturalized. 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 attempted to authorize the imposition of such a penalty.

The only question that has been raised under the "transportation" prohibition portion of section 12 concerns the possibility that Ohio might wish to participate in federal programs providing for a regional or interstate penal institution. The committee, however, concluded that it was only speculative whether or not the language of the section would, in fact, prohibit such participation and, therefore, no clear need to amend the section had been demonstrated.

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. 475 (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 the actions of the trial judge in ordering the rooms be kept closed until bond and security were given pursuant to the act were upheld by the Court 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).

Murder provides a type of exception to this clause of the same nature as that seen in Miller. 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).

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.

Committee Recommendation

The committee 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.

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. 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.

Committee Recommendation

The committee recommends no change in this section.

History; Comparison with Federal Constitution

This section is the successor to an earlier, similar guarantee. Article VIII, section 5 of the Constitution of 1802, in language reminiscent of earlier times with slightly altered problems, 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. California, 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, and until recently the relatively explicit Fourth Amendment guarantees were not broadly interpreted in the states. A series of cases brought the impact of the exclusionary rule to state procedures.

In Rochin v. California, 342 U. S. 165, (1952) the Court refused to allow a conviction to stand based on evidence seized by police methods that would shock the conscience. Later, in Rea v. United States and Elkins v. United States, 364 U. S. 206 (1960) the Court ruled that state and federal officers could not exchange illegally obtained evidence for use by either in criminal prosecutions. The difficulty was to set standards for exclusion based on what was shocking to the conscience. Finally in Mapp v. Ohio, 367 U. S. 643 (1961) the Court ruled that all evidence obtained by searches and seizures in violation of the Constitution was inadmissible. Since the Fourth Amendment was applicable to the states, it was enforceable against them the same way as enforced against the federal government; if it were not then the freedoms would be unprotected against abuses by state officials. The Court continued by saying that the lack of exclusion tended to destroy the whole system of constitutional restraints and that the Fourth Amendment should not be subject to the whim of any public official and revocable at his will.

It is from this perspective that all cases dealing with the Fourth Amendment should now be viewed, for any decision that helps determine the meaning or application of the Fourth Amendment, has application to state as well as federal officers, and its effects are so pervasive that similar state protections are seldom invoked.

A basic Fourth Amendment question developed through Supreme Court decisions is under what circumstances a search without a warrant is not unreasonable. The Supreme Court has consistently manifested a strong preference for the use of warrants in order that the justification of a search be evaluated by a magistrate prior to its occurrence but the Fourth Amendment only condemns those searches which are unreasonable. The most common exception to the warrant requirement is a search incident to an arrest with or without an arrest warrant. The concept of a search incident to an arrest implies a physical and temporal relationship between an arrest and the search. Chimal v. California 395 U. S. 752, (1969) made that implication clear, a position arrived at through gradual development.

In Agnello v. United States, 269 U. S. 20, (1925) the Supreme Court ruled that an arrest would not support a warrantless search several blocks away. The right to search incident to an arrest was further limited by Vale v. Louisiana, 394 U.S. 30, (1970) which held that an arrest in front of a residence would not justify entering and searching the premises. Coolidge v. New Hampshire, 403 U.S. 443 (1971) stated Vale's inverse by holding that an arrest in a residence would not support a search outside of the home. These phycisical limitations to a warrantless search incident to an arrest might be avoided by delaying an arrest until the suspect is where the officer wants to search, but there is some question as to the validity of this type of procedure.

Similarly, the search must be close in time to the arrest to be considered incident to the arrest. (Preston v. United States, 376 U. S. 364, 1964). An incident search cannot precede an arrest considered as part of the justification of the search, Sibron V. New York, 392 U.S. 40 (1968). A prior search will more often than not be found unreasonable because of the question of whether probable cause existed prior to the search, and courts are quick to hold a search illegal where it appears that an arrest was a pretext for a warrantless search. In Warden v. Hayden , 387 U. S. 294 (1967), the Supreme Court held that searches that were prior to or contemporaneous with the arrest were legal, but only within a narrowly defined area. In Warden, the police entered the house in pursuit of a felon, the scope of the search was as broad as was reasonably necessary to prevent the dangers of resistance or escape, and the search was prior or contemporaneous with the effect to find the suspected felon.

A search incident to an arrest cannot be unreasonably extensive, Kremen v. United States, 353U.S. 346 (1957). In Harris v. United States, the Court upheld a five hour search of a four room apartment, but it justified this search on the basis that the apartment was in the defendant's exclusive control, noting that the nature of the items (two cancelled checks) made an intensive search necessary. In later cases that arose over this issue, the Court required a search warrant where an intensive search was contemplated. All three of these limitations on warrantless searches incident to an arrest existed and developed independently until Chimel established that, incident to an arrest, the officer could first search the arrestee to remove any weapons that might be used to resist or escape, and any evidence that might be subject to concealment or destruction and that the officer could search an area within arm's or lunging reach to check for any weapons or evidence that could be seized by the arrestee. The search

of the individual could be conducted on the spot or at the jail, but this is because the police have the power to inventory any prisoner's property and because of the police's general power to act to control prisoners.

In United States v. Robinson, 414 U. S. 218 (1973), custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. The lawful arrest establishes the authority to search, and a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

Automobile searches comprise another important exception to the Fourth Amendment requirement of a warrant. (Carroll v. United States, 267 U. S. (1925).

Another exception to the Fourth Amendment's of a warrant requirement/is selective wire-tapping and electronic surveillance. The first time the Supreme Court heard this issue, in Olmstead v. United States, 277 U.S. 438, (1927) the Court ruled that since the wiretap was not made by trespass onto the property of the defendant, there was no Constitutional violation. The Court felt that since the information was secured by the use of ears alone, there was no entry or search and seizure, and it concluded that if this was an objectionable practice it should be regulated by statute.

Both telephone taps and other forms of electronic surveillance have been regulated, with respect to federal law enforcement, by statute. Many states, including Ohio, also have statutes limiting the use of such evidence-g athering devices or specifying the conditions under which warrants can be obtained for such searches. Several states have also written controls on wiretapping and electronic surveillance in their constitutions.

Stop-and-frisk is another exception to the warrant requirement of the Fourth Amendment. In Terry v. Ohio, 391 U. S. 1 (1968) this exception allows evidence in a warrantless frisk of a suspect to be used against the suspect. In a decision that

seemed to contradict the exclusionary rule, the Court emphatically rejected the contention that a stop-and-frisk was outside of the Fourth Amendment, but the Court did place certain specific limitations on the police officer's right to search. The officer must observe conduct that reasonably brings him to conclude, in light of his experience, that persons are engaged in criminal activities and that they are armed and dangerous. While investigating this behavior, if the officer identifies himself and makes reasonable inquiries into the person's behavior, and there is nothing to dispel his fear for his safety, he is entitled to conduct a careful search of the outer clothing to discover weapons that could be used against him. The officer need not be absolutely certain that the suspect is armed; the issue is whether a reasonable, prudent man in these circumstances would have believed that his safety and that of others was in danger.

Consent is another exception to the requirement of a warrant, although the Court has placed restrictions on whose consent will waive the requirement, and required that the consent be voluntary, both physically and psychologically.

Administrative searches, (for example, of a housing project to detect violations of housing code or health laws) also constitute a limited exception in that the Court has ruled (Camara v. Municipal Court, 387 U. S. 523, 1967 and See v. Seattle, 387 U. S. 541, 1967) that warrants must be obtained for such searches but that the governmental unit attempting to make the inspection need not have probable cause in the sense of noting probable specific violations at particular locations. Information about the nature of the buildings to be inspected, the conditions of the area, and the length of time since the last inspection would be sufficient for obtaining a warrant. Other warrantless searches, where inspections are necessary to a regulatory scheme, are also permitted. (U. S. v. Biswell, 406 U. S. 311, 1972).

Other cases have developed the requirements of probable cause and of the descriptions necessary before a warrant can legally be issued.

As noted above, 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 area 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). Of course it is not necessary to provide protection of rights only at the minimal Fourth Amendment level, and recent attacks on the exclusionary rule have led some states to write it in their own constitutions specifically, so that any retreat by the Supreme Court would not render admissible in state courts evidence now deemed inadmissible under the rule.

Ohio courts have interpreted Article I, section 14, if used it 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.

Committee Recommendation

The committee recommends no change in this section.

History; Comparison with Federal Constitution

The provisions of Section 15 are a shortened version of section 15 of Article VIII of the 1802 Ohio Constitution. The major difference is that 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 but required legislation in order that a debtor could be imprisoned under those circumstances. Current Ohio statutes do 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 has 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 (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.

Present Constitution

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.

Committee Recommendation

The committee 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 whether this section was intentionally omitted from consideration by the committee delegated to study the Bill of Rights, whether it was considered but deemed not necessary, or whether its exclusion was an oversight. In any event, its omission was noticed by a delegate, and he introduced a motion to include the original section in the new Bill of Rights. The motion carried amongst general laughter at the thought of being able to receive a speedy trial, and Article VIII, section 7 of the 1802 Constitution 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 Fourteenth 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 Fourteenth Amendment, expresses evolving concepts of justice and judicial processes, and applies 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. Concepts of due process are found in several Bill of Rights Amendments to the Federal Constitution and applied to the states through the 14th.

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 has been interpreted as an aspect of due process. An "open court" though, has come to mean more than an 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 interpreted as providing for a specific right for which there is no direct federal parallel, although certain aspects are contained within the concepts of freedom of press and freedom of information, while others are contained within the concept of public trial for which there is already a specific guarantee.

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 the man 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 saying that, under our system of jurisprudence, the courts are open to all citizens, and no person shall be deprived of life, liberty or property without due process of law, and that any provision of any organization restricting its members from pursuing their rights must be strictly construed.

In Scripps Co. v. Fulton, 100 Ohio App. 157 (Cuyahoga Co., Ct. A., 1955), the company brought suit against 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 a trial be conducted in secret. Basing its reasoning on Article I, sections 10, 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 Fourteenth Amendment "due process" clauses. This is more than mere parallelism, because Ohio courts have repeatedly held that "due course" of law is equivalent to "due process of law." 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. In this case, there was no semblance of a formal hearing as to the accused's mental condition, and no evidence tending to prove insanity was presented. The court acted summarily without following the required statutory procedures, and in sentencing the accused, the court fully and effectively deprived him of his personal liberty.

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. Further, 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. Selling would not improve the owner's position either, because until the unwilling seller of nonnuisance property found a buyer willing to pay one-half of the value of the property extra to make a nonnuisance improvement, the seller would be subject to

a minimum fine of $25 a day, and to this extent, the Code is confiscatory. The Court concluded that to hold otherwise would permit requiring improvement 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.

The Ohio Supreme Court overthrew a Toledo statute which limited the hours of grocery stores while expressly excluding other stores from the operation of the law, on the basis of due process, Olds v. Klotz, 131 Ohio St. 447 (1936). The Court said that regulation is not within the police power unless the relation to the public interest and the common good is substantial and the terms of the law or ordinance are reasonable and not arbitrary in character. Here, the Court held that the ordinance had no substantial relation to 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 lives, limbs, health, comfort, and quiet 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 all kinds of 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)). Where an 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 effect on certain people, Benjamin v. Columbus, 167 Ohio St. 103 (1957). Whether it is arbitrary or unreasonable is a question for the legislative body and unless its decision is clearly erroneous the courts will not interfere, and where the legislative body has made determinations that are concerned with health, safety and welfare, the power of the courts

is severly limited. A court cannot usurp the legislative function by substituting its 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 inoperative and void 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. If a court decides that a statute fails to comply, it must overturn the law, because 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 (Liebert v. Vitangeli, 90 Ohio App. 470 Stark Co. Ct. A.,(1942). In Williams v. Marion Rapid Transit, 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." Squaring such a maxim with American notions of subordinating men to laws has required frequent repetition of the historical explanation of how such a doctrine became imbedded in American jurisprudence. "The real basis of the king's immunity from suit, " writes an Ohio commentator[1] "was the impossibility of enforcing a judgment against him." Thus Blackstone, the venerable English authority of the 18th century, is cited in footnote:

> "For all jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it; but who shall command the king?"[1] Blackstone, Commentaries on the Laws of England 235.

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. Reference to recognition of the rule may be found in the Federalist Papers. Hamilton argued: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." 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 has consistently held that the provision for suits against the state is not self-executing. (See, for example, Krause 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.

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

2. The Federalist No. 81 at 567 (Dawson ed. 1873).

Present Constitution

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

Committee Recommendation

The committee 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 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 or otherwise modified.

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, 273 NYS 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, no Earl Nash, no Baron Von Croesbuck, 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.

Present Constitution

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

Committee recommendation

The committee 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, 1871, 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, 1914). 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. Cleveland, 107 Ohio St. 144, 1925).

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.

Committee Recommendation

The committee 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 inviolate but subservient to the public welfare and that compensation would be paid to the owner of any property condemned. The present section of the Constitution of 1851 retains those basic principles from the earlier Bill of Rights, but goes to greater lengths to establish procedure. The earlier section was felt to be inadequate to protect the property rights of the people and many people with influence used eminent domain 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 Fourteenth Amendment. (Briggs v. Allegheny Co., 369 U. S. 84, 1962).

It is to be noted, of course, that 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, 1892). 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.

The theory behind this power is that it is necessary for the independent existence and perpetuation of government, Kohl v. United States (91 U.S. 367, 1875). The power is also very extensive. American governmental bodies have the power to condemn any property rights to aid in accomplishing any permissible governmental enterprise, Berman v. Parker (348 U. S. 26, 1954).

In early cases, the property, land, or constructions, has 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).

Attendant to this concept is another concept reflected in the Fifth Amendment: that the state should be no better off after acquiring the property than it would have been had it been a private individual. This provides the rationale for compensation.

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 Goodwin v. Cincinnati and Whitewater Canal Co. (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. In this transaction, a railroad was prohibited from benefiting from the fact that the canal company could no longer operate profitably and from paying the value of canal property as then used rather than its potential value converted for railroad 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 Co. v. Commissioners (104 Ohio St. 447, 1922) the plaintiff sought to enjoin park commissioners from prosecuting an appropriation suit instituted to appropriate certain lands for public use. There were two parcels of land 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. There were no provisions made for the methods of exercising these rights, nor did it appear how they would be enforced, nor how often they could be altered nor if notice would be given upon an alteration and a chance to be heard provided. When an interest less than a fee is sought to be acquired, the owner, whose property is to be taken against his will, 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. Public use implies the possession, occupancy, and enjoyment of the land owned by the public or public agencies. The exercise of the police power is different from the right of eminent domain. When the acquisition of an interest in private property is necessary for the promotion of the public welfare, the owner must yield in his interest, but Article I, section 19 contains the guarantee that private property can only be taken for public use after compensation has been paid.

While the Court in Pontiac established the broad scope of protection provided by Article I, section 19, seemingly at the expense of the police power, all interference with an individual's use of his land does not constitute a seizure requiring compensation and may be a legitimate exercise of the police powers. Sections 5516.01, 05, 99 of the Revised Code prohibit and regulate the use of billboards irrespective of ownership or location. In 1964, Ghaster, Inc. v. Preston, the plaintiff contended that these statutes took private property without compensation. He argued that property within the meaning of various constitutional provisions included the right to use land and that deprivation of its use by the prohibition of the statute was a taking. The Court upheld the constitutionality of the statute.

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. 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. The determination of whether compensation is required in Ohio depends on whether the property has actually been taken. "Taken" denotes something different from "damaged" and to construe it as meaning damaged would be strained and unnatural. Therefore, to recover, a taking must be shown; it is not enough to show damage.

Ordinarily, to constitute a taking, the government activity must physically displace a person from space in which he is entitled to exercise dominion consistent with the rights of ownership, but 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. Columbus, 3 Ohio St. 2d 154, 1965).

A later case succinctly summarized the problem of damage (State, Ex. Rel. Frejes v. 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 many 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".

In Ohio, in the absence of a statute, there is no liability in a condemnation proceeding for consequential damages to adjoining property. However, any direct encroachment upon land which subjects it to public use that restricts or excludes the dominion of the owner is a compensable taking. More specifically for adjoining property owners, any use of land for a public purpose which inflicts an injury upon adjacent land, if it would be actionable if caused by a private owner, is a taking within the meaning of the Constitution. To deprive an owner of any valuable use of his land is to deprive him of his land, pro tanto, and the recovery extends to all lands affected. If there is an allegation of a lessening of the value of the land,

there is only a damnum abseque injuria, as in Frejes. Although where there is evidence of substantial interference with elemental rights incident to the ownership of property due to the performance of a public function, Article I, section 19 requires that the owners be paid compensation (Lucas v.Carney, 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, 1940) the assessment was substantially equal 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. It further acts to restrict this power by requiring payment or deposit before land may be taken for public use except in certain specified exceptions. In Biery v. Lima (21 Ohio App. 154, Allen Co., Ct., A., 1969) the plaintiff sought an injunction to prohibit the city from entering into possession of an easement across his land. The city tried to use "quick take" without the compensation first being assessed and paid or secured. The Court said that only for highways or in time of war or public exigency, imperatively requiring seizure, could property be taken without compensation first being paid. (Also see Worthington v. Carskadon, 18 Ohio St. 2d 222, 1969). The City of Columbus attempted to use a similar procedure but with a variation. Cassady v. Columbus, 31 Ohio App. 2d 100 (Franklin Co., Ct. A., 1972). The city deposited money as security before acting, and the owner withdrew the money; on this basis, the city claimed to have the authority to proceed under Article I, section 19. The court said that only under the specific circumstances outlined in the section would a quick take be valid and that any procedure that allowed a taking without following the prescribed procedure would be unconstitutional. The court continued by saying that it was not enough to merely deposit money assessed by the city council. The money may or may not

have adequately compensated the property owner, but 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 could reasonably and practically be adopted (Sowers v. Schaeffer, 155 Ohio St. 454, 1951).

Personal property, without more, is not taken in a proceeding in an appropriation case, but where chattel property is united to the land by use so that the two are rendered, in effect, a single property, it can make no sense to deal with the taking of chattels, except as falling within the land appropriation case. If the nexus existing between the chattel and the land is severed by the appropriation of the land, and the chattel is retained by the condemnee, there can be no recovery for its removal and such costs are damnum absque injuria. (Masheter v. Boehm, 34 Ohio App. 2d 43, Cuyahoga County Ct. A., 1973).

One method that has been used to circumvent the lack of a provision for damages has been utilized in the area of urban renewal, or other large public works projects (Bekos v. Masheter, 15 Ohio St. 2d 15, 1968). 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. This rule facilitates the valuation of property taken by adjusting the date of valuation in order to exclude depreciation due to delays in public projects and promotes the Constitutional requirement of just compensation. In somewhat similar situations, a court held that where depreciation had resulted from changing government purposes and appropriations, the value would be established 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).

Where the law permits possession to be taken before its value has been appraised and paid or tendered to the owner (quick take) or where possession has been taken without the institution of such proceeding with the owner's acquiesence, the just compensation to which the owner is entitled included interest on the value of the land from the time possession was taken by the condemnor, State Ex. Rel. The Steubenville Ice Co. v. Merrell, 127 Ohio St. 453 (1934).

Compensation and damages must be assessed by a jury which is entitled to make the determination from all the evidence (In Re Appropriation of Easements for Highway Purposes, 172 Ohio St. 524,1961). While this right to a jury determination is absolute, it may be waived by agreement by counsel and the question of compensation submitted to the trial court. 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., the court held that the operation of section 163.08, 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 (16 Ohio St. 2d 76, 1968).

Section 163.09, which allows a judge to determine the value of property as set forth in any document properly filed with the clerk of courts by the public agency following the expiration of the time period, was also upheld in the same proceeding. The courts, though, have strictly construed this provision. Even if the owner fails to answer, the agency is prohibited from amending its petition subsequent to the expiration of the time period to state an appraisal. Consequently, section 163.09 does not apply and the value has to then be determined by a jury (Board of Education v. Dudra, 19 Ohio St. 2d 116, 1969).

Zoning regulations often raise due process and equal protection questions involving the Fifth and Fourteenth Amendments of the United States Constitution and Article I, sections 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?"

Euclid v. Ambler Realty Co.(272 U. S. 359, 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 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. Borass, the Supreme Court upheld a New York village ordinance that restricted land use to one-family dwellings with certain exceptions, 416 U. S. 1 39 L. Ed. 2d 797 (1974). The ordinance,

in defining a family, prohibited occupancy by more than two unrelated individuals and on this basis ordered Borass 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 decisions would be upheld if they were not unreasonable or arbitrary and bore a rational relationship to a permissible governmental objective.

In Ohio, as previously mentioned, the 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 v. Joseph, 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 properly 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 and that the refusal to grant the permit was therefore arbitrary and unreasonable and violated the owner's property rights protected by Article I, section 19 and the due process clause of the Fourteenth Amendment.

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 powers of local self-government as provided in the home rule amendment, Article XVIII, section 3, and is specifically within 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. The powers of the courts in such matters are severely limited and the court cannot usurp the legislative function by substituting its judgment for that of the council, particularly since governing bodies are better qualified to act in light of their knowledge of the situation. The power of the 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.

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.

Committee Recommendation

The committee recommends that this section be referred to a special committee, together with section 5 relating to juries, for further study of 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.[1] No changes have been made since then. There is no federal counterpart.

Comment

As a point of background to state constitutional bars on limiting the amount of recovery for wrongful death, such as Article I, section 19a, it should be noted that 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, Lord Campbell's Act[2] 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[3] is a death act for the benefit of the surviving spouse, the children, and other next of kin.[4]

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.[5]

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 went on to argue 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 went so far as to say 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 based their arguments on two propositions. First, it was 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. Secondly, opponents argued that the possibility of unlimited loss would cause the necessary premiums on casualty insurance to be so exorbitant as to make coverage impractical.

Debate of the suggested prohibition on limitation of the amount recoverable in wrongful death was sincere but not extended. The proposed constitutional amendment was finally passed by the Convention with approval of approximately 80 per cent of the delegates.

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 reformations of casualty and liability, particularly automobile, insurance laws from traditional systems to plans which have been popularly styled "no-fault" insurance. There are several fundamental approaches to no-fault insurance and many permutations upon each basic theme, but practically every approach rests upon the same proposition. This 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 about 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. The suggested dilemma occurs when a no-fault act has been passed and the damages arising from the wrongful death are less than the threshold amount imposed by the insurance statute. The no-fault bar to suing the tort-feasor appears clearly to run afoul of the Article I, section 19a admonition that "damages recoverable by civil actions in the courts . . . shall not be limited by law"

This conflict is recognized by most serious commentators on no-fault insurance plans.[6] Robert E. Keeton and Jeffrey O'Connell, authors of the Basic Protection plan of no-fault insurance, grant that in a state with a prohibition on limiting the amount of recovery in wrongful death, a no-fault insurance scheme with a rigid threshold would, indeed, violate the constitutional guarantee when damages did not

exceed the threshold amount.[7] The Keeton-O'Connell plan, a modification of which has been enacted in Massachusetts, therefore, includes in its prototype policy an alternative provision[8] for use in Ohio and the eight other states with constitutional prohibitions similar to Article I, section 19a. This alternative provision preserves the cause of action in every case involving a wrongful death, regardless of the amount of damages.

If the action for wrongful death were always saved, the threshold concept of no-fault insurance systems would be compatible with Article I, section 19a. Another, albeit more complex, solution to the conflict would be in adopting an amendment to the Constitution allowing no-fault insurance to be an exception to Article I, section 19a. The committee, however, concluded to recommend no change in this section. The question is a policy question, and it is difficult to determine exactly where the greater public interest lies.[9]

FOOTNOTES

1. Yes - 355, 605; No-195, 216.

2. 9 & 10 Vict.;c93.

3. Revised Code, Section 2123.01.

4. Revised Code, Section 2125.02.

5. State of Ohio, Proceedings and Debates, Constitutional Convention, 1912, p. 1411 (April 25, 1912), and pp. 1707-1714 (May 8, 1912).

6. E. G. Ruben and Williams, The Constitutionality of Basic Protection 1 Conn. L.R. 44 (1968); and, Comment, The Constitutionality of Automobile Compensation Plans in Wyoming, 5 Land & Water L. Rev. 191 (1970).

7. Robert E. Keeton and Jeffrey O'Connell, Basic Protection for the Traffic Victim, (Boston: Little Brown and Company, 1965) pp. 506-507.

8. Basic Protection Plan section 4.2.

9. American Insurance Association, Report of Special Committee to Study and Evaluate the Keeton-O'Connell Basic Protection and Automobile Accident Reparations (New York: 1968).

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.

Committee Recommendation

The committee 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, which it closely resembles. The last part of the original section was copied from the last clause of Article I, section 20, but the first clause was radically revised. The result is that Article I, section 20 provides two guarantees, similar to the Ninth and Tenth Amendments of the United States Constitution, while Article VIII, section 28 provided only one. The 1802 section said, in part: "To guard against the transgression of the high powers which we have delegated we declare, that all powers . . ." While the Tenth Amendment reserves undelegated powers to the states and to the people, Article VIII section 28 in 1802 guaranteed that all unenumerated powers would reside in the people. The second clause of Article I, section 20 still preserves this right. The first clause sets out a right not present in the 1802 Constitution, by assuring that the listing of rights will not injure, in any way, rights held by the people, but not so listed. This is the same guarantee provided in the Ninth Amendment.

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.

Ohio

Comment - The Ninth Amendment 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 Fourteenth Amendment.

Early cases dealing with the Ninth Amendment were concerned with the Tennessee Valley Authority. In Ashwander v. T. V. A., 297 U.S. 288 (1936), the plaintiff contended that the government had no authority to build a dam, and lacked the right to sell power from the dams where its sale would compete with the local power company's. The plaintiff, among other things, contended that this was an invasion of Ninth and Tenth Amendment rights, depriving the power company of the right to sell electricity; and interfering with the State's control in the area. The Supreme Court, though, found that the federal government's powers of defense and regulation of commerce gave it authority to supersede the state. The Court said that in insuring rights retained by the people, the Ninth Amendment did not withdraw the rights which are expressly granted to the federal government, which were necessary and superior to those of the company. The sale of electricity was incidental, and there was no prohibition against a project that would help pay for itself. In essence the court held that the plaintiff had no Ninth Amendment right where the exercise of such a right would interfere with the legal exercise of the powers of the federal government.

In Tennessee Power Co. v. T.V.A., 306 U.S. 118 (1939), the plaintiff contended that federal involvement in this area constituted illegal regulation under the Ninth and Tenth Amendments and interference with his right to own property and to employ it in his business. The court held that in contracting with its vendees and setting the rate at

which they could sell power, the government was not engaged in regulation of the plaintiff. The Ninth Amendment guarantees rights, but only to the extent that their exercise does not in any way interfere with the government's rights or the government's attempts to effectuate those rights in a legal manner.

In United Public Workers of America v. Mitchell, 330 U.S. 75, (1946) certain civil service employees of the executive branch of the federal government sought an injunction to prohibit the enforcement of the Hatch Act in order that they could take part in political campaigns. The Supreme Court accepted the contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments was involved, but it did not hold these rights to be absolute. Congress could regulate political activities of government employees, on the premise that this type of regulatory legislation was designed to promote efficiency, integrity, and discipline in the discharge of public duties by the public servants, and that this was clearly within the scope of the legislative power. Ninth Amendment rights were not protected when their exercise interfered with the authorized or recognized exercise of government power.

The "right of privacy" found in the Ninth Amendment was enunciated in Griswold v. Connecticut, 381 U.S. 479 (1964), in which Connecticut's law against disseminating information about birth control methods was held unconstitutional. The Supreme Court held that certain guarantees of the Bill of Rights have shadows emanating from these guarantees helping to give them life and substance, creating zones of privacy. The Ninth Amendment was held to be one of those guarantees, and together with other guarantees, it forms a zone of privacy around the marriage relationship, which could not be invaded by a broad state statute that sought to regulate in this area. Privacy in marriage, the Court held, is an "ancient, sacred" right fundamental to our society."

Secondly, the exercise of the right does not interfere with the exercise of the power of the government to conduct its own affairs.

Justice Goldberg, in his concurring opinion, developed the concept of a broad Ninth Amendment. He argued that the concept of liberty protects those rights which are fundamental and that those rights were not confined to the specific terms of the Bill of Rights. History, according to Justice Goldberg, reveals that the first eight amendments were not meant to be exhaustive nor were they meant to imply a negation of all rights not expressly affirmed. These unenumerated rights are protected by the Ninth Amendment. He continued that to apply the Ninth Amendment to the States would not change history. The Ninth Amendment, in indicating that not all liberties are specifically mentioned, is relevant in showing that other unenumerated fundamental rights are protected from the states, as from the federal government.

The decision in Roe v. Wade, 410 U.S. 113 (1973) further developed the concept of Ninth Amendment rights. The right of privacy was extended to the right to an abortion where it did not interfere with legitimate interests of the state. The state has an important interest in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point, these interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The right to privacy is not absolute.

Justice Douglas, in his concurring opinion, divided Ninth Amendment rights into three categories.

> First, the autonomous control over the development and expression of one's intellect, interests, tastes, and personality.

These rights, to him, are absolute and permitting of no exception. The other two categories, while fundamental, permit state regulation where a compelling state interest can be shown.

> Second, freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the upbringing and education of children.
>
> Third, the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, and loaf.

Future cases will have to determine the full depth and breadth of the unenumerated rights. Some states have written a "right to privacy" provision in the state constitution.

The development of absolute Ninth Amendment rights, though, is limited by the concept of "compelling state interest," as was seen in Roe. In N.A.A.C.P. v. Alabama 357 U.S. 449 (1958), the court said that in the domain of indispensable liberties, abridgement of such rights, even though unintended, may invariably follow from various forms of government action. The courts must weigh the interests of the state in a law against the interests of the individual and the concept of liberty in the right sought to be abridged or regulated.

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 VIII, section 28 in 1802 declared that nondelegated powers remained with the people (now Article I, section 20). Fifty years later, in State ex rel. the Robertson Realty Co. v. Guilbert, 75 Ohio St. 1, (1906) the Supreme Court of Ohio repeated the limitations of delegated governmental power. The Court held that under the Ohio Constitution, which is explicit in excluding from the legislative department the exercise of powers not delegated, the authority to act must be found in express terms or by implication in the Constitution.

In State ex rel. Attorney General v. Covington, 29 Ohio St. 102, (1876) a law passed by the legislature was attacked. The law provided that in all cities with a population over 200,000 police powers and duties would be vested in and exercised by a five-member board appointed by the governor for five-year terms. According to the 1870 census this legislation only applied to Cincinnati and would continue to do so for the foreseeable future. Objection to the bill was based, in part, upon Article I, section 20 "and all powers not here delegated remain with the people." The Court, though, said that this had the reverse implication that all powers delegated in and by the Constitution do not remain with the people, but are vested in agents and officers of the government to be exercised by them alone. Further the Court held that whatever limitations upon delegated powers may be found elsewhere in the Constitution, it is clear that Article I section 20 does not impose a limitation on those powers.

> That section only declares that powers not delegated remain with the people. It does not purport to limit or modify delegated powers.

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.

Committee Recommendation

The committee 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.

This section, which places limits on the power of a corporation to appropriate property, was included in the study of Article XIII, Corporations, by the What's Left Committee and referred to the Bill of Rights Committee because of its relationship to Section 19 of Article I, eminent domain, and Section 5 of Article I, the right to a trial by jury.

History; Comparison with Federal Constitution

Section 5 of Article XIII 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 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.

Some of the delegates greatly feared the abuses of private corporations and their ability to influence the legislature.

Mr. Stanton: I want simply to protect the rights and interests of private individuals from the over-shadowing power of corporations. (1 Debates p. 446)

Mr. Gregg: The companies always manage to get such men as suit them, into the commission, and go over and value the ground all their own way, and the land owners have to give up to them. (Ibid.)

Mr. Hitchcock was quoted as saying that he wished the legislative power over corporations to be recognized. (Debates p. 849)

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). Mr. Stanberry urged that there was no distinction. In the course of this debate, Mr. Ranney stated that what Mr. Stanberry said was "all in a fudge." Mr. Norris then rose to criticize the abuse of the "silver mouthed" Mr. Mason, whom Mr. Norris said "never speaks but in the malice of his heart"; Mr. Norris was brought down after some discourse by mounting cries for "order" and a note by the recorder of "great confusion." Mr. Mason was allowed to state that Mr. Norris' "fiery arrows" had fallen harmless at his feet. In the vote which followed, the resolution to strike out Section 5 was defeated by a vote of 49 to 37. (2 Debates p. 850).

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, 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 owner, 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. 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. 235 (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. Following are points of difference:

Taking. Section 19 states that compensation must be paid when private property is "taken" for public use. Section 5 requires compensation when a right of way is "appropriated to the use" of a corporation. One of the abuses noted in the

debate was the informality with which property was taken and damages paid. The Section 5 language may preclude an interpretation that property is not "taken" until title passes, and thus compensation need not be paid at the time a company comes in to cut trees or lay a roadbed. In light of the many subsequent cases interpreting the legal status of a "taking" requiring compensation under both the federal and state provisions, however, the language of Section 5 appears to have no legal significance broader than that of Section 19, and thus may be considered redundant.

Compensation. Section 19 requires that "a compensation" be made. Section 5 requires that "full compensation" be made. An Ohio case, however, holds that "compensation" as used in Section 19 means "full compensation". Athens v. Warthman, 25 O. App. 2d 91,54 00 2d 123, 1970. Thus the language of Section 5 does not appear to add anything to the language of Section 19.

Section 5 adds that compensation must be paid "to the owner", an instruction that Section 19 does not contain. The convention delegates told of cases where owners had no notice of the proceedings. (1 Debates p. 446) Although these words evidently are not discussed in the Debates, one can infer that it reflects an insistence that the owner himself receive the payment, rather than that it be held for him or deposited on his behalf. It would require, for instance, that the owner be ascertained. In current practice, it seems unlikely that these words add anything to the requirements of Section 19.

Benefit from Improvements. Section 19 states:

> "...compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

Section 5 states that compensation shall be made:

> "irrespective of any benefit from any improvement proposed by such corporation."

Despite the language of Section 19, the courts have differentiated "special" and "general" benefits. This was first done in Little Miami R.R. Co.

v. Collett, 6 O. St. 182, 1856. The Court of Appeals for Auglaize County repeated the distinction in Richley v. Bowling, cited earlier, in 1972, observing that some lower court cases (not identifying them) had allowed deduction of "special" benefits, not "general" benefits, the latter being those that accrue to the community at large and consequent enhancement of the value of lands and town lots. The court held that increase in value of land resulting from creation of exits from a limited access highway were general benefits, and thus not deductible. To be "special", the benefit would have to benefit the property directly and solely. The court did not rule as to whether a special benefit could be deducted--it merely held that this was not special, and thus could not be deducted in any case. A dissenting judge described the benefit as a "windfall" that the jury should have been instructed upon so that it could take it into consideration in determining compensation.

The point of including the foregoing discussion is to indicate that there is judicial opinion that, although Section 19 states that compensation shall be assessed without deduction for benefits, some benefits may be deducted. The question is whether this judicial opinion would be the same under the stronger language of Section 5: "irrespective of any benefit from any improvement proposed by such corporation"?

The practice of the railroads and turnpike companies was evidently as often as possible to pay no compensation, on the theory that the road so benefited neighborhood properties that benefits equalled or exceeded the loss to the landowner.

Jury. Section 19 requires that compensation be assessed by a jury. Section 5 requires that compensation be ascertained by a jury of twelve men, in a court of record. The delegates discussed this point. They felt that the section must specify twelve men and a court of record, because, under existing practice, appointment of three commissioners was called a "jury," and the

appraisal and compensation could be made without notice to the landowner or a court trial (1 Debates p. 444). Subsequent case law appears to assure a twelve-man jury under Section 19, also, without this specification. (Lamb v. Lane, 4 Ohio St. 167, 1854). There the court held that "jury" means a jury of twelve men.

If section 5 were repealed, however, it is open to question whether a "jury" under Section 19 would have to consist of 12 persons in light of recent Supreme Court decisions holding that 12 persons were not required at common law for a criminal jury.

The committee that drafted the Section 19 provision saw no necessity to define "jury" for they apprehended no disregard of the ordinary, legal meaning of the term; the committee that prepared the Article on corporations apparently were less confident, or were of a more cautious temper, and they did define it.

Quick-Take. No "quick take" is allowed a private corporation under Section 5. There must be a judgment confirming the verdict of the jury, before the corporation is entitled, by a deposit of the amount of the verdict, to possession of the property. Wagner v. Railway Co., 38 Ohio St. 32 (1882). Section 19, on the other hand, allows "quick take" in war or other public exigency, imperatively requiring its immediate seizure, and for roads if they are open to the public without charge. Conceivably, this could allow a private corporation under some circumstances to use "quick take", if it were not prohibited by Section 5, but it seem s highly unlikely that this would occur.

The committee 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 committee 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.

What's Left Committee

Chairman, Mr. Craig Aalyson

First Meeting, January 23, 1975

Last Meeting, January 25, 1977

Minutes begin on page 4815

Research begins on page 5028

Ohio Constitutional Revision Commission
Elections and Suffrage Committee: Miscellaneous
January 23, 1975

Summary

The Elections and Suffrage Committee met on January 23 at 10 a.m. in the Commission offices in the Neil House. Present were committee members Craig Aalyson, Chairman, Richard Carter and Jack Wilson. Ann Eriksson, Director, and Brenda Avey attended from the staff. Liz Brownell attended for the Ohio League of Women Voters.

The meeting opened with a continuation of the discussion of the language on corporations, presently Article XIII. Ann Eriksson commented that Katie Sowle had no further comments or changes to recommend regarding the language put forth by Mr. Carter. She had two questions. One, whether it was really necessary to include the language excluding the coverage of municipal corporations.

In view of the history of Article XVIII, all agreed that it probably should be included, so that the words "classified" and "regulated" don't apply to municipal corporations. Since they were included in there originally in Article XIII, it is well worth trying to exclude them.

Mr. Carter: You remember when we had this problem of trying to define what a corporation was in context with our constitution. I think we ought to leave it in.

Mr. Wilson: I think it's an improvement.

Mr. Carter: I would flip a coin as between "A" and "B" of my proposals. "B" is a couple of words shorter and I think it reads better. I like "formed in this state and elsewhere" better than "domestic and foreign". Foreign is a word that I think requires definition.

Mrs. Eriksson: It keeps with the basic format that the committee had originally designed.

Mr. Carter: I think it's a good sentence. It is a little different than what Nolan had. Do you see any substantive difference?

Mr. Aalyson: I don't know that I have ever understood precisely what Nolan's problem was?

Mr. Carter: He was very concerned of the possibility that the committee's proposal might be construed as not applicable to foreign corporations. Our argument was that the legislature has the plenary power and there is no reason to spell it out. Nolan was concerned about dropping the clause. He wanted to make sure that the state had the authority for the governing of foreign corporations - who sold securities in the state, et cetera. The second thing he felt is that the legislature could clearly have the power to classify foreign corporations, as well as domestic corporations. For example, as non-profit or profit. I think he has probably got a good point there. I think what we had was perfectly alright, but since Nolan was concerned that it might have some limitations, it's easy enough to change.

Mr. Wilson: The first paragraph suggested would cover all corporations other than municipal corporations, whether formed in Ohio, Timbucktoo, or Saudi Arabia.

Mr. Carter agreed.

Mr. Carter: I move to adopt the language in the last paragraph "B" language in the January 13 memorandum.

Mr. Wilson seconded the motion.

All voted yes.

Mr. Carter: I do think it is a tremendous improvement over what we have in the constitution from an English, editorial, and simplification point of view, even though it doesn't represent any substantive change. Now we need somebody to present the report to the Commission because Katie is not going to be there.

Mr. Wilson: Now that I have just reread there is one point on a word that is in here. "Supervise". Does "regulated" encompass "supervise"?

All agreed that it did.

Mr. Aalyson volunteered to present the revised recommendation to the Commission at this afternoon's meeting.

Mrs. Eriksson: The total recommendation of the committee involves the substitution of this language for everything in Article XIII, except that we would refer some of the provisions in there to another committee-the eminent domain provision. You remember we had discussion about that.

Mr. Aalyson: That's already been presented to the Commission though - the fact that we were going to refer that.

Mrs. Eriksson: The whole report was presented to the Commission, but we took no action on it.

Mr. Aalyson: It would seem to be appropriate for us, if no one has any objection, to consider these various research studies that we have in the order that they are numbered. The first one would be Research Study No. 39 which has to do with public officers, their qualifications and the matter of oaths and salaries. It's an August 1, 1974 publication.

Mr. Wilson noted that the Auditor of State did not subscribe to the oath because it was incorrectly administered.

Mr. Carter: Do we want to take up this question of the elibility to public office?

Mr. Aalyson: I think so. Are the qualifications for an elector spelled out in a single constitutional provision?

Mrs. Eriksson: Section 1 of Article V is the section which says the qualifications for an elector which now will, if the Commission's recommendation is adopted, simply specify 18 years old and a resident such time as provided by law.

Mr. Aalyson: I've made my position known in this respect before, but it appears to me that it is beneficial to one who has to interpret or look to the constitution if a section which even indirectly refers to another section such as this does, notes that other section. For example, as specified in the section which defines the elector, I think might well be added to this without hurting anything or cluttering up the constitution. Or, "no person shall be elected or appointed to any office of this state unless possessed of the qualifications of an elector as defined in Article V, Section 1 of this constitution. That makes it so much easier for people who deal with statutes and constitutional provisions. I suggest it as food for thought. I have no other suggestions myself with regard to this particular item.

Mr. Carter: I really have not given a lot of thought to this so I don't have much of an opinion, but I raise this question - if you cross-reference in the language of the constitution itself, first of all, you start getting all of the problems when you change one section, you've got to make changes elsewhere. The second thing is, I wonder is this really appropriate to be put into the constitution or really if it shouldn't be in

a "handy-dandy" reading guide for the constitution or index or something of that sort.

Mr. Aalyson: I encounter the difficulty that everytime I try to use an index, primarily statutory, people who have done the indexing would not index in the same fashion I would and you can search and search and sometimes you simply don't come up with it. That's why I suggest that I like the idea that if a statute or a constitutional provision almost inevitably has to be referred to that the provision is right there. Ordinarily, in the indices, if the statute or the other constitutional provision is mentioned, then the indices will pick it up in the cross references, so it's very easy to change one and have to change the other.

Mr. Wilson: I see a change in Dick's philosophy since you just approved a motion to say "not governed under Article XVIII" in Article XIII.

Mr. Carter: We have always used references to other constitutional articles when it was necessary for the interpretation of an article. For example, the business of initiative and referendum, you had to make references to make the thing tie together. But to do it as an optional kind of thing, to make it easy for the lawyers and anyone else to try to find his way through the constitution, I don't know.

Mr. Wilson: Perhaps it would be better to have a new section of the constitution consisting of definitions and then indicate where each one of those is referred to in the various sections. It would help the layman trying to find out various things. It wouldn't necessarily have to be part of the constitution although in theory it would be since it would be defining the terms of it, but it is something that would be of assistance to all of the people. He's right. This really is tedious to try to pick out everything you want to know, and I know of no other way to do it than by a complete section on definitions. That's a whole new ball of wax, though, as far as this commission is concerned.

Mr. Carter: Ann, do you have any thoughts on how other constitutions treat this question or any thoughts on how it might be best handled in Ohio?

Mrs. Eriksson: The bill drafting rule that we try to follow in drafting bills is to do pretty much exactly as Craig suggests, to make intersectional references wherever we think there could possibly be a question as to the meaning of a term like "elector". I completely concur that once you really get into something an index is really next to useless, I think. But as a constitutional principle, I don't know. Some constitutions do that very extensively, but those are mostly the rather lengthy constitutions which contain, in effect, a lot of statutory material. For instance, I think you will find a lot of things like that in the California constitution and others that really have a lot of statutory material.

Mr. Wilson: Definitions are generally based upon current common English usage and understanding of the meanings of words but those things change.

Mrs. Eriksson: But that's not true of a word like "electors".

Mr. Aalyson: "Elector" is defined in the constitution, the qualifications are designated.

Mr. Wilson: A while back we were talking about some language in the corporations article that we didn't know what it meant - "dues from private corporations". Now, when this was written, maybe that meant something. A book of definitions of what dues from private corporations are might help us to see what they were trying to do. I'm not pushing the point. All I'm saying is that we have no assurance that 100 years from now the wordage that we're using won't be changed as far as common understanding is concerned. I don't think you can overcome it, but for purposes of clarification you may be able to do it a little bit at the moment.

Mr. Carter: Are you thinking of making this a formal part of the constitution, Jack?

Mr. Wilson: Not necessarily.

Mr. Carter: It would not be voted on by the people what definitions mean?

Mr. Wilson: This would help people. It might not help the people who are working with it all of the time such as the legislature or the courts where they have their own definitions and understanding but Joe Doe out in the hinterlands doesn't understand a lot of these words as to what they actually mean.

Mr. Carter: You would certainly open up a raft of new court cases.

Mr. Aalyson: That's a very difficult proposition too, to try to define.

Mr. Wilson: That's true. That's what makes it difficult for the average voter to understand what he is reading or what he is talking about sometimes. I don't know of any open-sesame way of clarifying this, but other than you have done in this language here, to try and get things down into language that is normally readily understood but again you hinge upon definitions.

Mrs. Eriksson: An elector is definitely defined in Section 1 of Article V.

Mr. Aalyson: My position which I'm sure everyone already understands is not that I'm wanting to restrict the legislature. I just want to make it simple for those who are referring to the constitution. Anyone who looked at this article would immediately have to go to another article to find out what an elector is.

Mr. Carter: I think if we are going to amend the section at all, it might be worth sticking that in there. I don't see that it does any harm for the few words. Let me ask you a question on the substance of the thing. Should there be any differentiation between an elector and the qualifications to hold office?

Mr. Aalyson: I don't know. I'm not so sure that one need have to be an elector to be an office holder.

Mr. Carter: Or, the other way around: should you have additional qualifications? In other words, what should be the appropriate qualifications for holding office. You're an office holder of long-standing, Jack.

Mrs. Eriksson: There are two questions: the one is the age and the other is the residency because by lowering the age to 18 you are lowering it unless some other provision is made for office holders. That question was specifically discussed by John Skipton's committee who felt that if you were old enough to vote you ought to be old enough to hold office. But the other question is the residency question because unless some different provision is made the lowering of the residency requirement also means that you can hold public office even though you have not been a resident of the state for more than 30 days.

Mr. Wilson: We're encouraging carpetbaggers.

Mr. Carter: Permitting it. I'm not sure we are encouraging it.

Mrs. Eriksson: There are two ways of looking at it. One is that often a governor will go outside of the state for a cabinet appointment and sometimes he finds the best qualified person by doing that. This has been the case in mental health and health fields, particularly, I think. On the other hand, if you are going to be elected to office, then there might be more of an argument for a residency requirement.

Mr. Carter: "Shall be elected or appointed to any office".

Mrs. Eriksson: For legislators, for example, there is a residency requirement, which is more than the requirement of being an elector. They actually have to reside in their districts for one year prior to an election. As perhaps you read in the paper, there was a provision in one of the southern states, Georgia or Carolina, that in order to be elected governor you had to be a resident of the state for some very long period of time like 5 years. And the Supreme Court, much to the surprise of a lot of people, permitted that to stand. The court did not actually hear arguments on it.

Mr. Carter: That was the one where they threw the fellow off the ballot who was obviously going to win. That was in South Carolina.

Mrs. Eriksson: That's a philosophical decision too, now that the requirement for voting has definitely been lowered as far as residence is concerned, because even 6 months has been held unconstitutional. And the other question is should a person be able to be elected governor who has only been a resident of Ohio for 30 days.

Mr. Carter: I would favor that. I think the parliamentary system in Britain is not all bad where you can run from any district that you can get the votes from. Whether you live there or not it doesn't make that much difference. I think it's very difficult for a person to be elected if he doesn't live and have identification with the electorate.

Mr. Wilson: Bob Kennedy moved to New York State.

Mr. Carter: And I'm not sure that's against the interests of New York State at all. If an outstanding figure wanted to come to Ohio and get elected in Ohio and could convince the people of Ohio to vote for him, I'm not sure we should prohibit that. Why not put our faith in the electorate to make the judgment on all factors of a person running for office? I would not be in favor of making it any more difficult. I have the same kind of approach to the age question, and that is I think if someone 18 years of age wanted to run for governor, he'd have a heck of a time getting elected. He's got to convince the electorate that someone of 18 years of age is capable and has enough experience and so forth to be governor. I think it would be an impossible thing to do. But to say that he wouldn't have the right to try and convince the electorate, again, I'm willing to put my faith in the electorate so I wouldn't be in favor of putting any additional restrictions in.

Mr. Wilson noted that he would be afraid to be tried by a jury of 18 year-olds because he did not feel they had reached the level of maturity to make the sort of judgments required.

Mr. Wilson: I agree with you Dick that it would be next to impossible for any 18 year-old to convince the majority of the electorate of Ohio to elect him as governor. I don't think we have anything to be concerned about that we should insert an age requirement for anything other than what we've got as electors. Regarding this matter of appointment, suppose an incoming governor wanted to appoint good men from out of the state...

Mr. Carter: I agree. You take Illinois. They got Hal Hovey away from the state of Ohio which was a great loss to the state of Ohio and if we were prohibited from doing something of that sort in return... I think that's a good point. If you were to drop those words "no person shall be elected to any office in the state unless possessed of the qualifications of an elector", I suppose you get this hue and cry that you do in local communities when they appoint a police chief or service director that doesn't live in the city, he lives out in the country, that that's a terrible thing.

Mr. Aalyson: Locally we've had some consternation in the past week because there was a school board member who resided outside of the district of the school board, so you are down to fairly low levels.

Mrs. Eriksson: This refers to being an elector of the state. Most city charters contain a similar provision. And there are now many questions being raised as to residency requirements for police and firemen which I think are brought out in the memo on employees.

Mr. Carter: I didn't mean that it would have any effect on municipalities. I think this is a reaction of the voter. "If somebody is going to be director of the budget for the state of Ohio he should at least live in the state of Ohio." I don't think that's necessarily true. I think I would be in favor of and it would be a blow for good government... I think the governor or whoever is making the appointment is going to take all of these factors into account and is certainly going to favor someone from the state of Ohio. But to deny him the opportunity of getting an extraordinarily gifted man because he is not a resident of the state I think is a mistake.

Mr. Aalyson: How about "no person shall be entitled to hold any office in this state unless a resident at the time he takes office". Then you can make him a resident and remove any other restrictions.

Mr. Carter: That's a good thought. In other words, the argument being advanced is he ought to live in the state after he takes the job.

Mr. Aalyson: He's got to live here at the time he takes the job and become a resident.

Mr. Carter: I like that approach.

Mrs. Eriksson: So that you would not tie it to being an elector, then.

Mr. Aalyson: No. I'm kind of leaning away from the elector on the basis of Dick's suggestions here. Why even make him an elector?

Mrs. Eriksson: What would you do about age, anything? Or just not say anything about age.

Mr. Carter: To hold the governor accountable for his appointments, using that as an example.

Mrs. Eriksson: It seems even more unlikely that an 18 year old would be appointed to a cabinet position than that he would be elected.

Mr. Carter: He would be an extraordinary one.

Mr. Aalyson: And if he were an extraordinary one maybe he should be entitled.

Mr. Carter expressed doubt that anyone would be that bright by 18 since the kind of knowledge required was learned through interaction with people and not just academics.

Mr. Carter: Well let's try. I think that's a good idea. As far as this is concerned, we could just drop out "or appointed". Then the question is of adding something to take the sting out of it from the standpoint of making sure that the appointee at least lived in the state. I think that's very valid.

Mr. Aalyson: "No person shall be entitled to hold any office in this state unless a resident of the state at the time he takes office."

Mr. Carter: That ducks the whole elector question, and gets back to the convicted felons question.

Mr. Wilson: Would it be any better to say "no person shall be elected to any office in the state unless possessed of the qualifications of an elector. No person shall be appointed to any office in the state of Ohio unless a resident..." This would break it into

two sections to allow the **retention** of the qualifications of an elector to be elected and yet allow appointments to anyone who will move into the state.

Mr. Aalyson: Appointments currently can include a felon?

Mrs. Eriksson: That would not be true because the section that we had all of the debate on says that the General Assembly may deny the privilege of voting or of holding office to any person convicted of a felony. All you would be saying here is that he had to be a resident but you wouldn't be changing that section.

Mr. Aalyson: You still have the same restrictions on the appointing body or person. They are going to be very careful about what they...

Mr. Carter: Sure, and the legislature has the right under this situation you are describing to prohibit it, but we are not doing it in the constitution and I think that's entirely appropriate. I like that. Well, on that basis, I think I would buy the language that Craig came up with.

Mr. Aalyson: If they become a resident before they take office, that ought to be good enough, in a lot of situations at least.

Mrs. Eriksson: As a practical matter what happens if a governor does appoint an out of state person to his cabinet, the person simply doesn't get sworn in as the director of the department until he's lived in Ohio for, at the present time, six months.

Mr. Carter: Sure, and why not recognize it. I think in the appointive question I buy this completely both philosophically and practically. On the elected question I have no objection to it. But I think that you will find some rather strong feelings that an elected official should also have the qualifications of an elector. That would go back to the double standard Jack suggested.

Mr. Wilson: We had an unusual situation in Piqua recently. Our municipal judge was elected common pleas judge and the common pleas judge was appointed to a municipal judgeship before he left office, but he lived in Covington, Ohio, about six miles west of us so he announced he was going to live with his mother to meet the residency requirements.

Mr. Aalyson: That tends to support the notion that the appointing agency is going to have to exercise a little bit of discretion.

Mr. Carter: Let's see if we could come up with at least a tentative draft.

Mrs. Eriksson: Splitting it as Jack suggested?

Mr. Carter: "No person shall be elected" and then it reads alright the way it is.

Mrs. Eriksson: And then "a person appointed to any office shall be a resident of the state at the time he takes office" or words to that effect.

Mr. Carter: "persons holding appointive office...shall be a resident at the time...".

Mr. Wilson: I think we're simply stating what you have said as more or less of an accomplished fact but it might as well be in there.

Mr. Carter; While we're thinking about it I just want to raise the question as to whether you want to put any restrictions at all on an appointive office in the Constitution.

Mr. Wilson: From a practical standpoint, I don't think it would have any great effect. He's not going to appoint a director who is going to commute between here and Philadelphia or something like that. But to guarantee the people that their state officer is going to be a resident of the state it might be good language.

Mr. Carter: I think it would be awfully hard to sell, as a political matter, if he didn't even have to live in Ohio, even though it wasn't a practicality. So I think I would buy it. In which case I would be happy to go along with Craig's thought of identifying "an elector".

Mrs. Eriksson: I think if you are going to make a reference you might as well make it to the section because that is the definition of "elector" and phrase it the same - "the qualifications of an elector".

Mr. Aalyson: Yes, any change that would have to be made you'd have to take the definition of an elector out of its present article or section in the constitution and that would be such a drastic thing and would happen so infrequently, I would think, that it would create no impediment.

Mr. Carter: It says that Article XV, Section 4, was suggested for repeal in 1957, that they were going to repeal the whole section. That surprises me. That shows that there is some interest.

Mr. Wilson: It also shows that the public doesn't want it out of the constitution. At least they didn't seven years ago.

Mr. Aalyson: It does seem to me that if you have a highly qualified individual who can come into the state and convince the populous that they want him maybe there should be no time restriction.

Mr. Carter: The time restriction is only 30 days.

Mr. Aalyson: Okay. This is because of court decisions.

Mrs. Eriksson: As a matter of fact the court decision had to do with voting and there has been no case testing that 6 months in the Ohio Constitution as far as office holding is concerned, so you really can't say for sure what the result is. The constitution still says six months for an elector.

Mr. Carter: Acutally that's not too tough to do because someone who's been a Bobby Kennedy is going to have to be in here a while to compaign and so forth,

Mrs. Eriksson: Our proposal was to take the 6 months out and leave it up to the General Assembly, which is going to be 30 days.

Mr. Aalyson: That is our present proposal?

Mrs. Eriksson: Right, to take the 6 months out and say "a resident of the state such time as may be determined by the General Assembly" which will be 30 days. What you're saying is that the only requirement for an office holder other than an elected one would be to be a resident at the time they take office. So he wouldn't even have to meet the 30 days if the General Assembly determines.

Mr. Carter: Okay, that takes care of Section 4. We had an interesting discussion. Section 7 is the next one, (requiring an oath or affirmation to uphold the constitution).

Mr. Wilson: I don't think you'd get very far changing that. I don't see any need for it, truthfully.

Mrs. Eriksson: Our research on this doesn't indicate any change or any problems.

Mr. Carter: It says you've got to take an oath and it's generally a very impressive thing to do.

Mr. Wilson referred to the difficulty which developed regarding the loyalty oath of the California state employees.

Mrs. Eriksson: Loyalty oaths are different and we don't require any in our constitution. The oaths that people objected to had to do with swearing not to join a subversive party which advocates the overthrow of the government, which is different from swearing to uphold the constitution, because it deals with membership in an organization.

Mr. Aalyson: I think the Supreme Court might reacha different decision on the question of if you are going to be an elected official or an officer of a governmental body that it would be proper to require that you have to affirm your loyalty.

Mrs. Eriksson: I don't know of anybody who has challenged an oath of this type except for people who don't swear, and even this says "oath or affirmation".

Mr. Wilson named some of the people who are required to swear in such as board of embalmers and funeral directors and cosmetologists.

Mr. Carter: I think it's a pretty good idea, though. Those that have a public trust, that little ceremony of taking the oath I think is worth keeping.

The next section discussed was section 20 of Article II.

Mrs. Eriksson: This is the provision that the county commissioners have tried to get changed.

Mr. Aalyson: As the present section stands, the salary cannot even be lowered during term. It says no change shall affect the salary.

Mr. Carter: That's an interesting comment.

Mr. Wilson: I wonder if the legal definition of compensation is strictly salary or expense allowances. That's the way they get around it.

Mr. Carter: I think the courts would take the view that as a factual matter compensation is those things received in compensation for services rendered.

Mr. Aalyson: I'm not so sure that I would have any objection to the legislature changing a salary other than a legislator's salary. But there is obviously some reason why they...

Mr. Carter: One reason that occurs to me: Let's suppose that you've got a director of penal institutions appointed for a four year term and the legislature changes from Republican to Democrat or vice versa and the party says "We can't get rid of this guy. He's in for a 4 year term, so maybe the only thing we can do is to cut his salary in half and that will make him resign and then we can exercise our will." Maybe that's good. I don't know. But I think it would raise those kinds of questions.

Mr. Aalyson: I was thinking of raising salaries.

Mrs. Eriksson: The Commission did make a recommendation on the legislators' section which would still not have permitted the increase in salary during term. It would have permitted them to be paid expenses. Perhaps there can be a good reason for distinguishing

between legislators and others if the legislature is fixing its own salary and other people have no control over their own.

Mr. Carter: The problem I see is the question whether terms of office transcend the authority of a single legislative body.

Mr. Aalyson: You may get the same situation we have now where the legislature is one color and the governor another and you could get a little hanky-panky going there I think on the question of salaries.

Mrs. Eriksson: The cabinet officers' terms always expire with the governor anyway and if the legislature passes a bill increasing salaries it simply doesn't apply to those people until the beginning of the next term.

Mr. Aalyson: What would have happened, for example, if under the present set-up the Democratic legislature would have rushed through a bill lowering the governor's salary by 50% or had it been vice versa in raising the salary?

Mrs. Eriksson: As a practical matter they could not have done it because in order for it to take effect when the governor took office it would have had to be passed as an emergency and they didn't have the votes for an emergency.

Mr. Carter: But if we were to remove this, is the question.

Mr. Aalyson: Yes. What would happen if we were to modify this significantly? Does it leave open loop-holes that should not be there?

Mrs. Eriksson: It probably does and that's probably why it was put in here. And to protect the public, because the theory is that a person who runs for office, particularly an elected official, knows what that salary is when he runs for the office and therefore shouldn't expect an increase during that term.

Mr. Carter: Let's suppose, for example, that the governor and the legislative leadership get into a bitter fight and the legislature says that the governor won't do what we want him to do and therefore we'll just eliminate his salary. They would have the power to do that I would think if we changed this effect.

Mrs. Eriksson: Not for the governor because there is a special section in the executive article which says basically the same thing for the elected executive officials. In other words, if you changed this section you would probably not be affecting that decision but you would be opening up the possibility for all officers who are covered just by this section which are county officials and a good many officers of the executive branch. Not the six elected officials because they're covered by the section in Article III. But many officers in the executive branch are covered by this section. All of the cabinet officers, and all persons who have a position in the public office.

Mr. Carter: And I also think that in fairness to the people that accept these positions they are entitled to know what their compensation is. I would certainly be willing to listen to a persuasive argument to change this,

Mr. Aalyson: Maybe we ought to invite some county officials in to discuss it.

Mr. Carter: Why do they want to change it?

Mrs. Eriksson: County commissioners are not all elected at the same time. If you increase the salaries you have one county commissioner perhaps who doesn't get that increase

at the same time the other two do because they are not all elected at the same time.

Mr. Carter: There is a certain amount of rationale to that.

Mrs. Eriksson: And they extend it to apply to all county officers because they say that one time you will be electing two commissioners and then another time one commissioner and the auditor.

Mr. Aalyson: A solution might be to require that they all be elected at the same time. Is there some reason why there is not such a requirement? Is that to preserve continuity of some sort in the office?

Mr. Wilson: It eliminates the possibility of throwing all of the "rascals" out at the same time. We have the same thing in our city commission. They are elected 3 and 2 for staggered terms.

Mrs. Eriksson: If you would like to hear the arguments, they are the ones who have pressed most hard for changes in this section.

Mr. Carter: I do think that if you listen to the arguments of one group of that nature you really would want to examine them and get testimony from other departments who would be affected.

Mr. Aalyson: I would be loathe not to let them speak if they would like to speak. The more I read this the more I think that someone has given very considerable consideration to it already.

Mrs. Eriksson: Liz, did the League oppose, when it was on the ballot the last time, the amendments which would have permitted in-term increases?

Mrs. Brownell: I don't remember but I suspect that we probably didn't say anything either way.

Mr. Aalyson: My personal feeling is that it is a good thing to keep this restriction.

All agreed that they were open to hearing further arguments from interested organizations.

Mr. Aalyson: Is there any group that wants to preserve the status quo as opposed to one who is trying to change it?

Mr. Carter: What I would suggest maybe we might do is to simply let our minutes and the discussion that Ann has in the monthly newsletter and so forth saying this matter has been looked at and no one has come forward to espouse a change, or something of that sort, and see what that brings out.

The other members agreed to this approach.

Mr. Aalyson: I wouldn't want it to appear that we passed over anybody without giving them the opportunity to be heard.

Mr. Carter: That covers the matter of qualifications, oaths, and salaries.

Mr. Aalyson: In Columbus, periodically we see a newspaper article about somebody who is sitting in an office with his job having been abolished, drawing a salary, and he's just got a raise. Apparently there was a political effort to get rid of him and they reorganized and abolished the office but the city attorney has said this is improper, so he sits there doing nothing.

Mr. Carter: What we're really saying is that unless somebody comes forward, we will recommend no change and that leaves us with just section 4 to be concerned about. I'd be curious to ask a bright gal like Liz whether she thinks an appointive officer must be a resident of the state prior to the time he is appointed in a state appointive officer.

Mrs. Brownell: A lot of them are not. (She mentioned some she knew personally who she didn't believe were residents.) I don't know whether they are civil service or appointed to the job.

Mr. Aalyson: An appointed...is clearly prohibited. We decided that an appointed person should only be required to be a resident at the time he assumes office. He didn't have to have the qualifications of an elector.

Mrs. Brownell: That's only 30 days.

Mr. Carter: But even so...

Mrs. Brownell: Even so, that is a hardship in terms of getting the best man for the best job. It seems logical.

Mr. Aalyson: And retaining the provision as it applies to elected officials they must possess the qualifications of an elector.

Mr. Carter: That raises the question in my mind as to what "appointed" means.

Mr. Wilson: Appointed means any official who isn't elected.

Mrs. Brownell: You're saying then that they must come and move here.

Mr. Carter: Yes, if they are going to work in the state they ought to live in the state.

Mrs. Brownell: You can't live in Kentucky and work in a state office in Cincinnati. That's where it would be a problem. The requirement used to be a year.

Mr. Carter: This goes back to the time before people were so mobile. It seems to me that that covers that section now.

Mr. Aalyson: The next topic is research study no. 41, having to do with public employees-civil service. From my reading of both the section and the research article, actually as a matter of fact before I read the research article I interlined in Section 10 an additional or substitute provision. The article now reads "appointments and promotions in the civil service of the state, counties, and cities, shall be made according to merit and fitness, etcetera". I had put in a question as to whether that should encompass all political subdivisions. On consideration, though, I thought that when you get into the lower eschelons such as townships and whatnot that it might be imposing an undue burden. That was really the only change that I thought might be made.

Mr. Carter: Jack, would you have any thoughts on that? This comes in an area that you might be familiar with.

Mr. Wilson: To be quite frank, I would like to eliminate civil service in the city. You can't get rid of some undesirable employees.

Mr. Aalyson: I'm sure that this is true even with regard to the state that you can't get rid of some undesirable employees and maybe we ought to give some thought as to whether we can modify this so as to permit that. But I think that we would be getting into a legis-

lative-type problem.

Mr. Wilson: It's a question of the lesser of two evils: the civil service where you retain some improper employees or where you go back to the spoils system.

Mr. Carter: Can I read you a sentence from the staff memo on this? David T. Stanley of the Brookings Institution is summing up the findings of the symposium. "We have painted a messy picture, but that's the way it is."

Mrs. Brownell: It's like a pendulum swinging back and forth. It's swung so far to civil service and there is a need to get a balance there.

Mr. Wilson: It's hard to be in a fair position with respect to either the civil service or the spoils system, but how you strike a good balance is a judgment matter whether you have a good employee or a bad one, at times.

Mr. Aalyson: And it would be next to impossible to do this constitutionally, I suppose. It's got to be a statutory thing to permit the exclusion of undesirable personnel.

Mr. Wilson expressed concern about all governmental workers forming a giant labor union, and the danger to the governmental processes in this country.

Mr. Carter: It doesn't sound to me from the memorandum or any of the information that we received that there is any thought to change for this section.

Mr. Aalyson: Has everyone reached the idea that I did that it might be a bad idea to extend civil service to lower subdivisions?

Mr. Carter: I would say that based upon what I've heard it would make sense to leave it about where it is.

Mr. Wilson: My personal conviction is that it has been extended too far already so I concur in your comments. I am afraid of this eventual organized governmental employee union. If the extension of civil service would inhibit that, I would be in favor of it, but I don't think it has anything to do with it. I'm in favor of leaving it alone.

Mr. Carter: If there was any reason to make a change, I'd like to clean up some of the english, but I certainly don't think it's worth monkeying with it just for that purpose. "The several counties" is an archaic phrase.

Mr. Wilson: This is one of the things that the definition of cities as 5,000 population that a lot of the villages that grow into cities don't realize. You are pumped automatically into civil service.

Mr. Aalyson: I don't suppose we ought to consider modifying it so as to make the merit and fitness to be ascertained by the General Assembly. My personal feeling is to shy away from this thing and leave it as it stands.

Mr. Wilson: I don't suppose there is anybody advocating strong changes in either direction.

Mr. Carter: It's kind of the unhappy medium.

Mr. Aalyson: We need a motion on Section 20 of Article II that there be no change.

The motion was made by Mr. Carter and seconded by Mr. Wilson.

Mr. Aalyson: The chair will entertain a motion as to section 10 of Article XV also.

Mr. Wilson: I will move that we recommend no change.

Mr. Aalyson seconded the motion.

Mr. Carter commented that the language could be cleaned up but it wasn't important enough not to take action on the section.

Mr. Carter: For example, in the second sentence "Laws may be passed providing for the enforcement of this provision..."

Mr. Aalyson: I think maybe that was intentional.

Mr. Carter: I'm sure it was, but it doesn't mean anything.

Mr. Aalyson: Unless it makes it mandatory that the legislature step in and do something. It doesn't mean anything now, of course.

Mr. Wilson: We can pass our proposal to the Commission and if there is any recommendation for change it will come back to us for further consideration. From a parliamentary standpoint I make a motion that we make no change in Section 7 of Article XV, regarding the oath of office.

Mr. Carter seconded the motion.

The chairman adjourned the meeting. The committee will discuss Research Study No. 43, Employee Welfare, at the next meeting which will be at the call of the chairman.

Ohio Constitutional Revision Commission
Elections and Suffrage Committee: Miscellanea
February 26, 1975

Summary

The Elections and Suffrage Committee met on February 26 at 10 a.m. in the Commission offices in the Neil House. Present were committee members Craig Aalyson, Chairman, Katie Sowle, Dick Carter, and Robert Huston. John Skipton, a Commission member, participated in the discussion. Brenda Avey was present from the staff.

Mr. Aalyson: At the last meeting we considered section 7 of Article XV, the section that deals with the oath of office; section 10 of Article XV which deals with civil service, and essentially decided that there would be no change recommended by us for those sections. We also considered section 20 of Article II which deals with the terms of office and salaries and decided that we would recommend no change and that we would make our formal recommendation at a future time, in order to give interested parties, if there were any, time to appear. In addition we considered section 4 of Article XV which deals with the requirements for elected or appointed officials. Although we arrived at a consensus of what we should do, which would be to require the elected officials to conform to certain requirements and appointed officials conform to the requirement just that they be residents of the state, I don't think we reached any agreement on language. I have prepared something which I would like to submit at this point. It is in essence the same as we discussed in the summary but it would be this: "No person shall be elected to any office in this state unless possessed of the qualifications of an elector as defined in Section 1 of Article V of this Constitution", which I think is what we agreed upon. A very minor modification in the second sentence "No person appointed to any office in this state shall assume such office unless a resident of the state." I thought perhaps it should allow for appointment while not a resident, but not the taking of office until he has actually become a resident.

Mr. Carter: That's precisely the thrust of what we were talking about. The question that comes to my mind is what is an appointed office?

Mrs. Sowle: What is an appointed to an office in this state?

Mr. Aalyson: This came to my mind also. I made this little change that I have suggested because I think we were talking in terms of no person shall be appointed to any office in this state unless a resident. That is not the way it reads now, but you still have the question of what is an appointive office.

Mr. Carter: What does the present constitution say?

Mr. Aalyson: It's a single sentence. "No person shall be elected or appointed to any office of this state unless possessed of the qualifications of an elector."

Mr. Carter: So really what the substantive change would be is to simply say that an appointed person has to be a resident before he assumes office.

Mr. Aalyson: But he need not possess the qualifications of an elector in order to be appointed.

Mrs. Sowle: So he would not have to meet the statutory 30-day requirement.

Mr. Aalyson: I don't think that we eliminate the 30-day statutory requirement. I think the statute could still require that. We did want to be careful to require that any appointed official should be a resident of the state while he was serving. But not to eliminate the possibility of selecting some well-qualified individual who might not be a resident at the time the appointment was set to be made.

Mrs. Sowle: Do I understand correctly that the reason for not asking him to be an elector but asking him to be a resident at the time he assumes office is that if he were required to be an elector, he would have to be a resident for the required period of time?

Mr. Aalyson: Yes.

Mrs. Sowle: So as far as he goes, that would be eliminated but at the same time, residency would be required.

Mr. Aalyson: Yes. If he's going to assume office, he has to be a resident while he's performing the duties.

Mr. Carter cited Hal Hovey as an example.

Mrs. Sowle: I think the purpose is a good one.

Mr. Carter: I am comforted by the fact that we haven't introduced any new material or changes in what is meant by an appointive office. We are simply going along ~~with~~ whatever interpretation is given the present constitutional provision. I like the change. I move that the committee make this recommendation.

Mr. Aalyson seconded the motion.

The motion was adopted. Mr. Aalyson welcomed Mr. Skipton.

Mr. Aalyson: The next topic to be taken up concerns the time for taking office by legislative and executive officers. It appears, as sometimes happens, that the legislature is considering the same problem which we were considering and that is the interval between the seating of the legislature and the seating of the executive branch. H.J.R. 6, which we have on the table before us, addresses itself to that question. I've had the opportunity to scan it briefly. It appears to me that perhaps a reading of that and a discussion of that might lead to some ideas that we want to take up and perhaps it will lead to us suggesting some changes in H.J.R. 6, maybe even coming up with an entirely new proposal of our own. Perhaps we should take some time for you to look at H.J.R. 6.

Mrs. Sowle noted that the bill recommended the removal of the declaration of election results to the General Assembly, and that the committee recommended its deletion but the Commission wanted to retain the ceremonial function.

Mrs. Sowle: I was interested to note in the minutes that Ann suggested at the Commission meeting that this provision had something to do with the gap, in other words the time of the reporting of the results to the General Assembly has something to do with the cause of the gap. I had been thinking purely of the ceremonial function and not as to the time element.

Mr. Carter: Where is it stated that the secretary of state determines who had the highest number of votes?

Mrs. Avey: That's a statutory provision.

Mrs. Sowle: And the present arrangement is that the governor and the lieutenant governor and so on take office on the second Monday while the others take office on the first Monday.

Mrs. Avey: This recommendation would change it so that everybody starts on the same day and the way they can do that is by eliminating the requirement that the general assembly receives the declaration of the election results.

Mrs. Sowle: But it doesn't change anything else. In other words, it doesn't change the other things that we were talking about in the Commission - the concern of the Commission about how ties are broken.

Mrs. Avey: It does make one change from our recommendation. On the last page of H.J.R. 6 it says that tie breaking decisions shall be made by the General Assembly on the day they convene in "first regular session", and in our recommendation we propose that ties be broken in the "next regular session". H.J.R. 6 would only permit ties to be broken in the odd-numbered year (which conforms to the present times for election of executive officers) and our proposal would permit ties to be broken in any year. If, for some reason, the time for the election of executive officers was changed, our proposal would permit the ties to be broken in any year, and this bill would limit it to the odd-numbered year, because that's what the "first regular session" denotes.

Mrs. Sowle: This refers only to the executive officers, and they would only be in the first regular session.

Mrs. Avey: But if for some reason that were changed...

Mrs. Sowle: But that would take a constitutional change, wouldn't it?

Mr. Carter: Yes, so you could change it at that time.

Mrs. Sowle: They would have to remember to change that, too.

Mr. Carter: I wonder why they added in Article II, Section 2 the terms of office? Isn't that covered already?

Mr. Huston: They eliminated it by deleting it from the first two sentences, and then it is restated in the final paragraph.

Mr. Aalyson: In the new language in the last paragraph they designate when the terms shall begin.

Mr. Carter: I see. Isn't that moot at this point?

Mr. Huston: Technically, legislative terms begin on the first day of January.

Mr. Aalyson: But they are changing that to the first Monday in January.

Mr. Huston: I can't see any reason to not have the terms start January 1, as opposed to the first Monday. Apparently they were trying to conform it to the executive branch.

Mrs. Sowle: Why didn't they conform the executive branch to the other?

Mrs. Avey: When the Governor was the only executive officer there was no fixed time for him taking office. When, in the 1851 Constitution, the other executive officers became constitutional officers, they fixed the dates for taking office. I don't know why they

chose Monday as opposed to another day.

Mr. Skipton: I know why we chose the days that are in the constitution at the present time. I imagine the authors of this bill did this because there is always the possibility that if the terms started January 1 they could call a special session and accomplish the same thing that occurred in January, before the first regular session begins.

Mrs. Sowle: Why couldn't the regular session begin January 1st?

Mr. Skipton: Previously it did, and the only reason for the change was to avoid having to meet on the holiday.

Mr. Carter: Yes, that was a change that your committee recommended.

Mr. Skipton: I came down here to Columbus many a New Year's Day. So it was only changed to avoid the holiday.

Mrs. Sowle: So they would rather miss the salary between the first and the first Monday then come down New Year's Day.

Mr. Skipton: They are probably figuring a month is a month no matter when you start. I don't know how the pay statute reads. I really don't feel any necessity for these proposals myself. I believe the reactions occurred to what happened in January, 1975 is enough to prevent it from happening very often again. And you just can't write into the constitution something to prevent every little hijinks that somebody may try to dream up. Being concerned about something that's going to happen in this little space in time ignores everything that can happen thereafter, too. And if we are going to write things in the constitution to protect against that, why don't we write a lot of additional things in the constitution to prevent hijinks that are going on right now. So, where do you stop when you start trying to write these kind of preventive provisions? I can think of dozens of things that the legislature is capable of doing right at this very moment that maybe we should put in the constitution. I'm not in favor of putting it in.

Mr. Huston: Would you think that the start of the office of the members of the legislature should be consistent with the start of the new executive officers?

Mr. Skipton: Actually, you know, our report covered that topic explicitly on page 32. It says "The committee considered and rejected an alternative calling for session commencement on the second Monday in January to avoid the holiday meeting because the constitution otherwise provides for the Governor and other state officers taking office on the second Monday in January. In deference to the dignity of the separate branches, the committee felt that the gubernatorial inauguration and convening of the legislature should not fall on the same day. The legislature meets a week earlier. It is organized and ready to transact business on the day that the Governor takes office. From a practical standpoint, joint convention and inauguration would cause problems of congestion and detract from public exposure and recognition of the legislature." I believe that is a fair statement of the rationale of the committee. One thing that ran all through the legislative article, we were trying to strengthen the status and prestige of the General Assembly and the feeling was that this was another device that allowed them to take office at a different time than the Governor, this meant that there would be more public focus on the convening of the General Assembly than there could be otherwise. And it was felt that this interval of time would be absorbed in the organization work of the General Assembly. The mere fact that somebody wants to play games with this sort of thing, my feeling then as it is now, is that I'll let public opinion take care of that.

I believe it will,too.

Mr. Carter: That's a point of view I had not heard expressed. There has been a great deal of stuff I've read in the paper in the editorial pages that says that this should be fixed up. We shouldn't have to go through this again. I haven't heard that point of view expressed. It's a viable view.

Mr. Huston: Do you think that the questions that have been raised by this so-called "shenanigans" and the posture of the legislation that was passed at that time - due to the fact that it's in the courts today, do you think that there is any reason that there should be a change to avoid that?

Mr. Skipton: The matters that are being debated in the courts could be debated at any time. That same sort of defect and alleged defect could be alleged of almost any passage of legislation. It wouldn't have to be limited to this. In other words, I don't believe the constitutional situation contributed to the problem that exists in the courts today. The problem that exists in the court is strictly one that whether they did comply with all of the mandatory requirements. If they did, they are alright. If they didn't, they aren't.

Mrs. Sowle: I'm like Dick. I hadn't heard these considerations before. They are pretty cogent.

Mr. Skipton: Basically, my feeling is that if you are going to write some safeguards in, there are some others that you'd better think about, too.

Mr. Aalyson: The problem, if there is one, might be solved, and I haven't had time to think about this, but it occurs to me that if you let the Governor take office first and the general assembly later, you preserve the independence situation with regard to recognition by the public of two different entities. On the other hand, you eliminate the possibility of the legislature trying to ramrod something through.

Mr. Huston: Don't you run into the same situation, because if the new Governor has a majority of the old legislature, he's going to try to run it through before the new legislature convenes.

Mr. Carter: One thought that occurs to me is a compromise and maybe it's a bad one, is to cut down the interval to a Monday and Tuesday type thing so that you make it very difficlut to conduct any legislation on a 24-hour basis, but at least you've got two different days. I think John has a valid point.

Mr. Skipton: I think this could have worked to just the reverse. When Lausche who was Governor with a Republican legislature - suppose there had been a Republican Lt. Governor - well, there was a Republican Lt. Governor. Suppose there had been a Democrat Lt. Governor under Lausche and he resigned to go into the Senate. You could have had the same situation occur. You did have it occur. You had a Republican Governor and a Republican legislature and if they wanted to engage in some hijinks, particularly if it was going to change from Republican to Democrat in a few days, it can be done by a special session. This won't prevent that. And that could happen. You go back into very recent history in the state and see how this thing could have done just the reverse, this wouldn't prevent it.

Mr. Carter: It would prevent this particular situation, and that's all it would prevent. The point is there are many other situations.

Mr. Skipton: In other words, if you had Lausche sitting there and he could veto something that the Republican legislature puts forth, he resigns because he wants to take a seat in the Senate, so Brown came in and they could have done this same thing at that time. It didn't occur, but this wouldn't prevent that happening. And this is a lot like what is going on in Washington right now. In today's paper it talks about Senator Pastore saying he wants to rewrite the 25th Amendment because he doesn't like having both the President and Vice-President not elected. He wants to force an election when this kind of a situation occurs. That's trying to lock the barn after the horse is gone, so to speak. And they are talking about events that are probably unlikely to occur again.

Mr. Carter: Well, we did agree that we would report back to the Commission on this matter. It would seem to me that the chairman should make a report.

Mr. Aalyson: Does anyone have a view contrary to Skip's? Do they think that there has been enough public reaction to this recent situation to justify a change?

Mr. Carter: Skip makes a very valid point from a logic standpoint, but I think that the public outcry on this thing is such that if we don't at least recognize the problem...

Mr. Huston: You can't always eliminate these problems but you can minimize them. Maybe Dick's suggestion on having the legislature take office on the first Monday and the executive branch take office on the first Tuesday is good. Give the legislature and the convening of the session the proper publicity, then the proper publicity to the executive branch the next day.

Mr. Aalyson: You might separate that even more by the first Monday and the first Friday.

Mr. Carter: That's essentially what we have now.

Mr. Aalyson: But you are in the same week. To try to get something through-in a week-end you can accomplish a lot. I don't know that you can do the same thing in three days.

Mrs. Sowle: What is the minimal time to pass a piece of legislation?

Mr. Skipton: It takes about 6 legislative days. Remember one time when the inauguration of the president of the United States was on March 4 or something like that? Congress was in session over two months before.

Mr. Carter: Yes, and that turned out to be bad. That was back in the horse and buggy days.

Mr. Skipton: But still the reason for changing it wasn't just to shorten that interval of time. It was the change in the presidency. It had nothing to do with these kinds of problems. I doubt if this would have even been much of an issue if the lapse in time hadn't been so short. That's what highlighted this particular problem.

Mr. Carter agreed.

Mr. Skipton: As a matter of fact, it could have worked out very well and maybe the Governor would have been sworn in a day later than he was. You wouldn't have even had the legal problem then.

Mr. Carter: I do think there is a certain amount of logic, Skip, when the electorate votes for new officers to make their choice known, there is a certain amount of logic to saying all those people should take office at the same time so that you don't have this blend of the rejected and new people.

Mr. Skipton: The thing that really should be considered here would be why the wait from the first week of November until January at all? Why don't we swear in the new office holders immediately - eliminate lame duck sessions entirely? In other words, following the election there would be no lame duck and the new body would take office as soon as the certifications of the elections are made. And instead of waiting for the Governor to be inaugurated, inaugurate him on the 20th of November. That's been proposed, you know. This is not an idle proposal.

Mrs. Sowle: Yes, because everybody starts doing things that are occasioned by the fact that they are going out of office in the executive branch as well as the legislative branch.

Mr. Huston: What if you have a recount situation that is provided for today with the minimum margin in an election? It takes time to get that recount handled so that you really wouldn't have any person elected to take office.

Mr. Skipton: Most of the debate you get on this stuff, really, theoretically, is on the basis of the people have spoken and let's put the people's representatives into office now. This is mickey-mouse to me. If you really want to do something about it, just forbid lame duck sessions.

Mr. Carter: Let's examine that a little bit. Clearly, in the administrative branch, in the executive branch there is a certain time that is required to effect an orderly transition. After Rhodes knew he was elected, which was in doubt for 24 hours, then he's got to put together an executive team. You've got to give those people time to get organized. All of the departing people have to wind up their affairs.

Mr. Skipton: In other countries in the world they just do it like that.

Mr. Aalyson: If we had the parliamentary system, we'd be faced with that each time. I don't suppose anybody suggested that.

Mrs. Sowle: That change is immediate, is it not?

Mr. Skipton: Yes.

Mr. Huston: I wouldn't say that they have been so successful.

Mr. Skipton: What I'm getting at is that you can see that there is a lot more basic, and I believe, much more profound questions than this particular problem. Because this problem is behind us. It isn't going to happen for 4 years anyway. And if we want to look into these kinds of problems, then let's look at the whole gamut of them, not just at this one little one. You go to the public and have an election and make people believe they've solved a problem and you don't even treat the most basic questions involved in the transition from one group of representatives to another.

Mr. Carter: You could also solve these problems doing what you're saying. Of course these are little things, but that's what you see, of all these state employees being added to the payroll in this period.

Mrs. Sowle: That's what I was referring to.

Mr. Carter: I think it would be a good thought, Craig, that it would be well for this committee to take a look, as John says, at the whole question of succession rather than dealing with this one little question. One of the things that would be helpful to us... there are practical problems involved, there are practical judgments that have to be

made, is what other states have done on this. It opens up a more basic question that we ought to be looking at. I think that's a very valid observation.

Mr. Huston: Then our recommendation on Article III, Section 3 is already obsolete.

Mr. Aalyson: I suppose that the time interval between election and the taking of office has been based primarily on the need for this transitional process, or at least the feeling that there was a need. What we are looking at, I think, right now is whether there is in fact such a need. If there were no period of time available, or at least such a lengthy period of time available, maybe we would encounter such problems, as Bob has suggested, with a recount, although recounts seem to affect so few of the elected people in the state. One would have to guess that if there were a much shorter period between the election of officials and the taking of office that there would be a change in the planning procedures of people who are running for office so that they would be making their plans before their elections and they would probably be able to take office much more quickly. They would know they had only a certain amount of time and would conform to that, as they do in the parliamentary systems - they pretty much know what they are going to do.

Mr. Carter: Is it not true that, let's take the Governor for example, in the event of a very close election where it's uncertain, doesn't the present Governor serve until his successor is duly elected and qualified? In other words, if there were any doubt, wouldn't the present Governor serve?

Mr. Aalyson: We wouldn't be without a governor.

Mr. Carter: Let's suppose we were to say the governor takes office the next day after the election.

Mr. Skipton: We have the succession things that are designed to eliminate that. I don't believe the governor serves until the successor is qualified.

Mr. Carter: We wouldn't want to be in a position where we didn't have a governor.

Mrs. Sowle: That's right.

Mr. Aalyson: It might not be all bad. It would eliminate this business of a newly-elected legislature trying to herd something through.

Mr. Carter: You do need a chief executive though, it seems to me. Not to have a governor in case of an emergency. Let's suppose you have a riot. You have to call out the National Guard.

Mr. Skipton: Well, you have all of these succession provisions to prevent that. Let's suppose for purposes of discussion that we were taking the parliamentary approach where the election is on November 3 and the new governor and his administration takes office on the fourth, the next day. Then there is a question when the election comes up as to who is elected, so that you can't determine who is governor in the interregnum while the results are being certified, etcetera, etc. The secretary of state presumably has to certify the results. Now, the query, is the old governor going to serve until his successor is qualified?

Mr. Skipton: I don't believe so.

Mr. Carter: Then who would be the governor?

Mr. Skipton: The new lieutenant governor. Under the recommendations that the executive committee made, he would be.

Mrs. Sowle: But the lieutenant governor would be taking office along with the governor, so we'd have to assume if he were going to succeed...

Mr. Carter: Then it would be the next guy down.

Mrs. Sowle: But everything was alright in that election and he could take office.

Mr. Carter: Well, let's assume they run in tandem, and it's in doubt, then there is a succession, that's what Skip is saying, so we wouldn't be without a governor.

Mr. Aalyson: Is the succession provided in the event that - in any event - that the governor cannot serve?

Mr. Skipton: Yes.

Mrs. Sowle: The lieutenant governor would serve temporarily.

Mr. Skipton: Under the existing constitution you have the line of succession and all we attempted to do in the recommendations of the executive committee was to spell it out - to make it absolutely certain.

Mr. Huston: The present constitution provides only for a 4-year term for governor. So I think that once his four year term is up he's out. He can't hold over until his successor comes in.

Mr. Skipton: That's my feeling, too, Bob.

Mr. Carter: But you've answered the question. The concern is that there would be a chief executive function that was being filled by somebody until the election was decided.

Mrs. Sowle: I have a question. How long does it take now to be certain of the outcome of an election?

Mr. Carter: It depends on how close it is.

Mrs. Sowle: Before the secretary of state... isn't that a matter of days?

Mr. Carter: Oh, yes, there has to be a canvass. I'm not recommending the next day.

Mrs. Sowle: Well, I realize that. But what I'm wondering is, let's say, arbitrarily, it's going to take an average of 5 days for the returns to be sent to the secretary of state by the various boards of elections, and counted and certified, and whatever. Is it possible for the same scramble to occur in that five day period that we saw in January?

Mr. Carter: I don't think so because you don't have the problem. The big problem that came up this January is two different elections overlapping.

Mrs. Sowle: Okay, but this (H.J.R. 6) would solve that.

Mr. Carter: This would solve that, that's right. But as Skip points out, you can draw many other circumstances where you end up with a similar situation.

Mr. Skipton: We could have had it this time. Suppose Gilligan got an offer for a job that he couldn't resist and so he resigned. Suppose he resigns in November. You'd have

the same situation, but it would have been reversed as far as politics is concerned.

Mr Huston: In 1947 the Attorney General ruled that if the Governor-elect died prior to being inducted into office, the duties and powers would not devolve upon the Lt. Governor, and also held that if a person elected to the office of governor dies subsequent to his election thereto and prior to the second Monday in January, the person holding said office is entitled to hold same beyond the term for which he was elected and continue therein until a successor is elected and qualified.

Mr. Aalyson: Attorney Generals' opinions don't have the force of law.

Mr. Huston: I realize that, but there is an opinion on it.

Mr. Skipton: I don't believe it would hold because the governor's term is set by the constitution.

Mr. Huston: That's what I would say.

Mr. Aalyson: Skip, does your succession provide that the succession shall operate no matter what the impediment is to the person taking office? For example, let's assume a situation where the incumbent governor does not run but two other people do run, and there is a question about the winner. Then if there was a tie or there was a close vote as to them the Lt. Governor would step in and assume the responsibilities of Governor?

Mr. Skipton: It spells it out and makes it very clear.

Mr. Aalyson: I think we can very easily consider moving the date of assumption of office up to an earlier period following an election.

Mrs. Sowle: Let me try to pursue my problem a little further. If the idea of going more closely to the parliamentary kind of turn-over of office, if the purpose of that is to eliminate the evils of the lame duck legislature and "lame duck" administration, if that's the purpose, do you really meet that purpose if you have a short period of time, even a matter of days. Because we saw what could happen in a matter of days in January.

Mr. Carter: Well, we've made it more difficult, basically.

Mrs. Sowle: It seems to me one of the problems we had in January, you were talking about in what you were reading from the report, the kind of dignity of the separate branches of government, and I think that's a very legitimate concern. If you have this scramble every time you have a change in administration, and not just every now and then, don't you have a problem of reflection upon the dignity of government? A legitimate criticism of what happened in January, I think, was it just made state government very undignified. I think government as a whole and the two parties both lost a lot of respect in the kind of think that happened, and I wouldn't want to have that happen every time we change office.

Mr. Carter: If you had a short enough period, like a week, then you could simply have a constitutional provision that you have the legislature dissolved on election day.

Mr. Aalyson: What would you do in an emergency?

Mr. Carter: I can't conceive of an emergency of such a nature that would require legislative enactment here. I would be much more concerned about the executive, because the executive has pretty broad powers in case of an emergency. So that wouldn't bother me. So the trade-offs, and I'm just thinking out loud here, that once an election is over

you have a tendency for the lame ducks to try and get the things done while they are still there. To make their political appointments, pass laws, etcetera, and of course they are tempered by the public, you are very,very correct on that, but there is still that tendency. The other thing that is not done is that government comes to a halt during that period. The advantage is that the incumbent administration has that period to get organized and to think about what they are going to do without being faced with the day to day responsibilities of running the show. So it gives them an opportunity to prepare programs, strategies, bond issues, etc., before they are faced with the day to day responsibilities. So it's a series of trade-offs, as I see it. The question on my mind is: do we have a reasonable trade-off at this point roughly of two months from the date of the election and the date of succession to power?

Mrs. Sowle: It looks to me like a problem with a great many ramifications, but I think that I agree that it would be worthwhile to take a look at it in detail and maybe see if other states have considered it and see if we can get any government experts and political scientists, too.

Mr. Carter: I think Skip has done a beautiful thing in that the role of this commission, and that's one of the advantages of the commission, is that it doesn't have to respond on a day to day or week to week basis to the exigencies of the moment. One of the ideal things about the commission approach is that it theoretically has the time to think and view and look at basic questions which transcend the matters of the moment. The legislature doesn't have that luxury. So I'm very much in favor of this idea of going back and taking a look at this whole question of succession of power and maybe we will conclude that what we've got now is as reasonable a compromise as you can get. But it might also lead to some significant observations. I would like to see a reasonable survey done of what the time interval is in other states to give us some feeling as to where we stand and can benefit vicariously, I think, from what is going on in other states.

Mr. Aalyson: I can't imagine that this is a novel question.

Mr. Carter: What has happened over the period of time is that communications have increased, transportation has improved. Back in the days when people walked and rode horses, you had to have long times. Things didn't move at such a rapid pace as they do today. But with the situation we've got today from a technical standpoint the succession could be the next day.

Mrs. Sowle: We have inherited these time gaps from our ancestors.

Mr. Carter: Sure the technological change has changed the scene. So I think it deserves a new look.

Mr. Skipton: In all of the great effort to shorten the campaign time... In fact, we've moved our campaign time from May to June and there were proposals to make it September. If you had a primary in September, do you realize that the campaign period would be shorter than we have now for the transition?

Mr. Carter: Yes, that's a good point.

Mrs. Sowle: And you have raised a very basic issue.

Mr. Carter: Well, the, Mr. Chairman, what I think is that in view of the discussion, I would like to recommend that we report to the Commission that the committee would like to take - this has triggered a broad view of the succession to power and the factors that are involved, the abuse of the time limits, and that we would like to conduct a rather in depth review of relevant material.

Mr. Skipton: Actually, the press might just like that sort of thing because frequently they editorialize on those long gaps. They might like such a study to be made. I don't believe it would look like a stall to them if you broaden the scope of the examination of the problem.

Mr. Carter: If the legislature feels any pressure to pass this, this is the kind of thing that legislatures can do. Our job is to take a more in-depth approach. I think this is just an excellent point.

Mr. Aalyson: I think it has been a fruitful discussion. I think we should report to the Commission that we are going to take an olympic look at this.

Mr. Huston: I agree. I think it deserves a lot more study because there are a lot of other sections not only of the constitution but of the laws that are also applicable.

Mr. Aalyson: I think we have reached the conclusion with regard to this matter, and perhaps we should pass on then to the other discussion if no one has any objection, of Research Study No. 43.

Mr. Huston: Is there any need to follow H.J.R. 6?

Mr. Carter: We have always taken the position that we are an advisory creature of the legislature to serve their purposes, and we do not see our role to interfere with legislative matters or to take a position on the matters before the legislature unless we feel it conflicts with something that we feel very strongly on. So I would say H.J.R. 6 is the typical legislative band-aid for a cut. There is nothing to prevent you as a citizen if you feel so inclined to go down and attend a committee hearing and testify. The Commission as a whole tends to shy away from getting involved in legislative matters. Is that a fair statement, Skip?

Mr. Skipton: That's been our policy up 'til now. We have sometimes expressed ourselves in Commission meetings. We have only attempted to act as a body on issues that we have originated ourselves. In other words, if we were the drafters, we would be over there plugging for it.

Mr. Carter: On occasion, we have been asked to give the endorsement of the Commission to some matter pending, by the legislature, and as a matter of policy we have said that we were going to follow the commission procedure and not act on an ad hoc basis.

Mr. Huston: I was thinking purely from the standpoint that if they passed this, it makes it difficult for them to do much with a commission recommendation.

Mr. Carter: That's a risk.

Mrs. Sowle: I would doubt that they would be in a huge hurry on this. So if they know that the Commission is thinking about it they might very well take their own time.

Mr. Aalyson: Well, then, passing on to Research Study No. 43 and section 34 of Article II which concerns itself with fixing and regulating the hours of labor. The research study seems to indicate that there would be no significant benefit to modify or repeal this particular provision and that perhaps some detriment in an attempt to repeal it. I saw one change that might be made, and it probably doesn't merit consideration, but in the final clause "No other provision of the constitution shall impair or limit this power" a better word would have been "No other provision of <u>this</u> constitution..." That's

nitpicking and I admit it. I don't think it would justify an attempt to modify the section.

The other committee members concurred.

Mr. Carter: I was persuaded by the concept of looking at the two, one in context with the other. I think on Section 34, even if there were good reason to take it out, the political realities would not favor repeal.

Mr. Aalyson agreed.

Mr. Carter: Section 37 I am persuaded, however, that that is statutory material. That it is no longer required in the constitution, and the reason is that it would have no practical effect, particularly if you leave section 34 in there.

Mr. Aalyson: And in light of the decisions that there have been on this section, it does seem to be superfluous.

Mr. Skipton: Are all of the workmen's compensation provisions still in the constitution?

Mr. Aalyson: There is only a single constitutional provision on workmen's compensation and it is still there and will be recommended for no change.

Mr. Skipton: My contention is why worry about taking out 4 or 5 lines when you have all of that in there?

Mr. Carter: Skip, I would say we spent 2, maybe 3 meetings on workmen's compensation, and you are right, it is statutory material, but there is such opposition to removal.

Mr. Aalyson: There was a time when it was felt that maybe it was necessary in order to give the legislature the necessary power, and maybe the philosophy has changed but it might meet some opposition to removing something that's already there that you wouldn't now encounter.

Mr. Carter: Business sees certain protections in the constitutional provision, which if were removed, would open Pandora's box. We finally decided that we were going over against the objection of our chairman, that we had better leave it alone.

Mrs. Sowle: I was persuaded by the memorandum that section 37 probably ought to go, particularly in light of the lack of legislative support for it - the repeal of the implementing legislation.

Mr. Aalyson: The necessity, if there ever was any, for protection, I think has now disappeared. The organization, not only of labor in general, but municipal governmental employees, which seems to be sort of snowballing, with administration and collective bargaining. The question, it seems to me, is whether we would encounter any objection on the part of a significant group if we try to repeal it.

Mrs. Sowle: It would have to be explained, as we've run into with other matters. But it really has no purpose or effect. I move to recommend the retention of section 34 of Article II and the repeal of section 37.

Mr Huston seconded the motion.

Mr. Aalyson: I have no further discussion, personally. I think I have stated my piece.

Mr. Carter: I agree with the argument. We are in essence saying that it's worthwhile. As Skip says about removing 5 lines from the constitution, I think part of our job is to remove these things. We have to make some attempt, else they just keep aggregating over a period of years.

Mrs. Sowle: If it were just sitting there not doing anybody any harm at all, I'm not sure I would care at all. But I personally don't like the idea of a provision being in the constitution and having no effect. In other words, it's being violated in the sense. The supportive legislation has been repealed.

Mr. Aalyson: The judicial decisions have lessened its effect.

Mrs. Sowle: Yes, and I think it is poor policy to have things on the book that are not only not being used, even more it's not being observed, it's being violated.

Mr. Carter: At least the intent has been violated.

Mrs. Sowle: I was thinking not only about the interpretation but the repeal of the enabling legislation. There is nothing at all to effect it any more, is my understanding. Isn't that correct?

Mr. Aalyson: There has been that repeal. I'm not so certain that there need be enabling legislation.

Mr. Carter: It doesn't require legislation to become effective.

Mrs. Sowle: That wasn't my interpretation of the memorandum. There was a comment that section 37 was not self-executing.

Mr. Aalyson: Section 37 is self-executing. It says "it shall not exceed 8 hours a day or 48 hours a week".

Mrs. Avey: On page 7 of the memorandum, it says the court said that "Section 37 of Article II was not self-executing within the definition that a self-executing provision is one which supplies the rule or means by which the right given may be enforced or protected...but nevertheless, after the adoption of that provision, the legislature was without power to affirm or make lawful a working day of more than 8 hours." They held it not self-executing in one sense. It even contravenes the intention of the framers. They obviously wanted it to apply to a broader range of things. So it is faulty in two senses: one, the legislature doesn't want it, and two, it doesn't do what it was intended to do in the first place.

Mr. Aalyson: Further discussion? It has been moved and seconded that Article II, Section 34 be retained in its present form and Article II, Section 37 be repealed.

All present voted aye, no nays.

Mrs. Avey: We have completed all of the matters before us. We're almost running out of things to do.

Mr. Aalyson: We may have enlarged our scope greatly.

Mr. Carter: Do you have any problem, Skip, with this committee to take a look at this succession problem? I'm speaking in view of your previous committee recommendation.

Mr. Skipton: No.

Mr. Carter: Would you be willing to sit with us on this?

Mr. Skipton: Yes. I'll be happy to sit whenever you wish me to. I really haven't given any study to the problem at all. I'm just aware that there are these other issues here.

Mr. Aalyson: Your committee's earlier discussion on the executive branch have generated some ideas that we hadn't thought over and maybe would never have thought of. The view we were taking of the situation was pretty well confined to that one problem. It's nice to have a larger view.

Mr. Skipton: I'll try to review what the rationale of our previous studies were.

Mr. Carter: As Bob pointed out, we would be in the position, if we recommended some changes, of modifying an existing recommendation. I don't see any reason why we can't do that. Our feet aren't cast in concrete. We haven't done it before but I would certainly say that if we think there is something better, we should 'fess up.

Mr. Skipton: I can't recall what we say in our reports. It may be that we don't say anything in our reports on the subject.

Mr. Carter: I was thinking in terms of the elections and suffrage committee report.

Mrs. Avey: The final report hasn't been made yet. Only the summary has been printed. I don't know that a summary has ever been changed before.

Mr. Carter: To my knowledge this is the first time we have had a summary. I'm not sure I know what the difference is between the summary and the report.

Mrs. Avey: One difference is that the summary leaves out the language as presented in both forms: as it would look after amended, and with the amendments and deletions. It also leaves out much of the historical stuff. It merely focuses on the effect of change.

Mr. Skipton: I believe they have written a summary on the executive report and it's less than 1/5 as long as the full report.

Mr. Carter: If we could get this perspective on what other states are doing that would be helpful.

Mr. Aalyson: I would think that there is some general discussion of the advantages and disadvantages of the parliamentary system as opposed to our own which would incorporate some survey of the states.

Mr. Carter: Looking to the other responsibilities of this committee, do we have any other responsibilities before us? Mr. Carter said he thought of a name for the committee: the "What's Left" committee, since we're doing things that haven't been covered by other committees, but without the connotation that they aren't of any substance.

The meeting was adjourned. The date of the next meeting will be set after receipt of information dealing with the succession question.

Ohio Constitutional Revision Commission
"What's Left" Committee
May 13, 1975

Summary

A meeting of the "What's Left" Committee was held on May 13 at 10 a.m. in the Commission offices in the Neil House. Committee members present were the chairman, Craig Aalyson, Robert Huston, and Katie Sowle. Ann Eriksson and Brenda Avey attended from the staff.

Several County Commissioners were present to testify before the committee on Article II, Section 20. Mr. Adolph Maslar, Executive Director of the Ohio County Commissioners Association, introduced them to the committee: Wilbur Rase, Scioto County Commissioner; John Ursu, Columbiana County Commissioner; Russell Hesske, Jefferson County Commissioner; Don Workman, Ashland County Commissioner.

Mr. Aalyson: The committee has considered Section 20 of Article II of the Constitution which, as you are all well aware, concerns itself with in term pay raises for officials of the state. It was the general consensus of the committee at that time that we would not change that provision but we felt that we should offer the opportunity for those who were interested in that provision to come in and make their feelings known with regard to the subject. We welcome you and extend our invitation to you to speak your minds on the matter and assure you that the committee will give every consideration to what you have to say and will pass the information along to the full commission. So, we're open.

Mr. Maslar: Mr. Chairman, there are 264 county commissioners. Eighty-eight of the 264 normally are at the short end of the salary schedule due to the constitutional provision and the way the legislature operates which means the normal pay raises that are passed, if they are, normally will affect two of the three and usually leaves the third one hanging. This creates a very serious problem within the group because as fate would have it, usually the lowest paid commissioner tends to have the most seniority. It creates a sore spot and to explain it to the people or to the commissioners or to the public is difficult because we don't set the salaries. As you know they are set by the legislature. We think our case is unique even though I know it was up on the ballot for the voters' selection twice last year. Of course, I didn't help to write the wordage as it was presented to the voters. I offered to help Ted Brown, but he didn't accept my offer. The ballot language said "in term pay increase" and I think that right away turned a lot of the voters off when they saw that. Maybe there is a better way to write it. I don't know. They do have a ballot board now that's going to help write the ballot wording. And maybe this is really what started me thinking about the possibility of presenting it again. I did ask several commissioners to come in because everyone of the commissioners in this room is a senior commissioner, usually in the county. They have been on the short end of it and I thought it would be appropriate that this committee hear their version of it. Sometimes it is embarassing and they get needled and so forth. Now, I can't speak for the auditors because there is only one auditor in each county and the only other office holder I could think of where there could be a similar problem would be in the senate. But the senate then sets their own salaries. So if you leave them out and the auditor being only one in each county, you've only got one office that really is being discriminated against and that is the lone commissioner in Ohio. The single commissioner just got caught up this past January, if re-elected. He is always two years behind.

Mr. Aalyson: You're speaking of the amendment that would have provided that had a pay raise gone to an individual officer in the county, then the other officers would have been entitled to that pay raise also. And it was defeated.

Mr. Maslar: Yes. I think it was issues one and two last year.

Mrs. Eriksson: We reproduced the language, and you have it in front of you, that was on the ballot last year. It included the proposal to amend Section 31 which would have taken care of the senators.

Mr. Maslar: To me, it seemed to be unclear on the ballot. When you went to the voting machines, which we used in Franklin County, I'm sure a lot of the voters were hesitant because they didn't understand it. I've been involved in a little bit of this and usually when they don't understand, they tend to vote no. There is also the possibility of repealing Section 20, unless that would create other major problems.

Mr. Rase: The one that we had on last year was defeated for some reason. I agree with Dolph that when people don't understand any issue that's on they vote no. Also we know that there is an awful distrust of public officials in our country today and they look at this and say, "Here he is, he's voting himself an increase in pay." I happen to be one of the oddballs and here are more oddballs and there are 88 of us as Mr. Maslar said. We're usually the senior commissioners. January 1 is the first time that I have had equal pay with the other commissioners. Because I was re-elected to another term. Two years ago I had two new commissioners come in the office who were as green as grass, they didn't have any experience and they were receiving 180 dollars a month more than I was receiving. Yet I was the chairman and took all the flack. Maybe I am a little unique. Since I have been commissioner I have made the commissioner's job a full time job, which it is in a county of our size. Whenever you cross an 80,000 population, from there on up, in my way of thinking, if you are going to be a commissioner you had better be a full time commissioner and not just part-time. Because we have been in everything, sewers, water, to try to upgrade the county to give the best services that you can. I'm working out of the office every day and about 3 nights a week you've got to go to meetings and you've got to turn down meetings. It's total discrimination to sit on the board with someone sitting alongside of you with someone who is not performing as much as you are and making more pay. This is bad. I know that you might come back and say, "Well, you ran for the office." And they also ran for the office seeking the same pay that I was receiving but in the meantime they received more pay, between the time they were elected and the time they took office. Between election in November til January 1, which amounted to $180 a month for them. This is discrimination if there ever was any. I don't really know how to solve this problem because we thought maybe it would have been solved last fall, but we saw the results of the voting and I will give you the reasons why I believe they voted that way. On any issue that is before the voters, if they understand it they usually back it. If they don't, they'll vote against it. We were trying to put a bond issue across for a new hospital in our county. It was defeated two times badly. And then we sat down and went over with the people that were trying to put it across, it was a county hospital, we got the hospital commission together and talked to them and had meetings, and the third time it went across just as good as it had been defeated the other two times. Because they felt that we were trying to hide something from them. But to try to explain the language that this has here to the common people, there is no way.

Mr. Aalyson: Will the ballot board tend to alleviate that problem of not understanding?

Mrs. Eriksson: I don't know.

Mrs. Sowle: Is there a bill pending before the General Assembly to propose a new constitutional amendment along these lines?

Mr. Maslar: Not on the repeal of Article II, Section 20. I believe there is a senator who is willing to sponsor one.

Mrs. Sowle: I wonder how much resistance you might be meeting from the point of view that since it was just voted on, is it a good time to send it back.

Mr. Rase: It would be suicide unless the language was there and it's got to be very plain, this is my way of thinking.

Mr. Maslar: Mr Chairman, I believe the reason that they created this ballot writing commission was to assist the Secretary of State. This is what they had in mind. Because a lot of times when you get involved in a technical type matter of constitutional change you vote yes and you mean no and so forth.

Mrs. Eriksson: They drafted the ballot language that was on the ballot last November on three issues. But they weren't in existence at the time last May when this language was on the ballot.

Mrs. Sowle: Of course the ballot board doesn't draft the language of the proposal. It drafts the summary that appears on the ballot and an explanation that goes out for publication. It doesn't draft the proposal itself.

Mr. Rase: Take 20a here. It starts out "Notwithstanding section 20 of Article II". How many people in the United States know what Section 20 of Article II is, outside of the county commissioners and a few others in the legislature? If it would come out and say, "All elected people....county commissioners....legislators....shall receive equal pay....yes or no?" It would have been overwhelmingly passed, I believe. When we start saying all of this we've just lost our purpose. I took humiliating remarks from people, "Boy, you must be awfully dumb to have two greenhorns come in that can make more money than you can." And you get it every day and it is very discouraging. I'm not complaining on the amount of pay that I was making. I'm just saying it's a matter of discrimination.

Mr. Hesske: I'm complaining about the amount of pay that I am making. I have been there five terms. I was a young man and I didn't have grey hair. I've got it now. Since 1959 up until this present date, even as far back as 10 or 12 years ago, there is no comparison as to what you do in office now as opposed to what you did then. And I don't care how small a county is or how large the county is, if the county wants to progress, the commissioners must be out working. We have federal help, and we have so many programs that the county commissioners can take advantage of and we have taken advantage of. We can move and we have been moving.

Now, in my case, I have been through several sets of commissioners. And I must act as the father, confessor and guidance counselor to keep the county moving in the direction of progress. Sometimes it is very very discouraging to know that I'm doing this and he's getting more. This is only natural for all Americans because we all want to be equal. When you get this fancy jargon on the ballot, even the fellow who is voting for his interest doesn't know what it means, so how do you expect the public to know? You certainly can't buttonhole all of the people of the state of Ohio. Eighty-eight commissioners can't buttonhole all of them to start to explain individually to each and every voter, that it provides for equal pay.

Mrs. Sowle: How long are the terms of office?

Mr. Hesske: Four years.

Mrs. Sowle: So it's potentially a four year delay.

Mr. Hesske: It's a two year delay actually.

Mr. Rase: Our constitution is set up so that one is elected for four years and then two years later two are elected. So that you won't have all three completely green commissioners - the same as the senate. I made the statement, I wasn't complaining on

the pay, but if I was running for county commissioner for the pay, I wouldn't be here because I could take a long handled shovel and go out here and make more money. The problem is you are being discriminated in this pay, and I'll also have to say that in my three terms as county commissioner, our workload in the commissioners' office has more than tripled.

Mr. Huston: Is this true with the large metropolitan areas? Is the work of the county commissioners increasing or is it decreasing?

Mr. Hesske: It's increasing from the smallest to the largest county. But the only difference is in the larger counties they have the financing money to hire, in some cases, administrators who are paid twice as much as the commissioner himself.

Mr. Huston: Where you have a metropolitan area that encompasses practically the whole county does the county commissioners'job require substantial activity now?

Mr. Maslar: I'm familiar with most counties and in the large counties the work has more than trebled. I've been here 11 years and we're in all kinds of federal programs that didn't exist 11 years ago. Seed programs, federal revenue sharing programs, we have workships now on federal programs alone, which didn't even exist. Plus we have state programs now and more coming. In the larger counties the commissioners meet one morning and one afternoon in regular session - this is their official session, but it's misleading. It's like a doctor's office. The doctor is there from 10 until 2 on Tuesday and Thursday, but he's in the hospital from 10 o'clock at night until 5 in the morning making rounds and doing what he has to. Large counties have more staff, but then they have horrendous problems from welfare on down.

Mr. Aalyson: The question which confronts us as a committee is not how much work is done and whether the pay is adequate for the work, but whether this constitutional provision should be modified to permit everyone who is serving to receive the same pay. I think we should stick to that proposition because we have no power to set the pay scales that maybe should be set for county commissioners.

Mr. Ursu: I am John Ursu, Columbiana County Commissioner, and I have the feeling that if everybody really knew what we were talking about, the discrimination against one commissioner, that there would be no one that could defend the other side. I don't think the people that drew up the constitution meant this to happen. I think the constitution is supposed to be a thing which makes everybody equal, and certainly as it has worked out in this particular case, it is not equal. We're the ones that are complaining because we're the only ones that haven't been taken care of, really. You take every other office in the courthouse and they have been taken care of. You can start off with common pleas judges. A few years ago they got a constitutional amendment which allowed them to have in term pay increases. And I think they deserve it. Particularly today with the inflation going 10% a year, they have a six year term, if they had to work for the same salary for 6 years, they'd really be behind in this day and age. So they were taken care of. County court judges and municipal court judges thought they were covered by the same constitutional amendment, and they weren't. Another constitutional amendment took care of them. But in addition to that, the legislature last year passed a bill that said we couldn't collect any of that money that we paid these county court judges that they received illegally. The other office holders, the recorder, the treasurer, and engineer, and the sheriff, what happens to them? It happened in '64, which I'm familiar with, and '68 and '72, and I wouldn't be surprised if it happens in '76. We had an election in '64, the election was in November, about 3 or 4 weeks after the election the legislature met in special session and passed a raise for everybody, including the two commissioners. Us poor guys in middle term, we don't get it. Every time it shortchanges us. And what it has meant to me is that my fellow commissioners have been making $12,100 a year. I've been making $9,900 a year. For two years that's

$4400 it's cost me, this last time. In the future, I think there will be a pay increase for everybody and I think it's going to amount to about $3500, you multiply that by 2 years, which, if I'm lucky enough to get re-elected in 4 years, that's going to mean about $7000 I'm going to be shorted again. So I don't think there is anybody that can defend, if they know what is going on, this position. And I would think that the constitutional amendment should be short and to the point. Let's not talk about all of the other office holders. Let's make it just like the judges,"All county commissioners shall have the same salary". And that's all that we're after.

Mr. Aalyson: Thank you, sir.

Mr. Workman: I'm Don Workman from Ashland County. I served my first term in 1962 and I agree with everything that the gentlemen have said here. They touched on most of the points quite well. I have been through the same things over the years and it is discouraging, sometimes. Particularly one of the things that happens in the commissioners' office, the first thing when the new men come in, you have an appropriations on January 1. And as these gentlemen said, you've got two new men sitting down here. They know nothing of the departments, they know not their needs, or what their expenditures are. As Mr. Hesske said, you've got to be the father confessor and everything else and attempt to put it on the line. And if anything goes wrong, you usually are the one, you're president of the board, you've got to front for the board. And if the press has any discouraging remarks, they direct them to the chair, usually. And so you have to take the flack with it. And I, too, think its discriminatory. In the remarks about the way the issue was presented to the voters, I think I have a very good instance. We passed a piggy-back sales tax. We had a referendum against it. We had two commissioners, and I was one, that passed it on the emergency measure. Two commissioners were up at the same election as the referendum. The bill passed by an almost 9% majority and both commissioners went down because of the bill, because of the wording of the ballot. It said, "No, the action shall not be accepted" and they voted "Yes". Consequently the bill went in beautifully and the people defeated the two commissioners, all because of the wording on the ballot. I think it's very important in the writing of the ballot language. I, too, in my years, felt discriminated against, over the long haul because you do have some very tough situations. I also believe that the constitution was set to the people to protect the in term raise and we have nothing to do with that, and that's where I say it's unjust. If I could raise my own salary, I would say, "This is great." But we don't have that privilege and so I think there is where the constitution maybe doesn't do what it was intended to do.

Mr. Aalyson: Thank you, Mr. Workman. Other remarks? Either from the guests or members of the committee? (There were none). We thank you for appearing, gentlemen. We will certainly take your comments into very careful and serious consideration in our further deliberations in this matter.

The commissioners thanked the committee and chairman.

Mr. Aalyson: To proceed with further discussion of this particular problem, then, I think I stated when we originally considered this matter that my feeling was that since no one in the state sets his own salary except the General Assembly, I had no difficulty in amending the present provision to provide for in term pay raises to persons who do not raise their own salaries. I do feel that probably there is a discriminating consequence of what does happen here and that it should be remedied if it can be. Certainly, I don't think it would be a major problem to reconstruct a provision that would permit an in term pay raise to those who don't set their own salaries. Of course, we discussed the fact that there might be an in term decrease that was designed to evict somebody from office. I think that it could be handled if the other members of the committee feel that the situation is serious and that it deserves our further consideration. I'm inclined to think that it does. I agree with what these gentlemen said that the constitution is

not designed to cause a discrimination to exist in any area. And perhaps it does here.

Mrs. Eriksson: If you wanted to consider a change, it would be appropriate to consider the same change made for judges. The constitution now prohibits a decrease in term for judges. The constitutional language for judges originally prohibited both increase and decrease, and now prohibits only decrease.

Mr. Aalyson: Does it permit an in term increase?

Mrs. Eriksson: Yes. It took two constitutional amendments to do it, but the judges now are in a position to be able to receive in term increases. If you do recommend a change in Section 20 of Article II, which is the section they're concerned with, you probably also ought to take into consideration Section 19 of Article III because that prohibits both increases and decreases for the state executive elective officials. That applies to the governor, lt. governor, auditor of state, treasurer of state, secretary of state and attorney general.

Mr. Aalyson: What you are saying is that if we're going to make a change make the change applicable to everyone except those who set their own salaries, which gets down to the question... Mr. Skipton's committee did consider that section and recommended no change in it. No one has been pressing for a change in that section as has been the case with Section 20. If your theory is simply no discrimination among equal persons then Section 19 of Article III does not discriminate, because those persons all take office at the same time.

Mr. Huston: Actually the purpose of these was, was it not, to prevent abuses of political process that the legislature could pay of a governor, you might say, and increase his salary in order that they would go along with them on their bills and the same with the other elected officials?

Mrs. Eriksson: Right.

Mr. Huston: I think that your big problem as these people expressed it is the discriminatory impact of a provision of this type. I would be reluctant to remove or amend Section 19 of Article III.

Mr. Aalyson: I feel the same way, Bob. If you tried to amend Section 20 simply by saying that every officer holding the same position would draw the same salary you might get the fellows with the raise getting a decrease as opposed to the fellow who's lower down getting the increase. So it would have to embody language that would call for every officer serving in the same position to draw the same salary as the one receiving the highest salary.

Mrs. Eriksson: Or, if you simply went the route of the judges and prohibited a decrease during term, and said nothing about prohibit an increase, just prohibit a decrease, you would accomplish that. The other aspect to the discrimination is, of course, the senators who serve overlapping terms have this same problem. Now there you are talking about someone who fixes their own salary.

Mr. Huston: That's a different situation.

Mrs. Sowle: Yes.

Mrs. Eriksson: So if you didn't want to recommend that, then you could do it on that basis. But then, if you wanted to permit senators equal salary then you would have to amend Section 31 of Article II. It's a more complicated problem than it appears to be at first glance.

Mrs. Sowle: Is anyone complaining of these provisions except for the county commissioners right now?

Mrs. Eriksson: Some Senators. When the legislature put this thing through they included Section 31.

Mrs. Sowle: Yes, and that went down too. And probably took everything else down with it.

Mrs. Eriksson: The auditors have complained from time to time and I believe that the situation with the auditors is that they're all elected at the same time, but I think they are elected with this odd county commissioner. When there is a general pay raise it usually applies across the board to all county officials, and perhaps the auditors are often in midterm when that happens.

Mrs. Sowle: Is there any reason why the timing has to be that way? Couldn't they pass another bill two years later?

Mrs. Eriksson: The county officials are paid by a system which goes on county population, and I think that there would be a lot of complaint if they tried to write a separate pay bill for that one commissioner. They would get into all kinds of questions as to whether the population of the county had increased or decreased in that two year period. I would not think that they would want to do that.

Mr. Aalyson: We haven't thought maybe of a philosophy that we've adopted in other situations and I'm not proposing it necessarily but we are talking about 88 people here and a constitutional amendment. And people who run for office with the knowledge that they are going to encounter this situation.

Mrs. Sowle: Yes.

Mr. Aalyson: They should be running with their eyes open, and they knew this could happen. I'm not saying it doesn't but does it justify a constitutional amendment to take care of 88 people in a state with a population of our state?

Mr. Huston: But should your constitution have anything in it that was discriminatory? That's the other half of the question.

Mrs. Eriksson: It is also true, that the other 2 commissioners may also be running for office on the basis of a salary that they have no assurance is going to be raised. It's just happened that for some years the legislature has raised that salary between November and January 1.

Mrs. Sowle: So this group of 88/is going to happen to every four years if they stay in. There is that possibility.

Mr. Huston: It's much more apparent today with the increases in pay and the increases in the cost of living.

Mrs. Sowle: Yes. If salaries start going down they may feel a little differently.

Mr. Huston: That's right. The pay of your governmental people has increased substantially because of the inflation whereas for years it was rather static.

Mrs. Sowle: Why did the judges' amendment pass and these fail? Now you mentioned that it took 2 times. Did the General Assembly provision take the rest of it down?

Mrs. Eriksson: I don't know. Actually, everytime the thing has been on the ballot where

it has been easily identified as an in term pay increase it's gone down to defeat, and this happened once to the municipal judges too. It went through this last time because it was a part of a bigger package, Issue 3, which was other revisions in the judicial article. And that's the way the common pleas judges got theirs too, from the modern courts amendment, which had many more things in it. That was an extensive revision of the judicial article. Then when the municipal judges, they put that on the ballot separately, and that was defeated. And then it was included last year, in 1973, as part of another revision of the judicial article and that's how that was adopted.

Mrs. Sowle: I tend to agree with the potential for abuse with an in term pay increase. But I notice from the memo that only 10 states prohibit it. The Model State Constitution does not prohibit in term pay increases. I suppose the alternative to controlling abuse through a constitutional provision, and I'm not selling this, I'm just trying it out, the alternative to controlling it by the constitution is simply to rely upon political controls. Whether they are good or not I don't know. But even if you decided that you want to rely on political controls, everybody else has gotten their bill through, so that really by now only the auditors and the county commissioners, the executive officers... well, that's still a sizeable bloc and the members of the General Assembly are controlled by this. If the history of this is that the electorate will not vote to permit in term pay increases then if we wanted to do anything probably the most we should be able to think of as a practical matter would be to abolish the discriminatory situation. If we want to take an interest in this plight of 88 people, as a commission.

Mr. Huston: Even today there's room for abuse there between the date of the election and the date of the taking of office because they can increase the pay. And now with your annual legislatures that's very easily done. They can increase the governor's pay or anybody's pay after the election. They see who is elected and increase the pay.

Mrs. Sowle: What they couldn't do though would be to bargain on something after the person is in office.

Mr. Huston: No, but they could bargain with him knowing that he is going to take office.

Mrs. Sowle: But if he doesn't come through they can't do anything about that.

Mr. Huston: No, that's correct.

Mr. Aalyson: Now, the pay increases that these gentlemen have been referring to for cost of living and whatnot they say comes between the November election and the taking of office in January. Is that correct? This gentleman from Columbiana County indicated that this has been for the past 12 years or so and there has been an almost automatic pay increase following the November election and before the taking of office in January.

Mrs. Eriksson: There has been that pattern. I haven't checked that out, but I think he is correct that this has happened the last few times.

Mr. Aalyson: There doesn't seem to be any way in view of this present provision that the General Assembly during that period could provide for the fellow who is holding over.

Mrs. Eriksson: No.

Mr. Aalyson: That is really what the crux of the matter is.

Mrs. Sowle: Is it appropriate for the commission to do this? That's another question in my mind. It doesn't seem fair. I would agree with that.

Mr. Aalyson: I tend to think it is, even though I'm the one who brought up the business

of 88 people being affected by a constitutional amendment. It seems to me that if you are talking about fairness then is when you talk about the constitution.

Mrs. Sowle: I know. I meant the discrimination against them doesn't seem fair.

Mr. Aalyson: Yes. And I think it's appropriate that we consider it even though it might affect only 88 people.

Mrs. Eriksson: There are more officials covered by this section than that. Because there are state officers, persons who are designated as officers, other than the six elected officials, who are prohibited in term pay increases by this section. For example, all of the heads of state departments are officers, a cabinet officer. And these persons are covered by this section as well. Now, there are not very many who are in the position of there being more than one of the same type but there are a few. For example, the members of the P.U.C.O. are considered to be officers. So that there would be persons where there is more than one of the same kind who might be affected.

Mr. Aalyson: That's right.

Mrs. Eriksson: And there is always some confusion about who is or who is not covered by the section.

Mr. Huston: In fact, in some situations, they will resign and be reappointed to a new term in order to get the increase. Then they will appoint someone to fill the vacancy.

Mr. Aalyson: Is there anyone who feels that it is inappropriate that if there is a pay increase which affects one office holder, all office holders having the same job should not have the same pay?

Mrs. Sowle: I agree.

Mr. Huston: I think that is the basic philosophy.

Mrs. Sowle: Is there any reason why the auditor shouldn't be considered or can the General Assembly in passing a pay bill think, "Well, these officers take office at a certain time." We'll consider that in fixing the salaries. Is there a way the legislature can keep them from being punished?

Mrs. Eriksson: The legislature could always pass a special pay bill for the auditor in that period between the election and the first of January if they want to.

Mr. Aalyson: What is the term for auditor? Two years? Four years?

Mr. Huston: Four years.

Mrs. Sowle: Who fixes their terms?

Mr. Aalyson: The General Assembly does.

Mrs. Sowle: Why don't the auditors lobby the General Assembly to change their terms?

Mr. Aalyson: If they shortened the term they would have to run again.

Mrs. Eriksson: Yes, they wouldn't want to shorten their terms. And, of course, if you talk about making all of the county officials elected at the same time, you're talking about 11 people on the ballot at the same time. And that's why the terms are staggered.

Mrs. Sowle: But they are not complaining to us and asking for us to help.

Mrs. Eriksson: I haven't heard anything from them.

Mrs. Sowle: If you approach it from the standpoint of discrimination, then that wouldn't help the auditors, would it?

Mr. Huston and Mrs. Eriksson: No.

Mr. Aalyson: Everyone else is in the same boat, isn't he, as the auditors, in that once the salary is fixed for the term, it remains that.

Mrs. Eriksson: That's correct.

Mr. Aalyson: The auditor knows when he's running or can anticipate when he's running what his salary might be. Of course that could be said for the commissioner, too, but the commissioners, some of them might get an increase and the others would not because of this provision. But, with regard to the auditor, they all get the same salary. They know when they.... None of them is being discriminated against.

Mrs. Sowle: That's right.

Mr. Aalyson: So I don't know that we have the same compulsion in their situation. I understand what you are talking about but I think that they are in a little different situation and don't need necessarily to be carried along. It's up to them I would guess to lobby the legislature for an increase before they take office.

Mrs. Sowle: Yes, that's what I was thinking.

Mr. Aalyson: Which these folks cannot do.

Mrs. Sowle: Well, I would be for trying to explore what kinds of language might be appropriate for this.

Mr. Aalyson: Actually, we just need a proviso, don't we? Provided that every officer serving in the same capacity shall draw the salary of the officer drawing the highest salary.

Mr. Huston: The only problem you would have is in connection with some of your commissions. You have chairmen of the commissions. And the chairman could be in that same boat. He could be the one that's getting the least salary because there have been increases for the members of the commission since that time. Now, he wouldn't be receiving the same. If his pay had been increased and you had a lame duck coming in, you wouldn't want him to receive the same as the chairman. He is a member of the commission and he is designated chairman and they pay him differently.

Mr. Aalyson: The chairman does get a different salary?

Mr. Huston: Yes. Normally they get a couple of thousand dollars more.

Mrs. Eriksson: In some. Certainly the P.U.C.O., the chairman gets a higher salary.

Mr. Huston: So you might have to have some language that....

Mr. Aalyson: "No <u>regular</u> member shall..."

Mr. Huston: Yes, something like that to cover the situation.

Mrs. Sowle: Well, there is a provided clause in Section 20 that was defeated. If we came up with a recommendation on this, I wonder what the reaction of the Commission would be.

Mrs. Eriksson: Those members of the Commission who know that it's been recently defeated are apt to react negatively. I don't know.

Mr. Aalyson: Unless the explanation is offered that has been offered here today in the discussion. I can't see any member opposing the thing with the idea that he is supporting discrimination.

Mr. Huston: There is really no realistic reason why this condition should exist. There really isn't any rational reason why it should exist.

Mrs. Sowle: I certainly agree. I'm just wondering if the Commission isn't going to perhaps say, "Well, why propose something that was just defeated?"

Mr. Aalyson: Actually, the reason that it does exist is fortuity, I think. It just happened to be something that was not forseen when this constitutional provision was enacted, I expect. You know, that there might be staggered terms which would result in a higher pay raise for somebody than the other would not get.

Mr. Huston: Are the risks too great to eliminate the section entirely?

Mrs. Sowle: I don't think you can eliminate the whole section.

Mr. Aalyson: There were once thought to have been, and we continue always to say that repeal of a provision probably can't be sold unless there is some good explanation for it. And if they wouldn't pass the proposed change, it would be doubtful that they would repeal what is here.

Mrs. Sowle: You need part of the section, do you not, because it has the provision that the General Assembly fixes the term of office and compensation, so you couldn't abolish that part.

Mrs. Eriksson: I think that the conclusion would be that that would be part of the general legislative power, anyway. On the other hand, it might be difficult to explain trying to repeal that part of it. I suppose there are several possibilities. One is just simply to make it, "but no decrease therein" thus making it like the judges.

Mr. Aalyson: But that doesn't accomplish what they are after which is to get the increase.

Mrs. Eriksson: If you say "no decrease therein shall affect the salary" then the implication is that they could get the increase. That would affect all persons. And the other is to try and draft something that would take care of the persons who are holding the same office.

Mr. Aalyson: Which is essentially the hope of Section 20 that was proposed on May 7.

Mrs. Sowle and Mrs. Eriksson: Right.

Mrs. Eriksson: The thing about 20 the way this was drafted is that it talks about from the same district. One problem with that is that "district" is not really meaningful. You have to assume that that means county. It applies only to elected persons, so that that would not apply to P.U.C.O. or anybody like that. On the other hand, Section 20a would.

Mrs. Sowle: It doesn't specify elective.

Mr. Huston: It's just any public officer.

Mrs. Eriksson: And so 20 and 20a would appear to overlap in certain instances and not in others. This was part of the confusion, I think.

Mrs. Sowle: What is the purpose of the second paragraph of proposed 20? Is that to prevent someone from resigning and then being appointed and getting a [illegible]? Is that what that was designed to do?

Mrs. Eriksson: No. If a county commissioner during his term resigns or dies or something and then at some other point you fill that vacancy, and in the meantime there has been a salary increase which he didn't get, but maybe which the other commissioners got...

Mr. Aalyson: I think it would be provided to prevent a pay increase to the fellow who was taking the appointment.

Mrs. Eriksson: Yes, because a salary increase might have been voted between the time the elected official took office and the time this guy did. This is to prevent him from receiving that increase.

Mrs. Sowle: Well, the situation that you were just talking about, would this paragraph apply to it? Where one would resign and then be reappointed?

Mr. Huston: This really talks about district.

Mr. Aalyson: And the elected officer. This is a common practice in a commission type thing where a P.U.C.O. member might resign and be appointed the chairman because the chairman, you see, that's what Bob was saying.

Mrs. Sowle: But this says elected, and in the same district.

Mrs. Eriksson: But I think that 20a would cover. It provides that if there is more than 2 years left in the term, he can get the increase.

Mrs. Sowle: We do have a letter from an auditor.

Mr. Aalyson: Ashtabula County.

Mrs. Eriksson: This was actually something directed to the General Assembly when they were considering the issue that did eventually go to the ballot and they sent us a copy of it.

Mr. Aalyson: I still feel, personally, I think that there is not a whole lot to be said against permitting an in term change in salary. And when I say change, I say that thinking of both increase and decrease. So long as the person affected cannot make that change himself. And I believe so long as the change affects all persons in a similar position. I have difficulty conceiving of a situation, for example, where the legislature in order to pay a political debt would change the salary of all, say, auditors. Because I think the budget problems would influence them greatly and it just seems to me that we are beyond a situation, perhaps I'm being naive, where political pay-offs are significant in our society in this kind of an area, where the legislature is fixing the salaries of all elected officials or all officials. Yet the public must feel otherwise unless the argument is valid that the reason they failed to pass the amendment in May of 1974 was because the public didn't understand what the amendment was trying to do.

Mrs. Eriksson: I'm afraid that I would have to disagree with that. Because I think

the public understands only too well.

Mrs. Sowle: They know it was a pay raise.

Mrs. Eriksson: Although I do think that the language is confusing.

Mr. Aalyson: Do you really feel honestly Ann that the public is opposed to in term pay increases on the basis that there might be a pay-off involved?

Mrs. Eriksson: No, not on that basis.

Mr. Aalyson: What do you feel is the basis, then?

Mrs. Eriksson: I think the public just doesn't think that public officers should get bigger salaries, period.

Mrs. Sowle: They are not going to vote for any pay increases, or permit any pay increases.

Mrs. Eriksson: Right. Or anything that looks like it. I don't think people suspect pay-offs.

Mr. Aalyson: But there are pay increases.

Mrs. Eriksson: But the public doesn't get to vote on them.

Mr. Aalyson: Okay, I see. They think that by adopting something like this that they're voting for an increase, you feel, as opposed to just permitting the legislature to do it which the legislature already can do.

Mrs. Eriksson: Right.

Mrs. Sowle: Or even if they understand it, they are not going to permit the legislature to do something. I think maybe we ought to make a proposal, but I am very pessimistic about anything getting past.

Mr. Aalyson: My feeling is that the only thing we should do is to make a proposal that would eliminate discrimination. If we can do that by simple modification, even with our pessimistic outlook about the commission and/or the public adopting it, fine.

Mr. Huston: Can't you, just by taking the present language and the last phrase, say "But no change therein shall reduce the salary of any officer during his existing term unless the office be abolished"? I mean to me that's a very simple change and it really accomplishes the same thing. It has the same effect.

Mr. Aalyson: It doesn't accomplish the raise that the 88 are looking for. It prohibits a decrease but the present one prohibits a decrease.

Mr. Huston: But now, they could include these people in there, because there is nothing in the pay raise...

Mr. Aalyson: I see. You mean eliminate "change" and just put in "decrease".

Mr. Huston: Just put in "decrease". It says "affect" now. So if you just use the word "decrease" they can't decrease it, but they can increase it. And it really isn't a significant change in the language of the constitution. I think the people would buy

a change that says that the legislature cannot decrease...

Mr. Aalyson: But if you say "decrease" and leave out "affect" then you leave it open for them to increase their own salaries.

Mrs. Eriksson: Not unless you also amend Section 31.

Mr. Aalyson: Alright.

Mrs. Sowle: Now, this would not affect executive salaries either.

Mrs. Eriksson: No, but this would affect, if you just make that change, which is like the change that was made in judges, then it is going to affect all officials who come under Section 30. It's not just going to eliminate discrimination.

Mrs. Sowle: These are all non-constitutional public officers, right? Covered by section 20.

Mrs. Eriksson: Right.

Mr. Huston: Any office created by the legislature.

Mrs. Eriksson: All officers.

Mrs. Sowle: I can see very good reasons for doing that and removing the prohibition about in term pay increases. I can see where that would make a lot of sense. I don't think the danger in terms of political pay-offs is a real danger. Not under Section 20. And it seems to me very bad to have each little group trying to get its constitutional change. Of course, the judges wouldn't be covered by this, but this would cover auditor, wouldn't it? And to leave each one to its own devices to lobby for a particularized provision seems to me not a very good state of things for the constitution. I am pessimistic about it passing, if we come through with that proposal.

Mr. Huston: I think it would have more chance of passing than if we made a substantial change in the language.

Mr. Aalyson: By substantial, you mean in terms of numbers of words, I think.

Mr. Huston: Yes, that's what I mean, because it confuses the public.

Mrs. Sowle: But I don't think that you're going to fool anybody that it completely alters the restriction. It's going to be discussed as an abolition of the prohibition against in term pay increases. I don't think anybody is going to miss that.

Mr. Aalyson: Everybody will understand that who has any savvy at all.

Mr. Huston: Everybody who is knowledgeable about it. But how many of the people really understand most of the issues on the ballot?

Mrs. Sowle: Well, what's the ballot board going to do with this? They're going to put on the top of the ballot, "This provision changes the rule about in term pay increases". At least, if I were on the ballot board, that's what I would put on it because that's what it does. I think it's a good way to change the language. But I don't think it's going to conceal the purpose of it.

Mr. Huston: I don't think it's going to conceal it. I wouldn't want to conceal it, but I think that when you get language such as what was proposed before it's very difficult for anyone to really comprehend what you're trying to do. People, when they don't understand, will vote against things. It would make it more equitable, there's

no question about it. And it would prevent some of the shenanigans that take place in connection with appointments also - resigning and being reappointed to a vacancy - which I think is legal and all that, but I don't think that you should have your constitution require those shenanigans.

Mrs. Sowle: Of course, if that were the language of 20, the commissioners would all change at the same time.

Mr. Huston: Yes, and there wouldn't be any prohibition against a change.

Mrs. Sowle: I'm wondering, if we go to the Commission with a proposal, whether we ought to go with alternative proposals, and if the Commission rejects the change that you were talking about, then whether we would want to ask them to consider language prohibiting discrimination?

Mr. Huston: You know, if there were some way we could get the word "discrimination" into the language, it would have a substantial possibility of passing, I think.

Mrs. Sowle: I agree with that.

Mr. Huston: So maybe we could put it in the affirmative, "There shall be no discrimination".

Mrs. Sowle: Yes, I think if that's really basically what it said, it would have a much better chance of passing.

Mr. Aalyson: But then you've got to determine, again, whether the elimination of the discrimination will be made by an upward or a downward jump. If you reduce everyone to the same level or raise them to the same level, it seems as though we are going to get something that's going to get a yard long in the constitution if we try and take care of all of these things.

Mrs. Sowle: I would be in favor of the one change, proposing that change in Section 20 and then maybe asking Ann to see what she can come up with in the way of alternative language about discrimination.

Mrs. Eriksson: If you want to consider some language eliminating discrimination, did you want to consider it only for the elected officials or are you concerned with the others? If you were going to eliminate discrimination, would you want to do it for public utility commissioners as well as county commissioners?

Mr. Huston: I think the basic philosophy would require you to do it in connection with your appointed officials also.

Mr. Aalyson: I agree with that.

Mr. Huston: It just seems inconceivable to me that two people doing the same job are receiving different pay just because of the time that they received the appointment. Because they have no control over their pay, whatsoever.

Mrs. Sowle: I would certainly agree with that. The current provision doesn't have that last paragraph in Section 20. Do we want to consider such a paragraph about vacancies? That would only be appropriate in the provision about discrimination. That wouldn't be necessary I take it if the basic change is made.

Mr. Huston: I think if you are making a minor change, it would be appropriate.

Mr. Aalyson: If we added to Section 20 a similar provision, I don't know that elective

office is necessarily a proper criterion. "All officers holding the same relative position", this is not the language I'd try to use, "shall be entitled to the same salary". That let's you have a chairman who would get a larger salary and yet provides that they will be equal otherwise.

Mr. Huston: Why do you really need that in Section 20 if you change 20 by making the minor change of using "decrease". You really wouldn't have to have it.

Mr. Aalyson: I don't know that you do. I suppose there is an opportunity for an appointment to take place... no I guess there isn't really. It would be very very rare, if ever, that an appointment would take place that would carry with it a salary increase that had not been enacted as to the others since 20 amended would provide for salary increases during term.

Mr. Huston: That's right.

Mrs. Eriksson: We'll come up with basically two proposals, one which will simply permit increases but not decreases and then another one to try to eliminate the discrimination for both elected and appointed public officers.

Mrs. Sowle: Then is it the position of the committee that we feel it would be proper to permit midterm increases for public officers? But we don't want to consider the executive officers or the legislature.

Mrs. Eriksson: The legislature because they fix their own salaries.

Mrs. Sowle: Yes, and the judicial, that's already been done. And the executive we're not proposing any change in. Of course, that's not really our committee anyway.

Mrs. Eriksson: I think you would want to put it in the report, though, that you had considered it.

Mr. Aalyson: That it was a factor which we felt was not proper for our own consideration but might be a proper one for the executive committee. I don't really see any reason, again, for discriminating against elected executive officers. Their costs go up at home just as much as an appointed officer. But perhaps there is a little more danger there especially when you start talking about the governor, for example.

Mrs. Sowle: It seems to me that if there is any danger of abuse, that that's where it lies, not so much with this. The potential for abuse doesn't seem to me to be very much here.

Mr. Aalyson: It's drawing toward noon and we haven't been able to consider the question of when elected officials should take office. I guess we will have to defer that again. I confess that the more I think about it the less I'm inclined to change. I think you create more problems perhaps than you solve. I think we should perhaps defer that until the next meeting.

Mrs. Eriksson: May I run down the other things that I think this committee might want to consider. I have gone over the constitution to see what is really left and the main issue would seem to be apportionment. If you are willing to undertake that one, that's the main thing that we haven't talked about yet. That's dealt with in Article XI. There are scattered sections in Article II that we haven't covered yet. One is the one permitting the General Assembly to pass mechanics lien laws, that's Section 33. There's also a section which has to do with the recording of titles to land that we've not prepared any materials on it as yet, that's Section 40 of Article II, Registration of

Land Titles. Section 41 of Article II, which has to do with abolishing prison contract labor is also a section that I think should be considered. How do you feel about apportionment?

Mr. Aalyson: My instantaneous raction is that it's a bomb. I don't know that it might be all the more interesting for that reason, and therefore one that we might like to consider.

Mrs. Eriksson: Senator Van Meter's resolution would not only change the apportionment board with respect to members of the General Assembly, but he has included congressional redistricting which would then be done by a board outside the control of the legislature.

Mr. Aalyson: My feeling is that we ought to hold that one on the back burner and look at some of these other less explosive matters first. But maybe when there are more members of the committee or even before the full commission we can bring this up and see whether they feel that we ought to do it or whether it had better be done by some special committee.

Mrs. Sowle and Mr. Huston agreed.

Mrs. Eriksson: Shall we proceed to mechanics lien?

Mr. Aalyson: Hasn't there been some recent legislation in that area?

Mrs. Eriksson: Yes, there's presently a bill pending. In fact, almost every session sees some bills to modify the mechanics lien law and really the constitutional section only says thatthe General Assembly may pass laws. Probably in response to a court decision holding such a law unconstitutional and that's what we have to find out as to why that was the situation, whether the constitutional provision is still necessary.

Mr. Aalyson: I think we should look at it perhaps to see whether it needs any updating. Are you suggesting that the reason for the constitutional provision was that some court held that this was such an invasion of property rights that it was required by a constitutional amendment rather than a legislative action?

Mrs. Eriksson: Yes. I don't think that there are that many cases involved with the constitutionality of the issue. That would not be a difficult one to take up.

Mr. Aalyson: And you're proposing that we look at it just to determine whether it should presently still be there.

Mrs. Eriksson: Yes, or, as in the case of workmen's compensation, is there any necessity to rewrite it either to write into it any of the provisions which either protect the property owner or to protect the laborer. Just to consider whether or not there is any trend which would necessitate any additional constitutional provision. Or, alternately, whether it is necesaary to have it at all. And also this one on abolishing prison contract labor, which I think may have some problems, in the light of some modern situations having to do with corrections and rehabilitation, there could be some reason to want to look at that.

Mrs. Sowle: Yes, I think that's a very good point.

It was agreed to do those two at the next meeting, and postpone Section 40 until later, and then apportionment.

The date of the next meeting was set for luncheon on the date of the Commission meeting, probably Wednesday, June 11.

Ohio Constitutional Revision Commission
What's Left Committee
June 11, 1975

Summary

The What's Left Committee held a luncheon meeting on June 11 at 12 p.m. in the Commission offices in the Neil House. Committee members who attended were the Chairman, Craig Aalyson, Dick Carter, and Robert Huston. Ann Eriksson and Brenda Avey attended from the staff.

(The meeting opened with discussion of the proposed alternatives to Article II, Section 20, concerning in-term pay raises.)

Mr. Aalyson: Alternative B comes closest to what we may be trying to do, which is to permit a person in the position of the county commissioner to get an increase if the other fellows get them.

Mr. Huston: You might have "same office" construed to mean that it isn't the same office if it has a different term.

Mr. Aalyson: There would not be a case where one group of county commissioners might get a raise and not the rest of the state?

Mrs. Eriksson: No.

Mr. Aalyson: The "same office" just means the county commissioner.

Mrs. Eriksson: Yes. County commissioners all get the same salary, by statute, but it just isn't effective until the beginning of the term and their terms are staggered. I think that where there might be some confusion is in the case of the chairman of the P.U.C.O. whose salary is designated by law as being higher.

Mr. Aalyson: The same thing is true in the Industrial Commission. Should we make the increase in salary applicable only to an elective office?

Mr. Huston: Do you want it to apply to any chairman of a commission that has a difference in salary?

Mr. Aalyson: I don't think we want the members to have the same salary as the chairman. If he has more responsibility and more duties than he ought to be entitled to have a higher salary.

Mr. Huston: The way the law now sets the salary, they set a specific salary for the chairman and then also for the commission.

Mr. Aalyson: "the same office". How about "all persons holding the same position"? Would that let the chairman be treated separately from the members?

Mr. Huston: I don't think so. He would be entitled to the increased salary applicable to the commissioner but he wouldn't be entitled to the increased salary applicable to a chairman.

Mr. Aalyson: Would this alternate B as drafted prevent the chairman of a body from having a higher salary than the members?

Mr. Carter: It refers to an increase in salary, not the salary.

Mr. Aalyson: "And except that an increase in salary applicable to an office shall apply to all persons holding the same office", so if you increase the salary of the members, the chairman wouldn't necessarily get it. If you increase the salary of the chairman, the members wouldn't necessarily get it.

Mr. Carter: I think it's dependent on the way the law was drawn.

Mr. Aalyson: They usually give a salary with an excess to the chairman. I think that would be alright.

Mrs. Eriksson: I think you are right.

Mr. Carter: In other words, they might very well say that the commissioners get $10,000 a year and the chairman gets an additional $1000 for his additional duties. And then if you increase the commissioners a thousand dollars then all the commissioners get it. Well, I'll make a motion that we make this recommendation for this change in Section 20 of Article II.

Mr. Huston seconded the motion.

Mr. Aalyson: Further discussion? If there are no negative sentiments, then the motion is carried. I think it's equitable.

Mrs. Eriksson: When we started drafting, I looked in the pocket parts and both Pages and Baldwin's have printed the change in this section as though it had been adopted by the people when it was on the ballot, and it was defeated. Both publishers have had this called to their attention now and I'm expecting that they'll get some errata sheets out soon.

Mr. Aalyson: We had at one point given serious consideration to the problem we had in J[redacted] period when there is a lame-duck governor and a new legislature. We kicked that around and then it has just sort of gone into limbo and been absorbed here without any further discussion. Is the sense of the committee that we want to pursue that or that we decided to back off and leave things as they stand? I think I made the declaration Dick when you were not here last time, that the more I looked at the thing, the less inclined I personally felt to change the situation, in view of the fact that we've had it occur only once recently. And by trying to make changes perhaps you create more difficulties than you resolve.

Mr. Carter: A friend of mine in the electronics industry calls whenever they make a circuit change, the "sneak pass", that has some other unintended effect that louses up the performance, and that's what you're talking about, the sneak pass.

Mr. Aalyson: Exactly.

Mr. Carter: The Supreme Court hasn't ruled in that matter yet, have they?

Mr. Aalyson: Judge Williams in the Court of Common Pleas held that the attempt to enact legislation without the lieutenant governor's signature was unconstitutional. I haven't heard any discussion or seen any comments in the newspapers as to whether or not the decision will be appealed. I would assume that it's likely that it will be. This decision came out earlier this week.

Mr. Huston: If, ultimately, the court calls this particular type of action that they attempted unconstitutional, there isn't any need, really, to change it, from that standpoint.

Mr. Aalyson: I think not.

Mrs. Eriksson: The thing the court ruled on was whether or not they could by-pass the lieutenant governor and the court ruled that they could not. If you are going to say six days is not a permissible length of time in which to enact legislation then what is a permissible length of time? It might be inappropriate to make any proposals with respect to the lt. governor's role until the matter has gone to the Supreme Court.

The others agreed.

Mr. Aalyson: I think the more basic question is whether we want to prohibit any activity in this area, that is, let a lame duck governor who gets the majority legislature try to push something through. Since he still is the elected representative or the elected executive of the people it's conceivable although highly unlikely, that the electorate was looking for a situation like this to occur when they elected the majority to the legislature. You might be thwarting the people's wish. I don't know. There are so many ways of looking at this thing.

Mr. Carter: It's almost mind-boggling.

Mr. Aalyson: I feel very confident that any change that would be made would be likely to lead to maybe not more but at least an equivalent number of problems.

Mr. Carter: You have to have a government in existence and operating from a change in one elected group to another, and you don't want to deprive them of the ability to do those things that are necessary and then to try and say during this transition stage you put in restraints as to what can be done. That strikes me as being a very difficult thing to do. Now we did bring up the question as to whether we should shorten the period from the time of the election until the transfer of powers is effectively made. The more I reflected on that the less happy I am about that.

Mr. Aalyson: Didn't we get the argument that we need this time for organization?

Mr. Carter: To prepare. In the parliamentary system, they have no time at all. It just happens. I'm not saying it's right.

Mr. Aalyson: If one is hoping to be elected, you would think one would have to be foresighted enough to get his system set up to accommodate the situation if he is elected. I don't know which is the better plan.

Mr. Carter: I don't see how you can realistically deal, without paralizing the government, with the myriad of problems that lame ducks create unless you just eliminate that period.

Mr. Huston: Isn't the real problem the governor and the new legislature taking office different times?

Mr. Carter: That's the problem that came up this last time.

Mr. Aalyson: I believe you suggested that, at least from the standpoint of recognition of the importance of the two branches, that there should be a division.

Mr. Carter: John Skipton said that.

Mr. Aalyson: They shouldn't take office on the same day, else, perhaps, the installation of one of the bodies will tend to detract from the installation of the other.

Of course you could maybe do that by separating them by two days, but... Provide that the legislature should go into session on a given day and that the governor would take office two days next following.

Mr. Carter: I think discretion is the better part of valor. We've looked at it and it's a hornet's nest no matter what you do, or could be a hornet's nest, and we haven't had that many abuses. I think it was Skipton who pointed out that there are much greater abuses that had taken place in the other situation where the lame ducks railroad a lot of stuff before they get thrown out after the election. So the only real answer to it would be to provide for almost an immediate transferral of power.

Mrs. Eriksson: If you wanted to make both impossible, the only thing to do would be to make an impossibly short period of time between the time of the election and the time of taking office.

Mr. Carter: They have the same problem in the federal system, of course, too. The same identical situation. I guess what you really get down to is that you have to rely on the sense of fitness and fairness by the people that are involved and that works most of the time. Then, of course, if we have the referendum and the initiative we've always got some protection in that area, too, for real abuses that take place.

Mr. Huston: If there was any change, do you thing we could get it by the legislature?

Mrs. Eriksson: There is already a legislatively initiated resolution to make the terms begin at the same time. I believe that's the thrust of that one.

Mr. Aalyson: It seems to me that not only our own discussion has been submerged in other things, but the legislature doesn't seem to consider it a real problem. They talked about it for a little while, but I haven't heard anything recently, have you? Not since January or February.

Mrs. Eriksson: No, there were initially some hearings on the resolution and it passed out of committee.

Mr. Carter: Well, I guess none of us are wise enough to come up with any cure-all.

Mr. Aalyson: Shall we proceed with mechanics' liens and take a quick look at that? This has become a very poignant issue with me just very recently.

Mr. Aalyson told the story about the leak in his swimming pool, where a repair made matters worse, and because Aalyson refused to pay the bill, the repair company may file a lien against him.

Mr. Aalyson: Why did you feel that this section should be considered by us, Ann? I think you were the one who considered that it should be.

Mrs. Eriksson: I know that the law has gone back and forth, that one keeps looking for ways to protect the laborer and then on the other hand, one keeps looking for ways to protect the owner. And because I know that there is now legislation pending which I think goes farther for protecting the owner of the property than any other legislation, I thought that we should see what the impact of the constitutional provision was. And when I got started, I didn't even know what it said. I really reached the conclusion that the legislature can do just about anything it wants to and the only reason for changing it would be if you had strong feelings about writing something into the constitution one way or the other.

Mr. Aalyson: My problem is probably more legislative than constitutional. I'm all

in favor of enabling an individual who has done something for you to be paid, but someone who has done something, in effect, against you, should not be entitled to attach your property, I don't think, for having worsened your condition rather than bettered it, but that's a legislative matter.

Mr. Carter: That's a statutory matter.

Mr. Aalyson: Right. I agree with the constitutional provision and it's a legislative matter as to when you are entitled to have relief and when you can't.

Mr. Carter: This is one of those things that I see from the comment, which is true, that if it weren't in the constitution, it might not have to be there. But once it is in there now, there is no way of getting it out even though it shouldn't be there. It's engraved in stone.

All agreed.

Mrs. Eriksson: This one was in direct response to a court case holding mechanics' liens unconstitutional.

Mr. Aalyson: Does anyone then object to our just leaving the thing as it is?

Mr. Carter: I have no other suggestion.

Mr. Aalyson: That language that laws may be passed to secure to these various classifications "their just dues"...

Mrs. Eriksson: Yes, that is rather old-fashioned language.

Mr. Aalyson: But it's not worthy of change, is it?

Mrs. Eriksson: It does not seem to have bothered anybody for many years in the constitutional provision. There is another provision that I do want to present to you. That's the provision of the constitution having to do with convict labor. The provision prohibits the sale of convict labor and it was put in the constitution to prevent the penitentiary officials from making convict labor available at a very cheap price. It was put in there at the behest of both labor and management who did not want this cheap labor available. In recent years, one aspect of rehabilitation has been permitting persons who are incarcerated to go into the community and take a job...

Mr. Aalyson: As an apprentice?

Mrs. Eriksson: Yes, and to return often to the prison at night. There has been, over the years, some question raised as to whether that is constitutional because of the constitutional provision. It's a question whether anybody in the corrections field is currently of the opinion that anything Ohio laws presently provide or might want to provide might be unconstitutional. The former commissioner of corrections had asked us to look at that question because he thought that there might be some hindrance there. However, Ohio does have a law which permits this kind of labor arrangement and apparently it has not been challenged. I don't know whether the current commissioner of corrections has any opinion on it or not. If you are willing to look into the question, we could invite him to come to the meeting and discuss it. I would suggest that if he doesn't think there is any problem with anything they might want to do in rehabilitation, then probably the section should not be tampered with. But there have been proposals introduced in the General Assembly over the past few years to make some

alteration in that section to accommodate this particular kind of situation.

Mr. Carter: I think we ought to take a look at that.

Mr. Aalyson: One question, Ann, if we are not jumping the gun on your memorandum. Are you saying that the idea of the original section was to prohibit, not inmates, but the state employees from selling convict labor?

Mrs. Eriksson: What they did was contract for the services of the inmates and the work was done in the institutions, I think. I don't think that they farmed these persons out.

Mr. Aalyson: So that the person heading the institution could get a contract to manufacture something and use convict labor and thereby profit from it.

Mrs. Eriksson: Well, there probably was some individual profit, although I don't imagine that in recent years that's been substantial.

Mr. Carter: The thrust of it is undoubtedly unfair competition.

Mrs. Eriksson: Right.

Mr. Aalyson: More than illegitimate profit.

Mrs. Eriksson: Yes. It was unfair competition that was greatly objected to.

Mr. Carter: What we might do is to make sure that it just doesn't prohibit rehabilitation activities - work done outside the premises or something of that sort.

Mrs. Eriksson: We can simply go ahead and set up a meeting and invite one or two corrections persons here to talk about it with you, or would you like to see the memo first?

Mr. Carter: Rather than have a full meeting, why don't we get the memo, and send the memo to the person that's involved and see if he wishes to either respond, maybe just in writing, and then it might save the necessity of having a meeting for that. See what develops, and then if enough comes out of it we can schedule a meeting.

Mrs. Eriksson: Alright. The other thing is apportionment. Now, I know that you indicated last time that you weren't sure whether you really wanted to take that up. But I think we will go ahead and have a memo prepared and then however we decide to dispose of it as far as this committee or some other committee...

Mr. Aalyson: I think that any of these things that are of interest, not necessarily to us, as a committee, but not necessarily to anyone else, should be simply the subject of a memo, and if anybody wants to call a meeting, we can consider that.

Mr. Carter: What is the thrust of the apportionment thing? There's nothing in the constitution now, is there, on this?

Mrs. Eriksson: Oh, yes. There is a whole article which determines the method of apportioning for the legislature.

Mr. Carter: In the constitution?

Mrs. Eriksson: Yes. Not for congressional districts, but for the legislative districts.

And it's done by a board which is politically oriented and it's a problem deciding how this can be done without involving the political process. But nevertheless there are those who are urging some change in the composition of the apportionment board. Senator Van Meter has a resolution to do this and it also includes congressional districting which is not covered in the constitution in Ohio. Congressional districting in Ohio is strictly done by the legislature, and in most states. But as you know, congressional districting was one of the bills passed in the six day war and it's also been passed where there has been a special session called after election when the situation was reversed, and it's therefore a very sensitive issue. The question is whether or not congressional districting should be taken out of the hands of the legislature and put in the hands of some kind of a board. Beyond that, then, there are certainly sections that we haven't covered but they are things that I don't know there are any problems. There are a couple of other clean up things that really ought to be recommended. For example, there is an article on institutions, on the penitentiary, that has some language in it that is completely obsolete. And I think this committee could dispose of that, too.

Mr. Carter: The dueling thing has already been taken care of, hasn't it?

Mrs. Eriksson: The dueling thing is on its way through the legislature.

The meeting adjourned.

Ohio Constitutional Revision Commission
What's Left Committee
January 27, 1976

Summary

The What's Left Committee met on January 27, 1976 at 9:30 a.m. in the Commission offices in the Neil House. Members present were the chairman, Craig Aalyson, Robert Huston and Dick Carter. Ann Eriksson and Brenda Buchbinder were present from the staff.

Mr. Aalyson - The first item to come before the committee this morning is section 20 of Article II, which has been previously considered with a recommendation made to the Commission, which apparently did not meet with favor at the Commission and it has been returned to us to see whether we may not amend the recommendation to meet with the approval of the Commission. As I recall, the principal objection to the language recommended by our committee is that it is not sufficiently inclusive. It did not take into account the problems which confront the county auditor and possibly problems which confront some members of the Senate. My personal feeling was then and remains that it is still a good idea to restrict the members of the legislature with respect to in-term increases in salary. I don't have the same compulsion about the auditor's office inasmuch as their salaries are not fixed by themselves. We might be able to modify the language to include them, but I would personally oppose any modification which would permit a change of income to the legislators if it were voted by themselves. Bob, any comments?

Mr. Huston - I concur in your thoughts with regard to the General Assembly. I think they have an interest in the legislation, which is a conflict.

Mr. Aalyson - Yes, I agree with that.

Mrs. Eriksson - It is a difficult problem of how you would include the auditor. All auditors are elected at the same time, it's just that they are not elected at the same time as the majority of the county elected officials.

Mr. Aalyson - Without sitting down and trying to draft any particular language, it occurred to me that perhaps we might modify this language to provide that any change in income or salary that did not affect the legislators themselves could be made during term. You wouldn't want to even limit it to legislators--any increase in salary which was--and I suppose that leaves it to the legislature--is enacted by the legislature, except as it pertains to themselves, would be effective during term.

Mrs. Eriksson - If you wanted to do that, I don't think you would need to specify anything about the legislature because they are covered by another section any way. Then I think all you need to do is change the word "affect" in the second sentence where it says "no change therein shall affect" and simply say "no change therein shall decrease", which would make it essentially the same as the judges' section. If you want to make it applicable to anyone other than legislators.

Mr. Aalyson - Then the section might read,"The General Assembly, in cases not provided for in this constitution shall fix the term of office and the compensation of all officers, but no change therein shall decrease the salary of any officer during his existing term unless the office be abolished."

Mrs. Eriksson - The word used in the section pertaining to judges is "diminished" rather than "decreased." The section reads that "judges shall receive such compensation as may be provided by law which shall not be diminished during their term of office."

Mr. Aalyson - In order to have uniformity, maybe we ought to have "diminished."

Mr. Huston - Was "diminished" used with judges because they used to have a formula?

Mr. Aalyson - They still have a formula based on population.

Mrs. Eriksson - I don't know. That was part of the Modern Courts Amendment.

Mr. Aalyson - Probably because judges drafted that and liked the word "diminished" rather than "decrease". If there ever is any interpretation, I think it might be wise to use the same language so that it might carry over. What is the constitutional provision, Ann, which does limit the legislators?

Mrs. Eriksson - That's section 31 of Article II. That section would remain unchanged as well as section 19 of Article III which has the same provision for the six elected state officers.

Mr. Aalyson - That seems satisfactory to me. If no one has any further recommendations or further discussion?

Ms. Buchbinder - Does the recommendation cover the county auditor now?

Mr. Aalyson - I believe it does. It covers every officer except those that are otherwise provided for by constitutional provision. Do you understand what change we are making? We are substituting for the word "affect" in the third line "diminished" and then eliminating the except clause at the end, so that there would be a period following "abolished". So it would cover any officer in the state except those that are specifically provided for by other constitutional provision. We leave it up to the General Assembly to take care of the cases where it is not provided for in the constitution. We will pass on to the subject of the militia.

Mr. Abraham - I am James M. Abraham. I am the assistant adjutant general. Unfortunately, General Clem had to be in Washington. Hopefully I might take his place. I would like to discuss briefly the philosophy. Bill Shimp will discuss the legal ramifications that might be involved.

Mr. Shimp - I am Lt. Colonel Bill Shimp in the militia, in the National Guard, and I was asked to come down here today by General Clem, the adjutant general, to discuss or answer any questions that this committee might have in regard to the way Article IX is designed. And, although I haven't talked to General Clem directly about his letter of 16, January, 1976, I think you have it before you.

Mr. Aalyson - Yes, we each have a copy of that letter.

Col. Shimp - Which seems to clearly and rather strongly indicate General Clem's feeling in regard to the particular provision that is Article IX, section 1, who shall perform military duty. I notice in the material that you have generated that a number of other states have shortened and truncated their provisions in regard to the militia. I'm sure that those provisions are adequate according to their feeling. But we don't see any particular reason why Art. IX, section 1 should be substantially changed unless the legislature is given that function--and I'm talking for myself now--and the legislature would do the same thing. Whether or not it is in the constitution or whether or not it is legislatively enacted I suppose doesn't make a whole lot of difference, although the Constitution, being the basic document, clearly delineates what the people feel. And if the people indicate that all citizens between 17 and 67 years are subject to be in the militia, then that's it. And the legislature can't change it. We don't see any particular reason to take it out.

Mr. Aalyson - Do you have any recommendation for modification or amendment to the sections as they exist? It being our understanding that you want to retain them essentially as they are.

Col. Shimp - I really haven't given these provisions personally that much thought to make any recommendations. Perhaps some of the other officers here have. The one section that caught my eye is section 5, in regard to public arms. "The General Assembly shall provide by law for the protection and safety of the public arms," I'm not too sure that that's essential to be a constitutional provision, since it would appear that the General Assembly would do that anyway, as would the adjutant general. Whether we need a constitutional fiat to provide for that I don't know. I have nothing further unless something else might come up in the discussion where I might be of some assistance.

Mr. Abraham - I do have some concerns, personally, about the existence of some of these items in the Constitution. And they relate back to the first and second amendments in the bill of rights of the Constitution of the United States. My concern is if we treat states' rights lightly, by removing some of these provisions from our state constitution, then, in effect, it may appear that we are not zealously protecting those provisions which do provide rights to the states. I for one feel that we shouldn't give them up because the migration of power to the federal level is ominous as I am concerned. Over the years we have seen too much erosion in what might be construed as states' rights. I believe, and General Clem feels the same way, that there should be no erosion in the provisions in the Constitution that might indicate to the federal government that we are not zealously protecting the rights that are given to us by the Constitution now.

Mr. Aalyson - We understand that General Clem's position, as set forth in his letter, of January 16, is that the constitutional provision should be preserved. Do you have any suggestions in regard to amendment or modification to accomplish whatever purpose you feel might need to be accomplished, or does the article as it now exists serve your purpose well?

Mr. Abraham - The article as it now exists historically has shown that it serves our purpose adequately. To add more verbiage might detract from its intent and clarity, and to reduce it would remove those elements in existence now that say that we understand and want to keep the state's rights given to us by the Constitution of the United States.

Mr. Aalyson - Are there any questions of Jim? If you have no further comments, thank you very much. We appreciate your contribution. Are there other persons here who would care to speak with regard to the article on the militia? There were none. We thank you and your comments will be considered carefully and taken into consideration when we reach our final conclusion with respect to this Article. Bob, have you had any thoughts with reference to Article IX, its retention or modification?

Mr. Huston - The Ohio Civil Defense organization. Is that under the Constitution--the state militia? What is the philosophy for the establishment of the Ohio Civil Defense?

Col. Shimp - Are you making reference to the Ohio Defense Corps?

Mr. Huston - I think it's called the Ohio Civil Defense Corps.

Col. Shimp - I don't believe that that is necessarily part of the militia.

Mr. Abraham - It's reflected in the Ohio Revised Code, I believe, as part of the organized militia. The unorganized being that which is not specifically spelled out in the Code.

Col. Shimp - The Ohio Defense Corps is defined as being part of the organized militia in the Code. It is not addressed in the Constitution as such. This card makes reference to the Ohio Civil Defense Corps, I notice this card is signed by General Del Corso, and it may be also treated in statutes. I'm not familiar with that particular name for it.

Mr. Huston - With regard to General Clem's letter referring to the 500-man Ohio defense force, I was wondering what he was referring to.

Col. Shimp - The Ohio Defense Corps is a creature of statute which is designed as a cadre or a skeleton-type organization as a back-up for the National Guard. If the National Guard were to be activated, either federalized or totally committed in some state mission, the defense corps is available to create a second force, a reserve so to speak, for the Ohio National Guard. The Ohio National Guard as it was activated in Korea was removed from the state. Then the only organized militia left is the Ohio Defense Corps which acts as a small cadre which can be expanded according to the needs of the Governor.

Mr. Huston - The card that I showed you, is that part of that 500?

Col. Shimp - I don't believe it is.

Mr. Huston - What is this organization?

Col. Shimp - The Ohio Civil Defense Corps must have some relationship to a civil defense organization which may be an adjunct of the adjutant general's department.

Mr. Abraham - Civil defense, per se, started back in World War II when the national guard was activated and the home guard was in the process of being expanded. And it was created by federal mandate and each state developed its own defense corps. What we have today is an off-shoot of what started in World War II and the provisions that created civil defense are still under federal guidelines, although there is a provision for each state to organize its own. Recently there has been a change in name, and official title now is the Ohio Disaster Services. However, the organization is still intact and the intent and purpose of it is to have it available in the event of total mobilization and a threat to this country.

Mr. Huston - I'm wondering whether or not that organization would do what General Clem suggests or refers to in his letter.

Mr. Abraham - That organization, under the present Ohio Revised Code, comes under the unorganized militia as part of the total population of the state. Unless there was a mobilization of the unorganized militia, the Governor really would have no control over that while at the same time, he does have complete control, within the limits of the law, of the Ohio Defense Corps. So there is a difference there and I think the main difference is the ability to put one into a frame where they would be responsive, whereas the other one is there and immediately available and trained to do a specific job, one of them being to replace the national guard in the event of its mobilization. If, for example, let's say a nuclear exchange occurred tomorrow, they would general mobilize the entire country. The Ohio National Guard would be immediately called out, if there is anything left of it, and then the Ohio Defense Corps, which has been trained to replace it, would be able to take its place.

Whereas the civil defense organization is not trained along specific lines and it would take not only probably some legislation but also some special training which we wouldn't have time to do.

Mr. Aalyson - Might it be said that the defense corps has a military connotation where the civil defense corps really does not?

Mr. Simmons - I'm John Simmons, chief of staff of the adjutant general's. That's right. The Ohio Defense Corps definitely is a military organization. They have military uniforms, they have military equipment whereas the civil defense organization has not.

Mrs. Eriksson - General Clem's letter appears to point out the necessity of being able to call out all citizens, the unorganized militia. The question would be whether or not it would be necessary to retain the language in the Constitution or whether it would not be appropriate to leave it to statute?

Mr. Abraham - Let me respond to that. One of our concerns is the fact that if we allow some of this to be removed or if we do remove it, then there is the problem of an indication that we are not really protecting our state's rights, particularly under the first and second amendments to the Constitution of the United States. This could be construed as an indication to Congress that we really don't care that much about our state's rights and it would allow for further erosion than what has already taken place. I think that concern has already been expressed although there are others that I mentioned earlier.

Mrs. Eriksson - Has this had this effect in states which do not have such a provision?

Mr. Abraham - There has been no manifest effect that I know of. I think that the impact of doing this will eventually show up as a feeling on the part of the states that we really are not concerned about those rights given to us by the first and second amendments. I'd be very much concerned if this could eventually cause a psychological effect that we don't want.

Col. Siemer - I'm Colonel John Siemer, the Chief of the Division of Soldiers Claims and Veterans Affairs. I'd like to speak at a lower level, from experience. In 1969 I was in charge of troops in Norwalk, Ohio after a flood. The help given to the National Guard by the people of that community, specifically citizens band radio personnel, enabled us to keep looters, spectators, and people who were unnecessary, out of an area. Their comments, and they meant them,were, "Well, we're part of the militia." They were never ordered up or called up by the Governor. But these men showed up. They were organized as a club. My troops did not have weapons because they were under five feet of water in the Norwalk, Ohio armory. By the use of the citizens band personnel working closely with the Guard, we were able to do a quicker, much better job in Norwalk than we were in some neighboring communities. The pride in being part of the militia that the people have when there is an emergency, they do show up, and these things are important to them. They used the phrase. I didn't even think of it. I was in charge of the troops. But it worked well and I can say that the reaction of the people was one of pride in helping their own community rather than my troops.

Mr. Aalyson - Are you saying, sir that you feel that the presence of the article in the Constitution would promote that feeling better than a mere statutory provision?

Col. Siemer - I feel that, yes, definitely. And they used the word "militia." Most people don't know that they belong to one, quite frankly.

Mr. Aalyson - We've been discussing the militia and have heard from certain witnesses this morning. The testimony has been, I believe, that there is a feeling at least among those who have been here and testified today, that the present constitutional provision should be preserved. That it should not be eliminated and left to purely a statutory type of provision and that this promotes a morale perhaps among the citizenry and also tends to tell the federal government that if we retain this, we do not want the federal people to encroach upon our rights in this area. Are there further comments from anybody present?

Col. Shimp - May I make one further comment? I think the people that work in the militia and have had experiences in it feel that the power that is given to them should flow from the Constitution which is the basic document that the people provide. It is so important that we have a feeling of strength and a feeling of morale in the militia, that I think to leave the basic power to the whim of the legislature would not be as good as to have it founded in the solid rock of the Constitution. I think it is that feeling that we are trying to express.

Mr. Aalyson - I think the general consensus has been leave it alone. There has been a suggestion that possibly section 5, having to do with the safekeeping of the arms, could be eliminated, but there has been no ardor, I believe, in expressing that view. Gentlemen, thank you very much for coming in. We appreciate your contribution.

The next order of business appears to be Article VII, which concerns itself with public institutions. We have before us certain persons who would like to testify with respect to that particular article.

Mr. Hopperton - My name is Professor Robert Hopperton. I'm an adjunct professor of law at the Ohio State University and administrator of the law reform project in the area of developmental disabilities at the law school at Ohio State.

Mr. Aalyson - We do have your letter of January 21, 1976 before us.

Mr. Hopperton - Thank you. As the research memo prepared by the commission's staff points out, there are several options with regard to Article VII, Section 1. One would be to leave the language as it is right now. However, I think it is obvious that some of the language in that section, which was enacted in 1851, is obsolete, out of date. Words such as "idiot" "insane", I believe, are not current terminology. So one additional option would be to update that language but leave the substance of that section the same. I would like to suggest a third possibility for your consideration and that is to achieve something further in a substantive way through Article VII, section 1. And I feel it in a very timely way and appropriate to be speaking before you this morning inasmuch as Channel 6 here in Columbus last night had a very interesting program about Columbus State Institute that expressed very well some of the limitations and problems with regard to institutional care for the mentally handicapped and mentally retarded. It is those limitations and problems related to institutional care that have brought about over the last two or three decades a movement toward deinstitutionalization and normalization. That, I think, is the clear direction of treatment and care and education for mentally handicapped and mentally retarded persons at this time. It is the way treatment will be handled now and in the future. It is with that in mind that I suggested a draft which is in preliminary form for your consideration with regard to providing in the constitution in Article VII for the alternative to institutions. And those are normalized housing - residential housing-opportunities for the mentally retarded and mentally handicapped. Something that would indicate in the basic document of the state that the state is interested in fostering the care of these mentally handicapped and retarded persons through the proper and

appropriate sound ways that have been developed over the last couple of decades for treating this type of person. I submit my draft as a preliminary one for your consideration to suggest a possible positive approach dealing with the language in Article VII, Section 1. I should make one other notation. In the draft that I supplied to you, I used again the word "dumb" as the last adjective in a series of adjectives describing the types of persons being considered. I think a more appropriate and more modern, accurate term is "mute" rather than "dumb" and I would like to suggest that term for your consideration instead of "dumb". I believe those are the only remarks I would like to make. I would be happy to answer any questions you might have.

Mr. Aalyson - I gather from your letter that Ohio is already fairly extensively engaged in this residential housing type of treatment for persons for whom they find that appropriate. Is that correct?

Mr. Hopperton - It is partially correct. I think the policy of the Department of Mental Health and Mental Retardation is clearly moving in the direction of deinstitutionalization. There are problems with regard to budget, for instance, and changing old attitudes in terms of implementing that policy. But deinstitutionalization is only half of the question. The affirmative provision of housing opportunities in the community is the other half. I think it would be useful for the basic document of the state as well as the General Assembly to consider ways that those kinds of housing opportunities could be fostered in the state.

Mr. Aalyson - Do you think that a constitutional rather than a statutory provision would be beneficial to change the attitude that you mention?

Mr. Hopperton - Yes, I do, very difinitely.

Mr. Aalyson - In your suggested provision, you mentioned other developmentally disabled persons. Does this imply someone who has a disability by reason of birth defect as opposed to injury? Do you intend that?

Mr. Hopperton - Yes, I should indicate what the relationship between mentally retarded and mentally disabled is. There is a discrepancy between federal and state law at this time. The federal term in legislation is now "developmentally disabled". That large category includes mentally retarded, epileptic, cerebral palsy and autistic persons, as well as other similar neurological handicaps, that develop early in life and up to the time of 18 years of age. So in terms of the usage of the language that I have provided in this draft, "mentally retarded" could probably be considered a subcategory of "developmentally disabled" and perhaps a cleaner way of stating that although it wouldn't be consistent with Ohio statutory law would be to say just "developmentally disabled" instead of "mentally retarded, other developmentally disabled."

Mr. Aalyson - Would you limit this type of care to developmentally disabled, and when I use that term I tend to think in terms of congenital defect as opposed to a defect created by injury of some sort.

Mr. Hopperton - Do you mean deinstitutionalization?

Mr. Aalyson - Yes. You use the term "developmental" and "developmental" means to me congenital or something that comes from near birth. I'm wondering whether you intend to include disabilities of these characters which might come from injury as opposed to birth defects.

Mr. Hopperton - I think the highest priority right now in terms of present state programs is in the area of developmentally disabled and mentally retarded. And since I work on a developmental disability law reform project, that was my emphasis. I did not intend to exclude any other group but I did not include them either.

Mr. Aalyson - Thank you. I have no further questions. Other questions? Dick?

Mr. Carter - You use the term "in surrounding circumstances as closely normal as possible". What do you mean by that?

Mr. Hopperton - The concept of deinstitutionalization and normalization which I discussed very briefly in the letter to Ann Eriksson are concepts of the philosophy that the best treatment and care for developmentally disabled persons is to put them in a mainstream or normal type setting. This is a setting that will maximize their possibilities in terms of developing themselves towards independent living, toward the ability to hold a job, the ability to perform in as normal a way as possible.

Mr. Carter - If we were to add the words "normal living patterns as possible", is that what you mean by that?

Mr. Hopperton - Yes..

Mr. Carter - Okay. It is interesting for me to listen to you today. I just heard yesterday a rather impassioned plea for the same treatment for juveniles, family group centers or something they call them in contrast to institutionalization in places like Lancaster and that sort of thing. Have you given any thought to that question at all?

Mr. Hopperton - I have not, for the same reason as I indicated to Mr. Aalyson. And I would suggest that this draft be circulated to consumer groups or interest groups related to the area of juveniles for their comment. I limited my emphasis here to mental retardation and developmental disabilities simply because that is my area of concern. But I think you are correct in suggesting that normalization is a concept that is relevant to the area of treatment of juveniles as well as mentally retarded and developmentally disabled.

Mr. Carter - Why do you feel that this is something that should be in the Constitution rather than handled by the legislature? This is a very important question to us at all times.

Mr. Hopperton - I think in terms of changing attitudes, it is very important. I might point to some negative things that have happened in some other states in terms of deinstitutionalization. In both California and New York, wholesale deinstitutionalization has taken place without the carrythrough towards the normalization. What has happened is that mentally retarded persons have been released en masse to the community without any provision for housing in the locality. This has caused tremendous problems and has caused mixed results in terms of deinstitutionalization. I would view it as very sound and desirable to have consideration both of institutionalization, and the alternative to institutionalization, which is not just deinstitutionalization, but the normalization, the provision of normalized living patterns in mainstream kinds of circumstances, and I think that is important and desirable to state in the basic document of the state as well as to state it in statutory law which can be changed very easily or can perhaps be subject to budgetary limitations or concerns of that sort.

Mr. Huston - Do you feel that the word "institutions" includes treatment also, or is that just a manner of keeping these people?

Mr. Hopperton - Theoretically, institutions are supposed to provide treatment for the individuals. In fact, in very few state institutions caring for the mentally retarded and developmentally disabled across the country, has any real treatment been provided. At best it's been custodial care, at worst it's been warehousing of human beings.

Mr. Huston - Do you think there should be anything in here with regard to the requirement of treatment?

Mr. Hopperton - That is a point which I think the research memo points out and I think it would be worth considering. That consideration is backed up by several federal cases that establish what is called a federal constitutional right to treatment. So there is significant coverage to that regard. I think the research memo does make a very legitimate point and that would be something worthy of consideration.

Mr. Huston - Isn't the provision of residential housing such as you are providing for in your suggestion, isn't that more in the nature of treatment than institutionalization?

Mr. Hopperton - It certainly includes treatment. It includes a different type of treatment in a different type of setting that is closer to the normal type of environment that most of us enjoy on a daily basis.

Mr. Huston - Could you eliminate that language and use "treatment" in lieu of the broad language you refer to here in regards to residential housing opportunity?

Mr. Hopperton - I would suggest that if treatment were included in Article VII, Section 1 then some provision, some mention, some consideration, should also be given to residential housing opportunities to indicate that not only treatment but some legitimate place for housing and maintaining a reasonable living environment should be provided for developmentally disabled and mentally retarded.

Mr. Huston - Is there any other means other than in the institutions themselves to provide for the care of these people other than residential housing opportunities and the language that you used here? Is that a very narrow provision? Should it be broadened? Why pick out just one little area?

Mr. Hopperton - I think it suggests the concept of normalization in residential neighborhoods. Now whether or not that is the appropriate term, I think that it includes the alternatives that exist through the individual institutions. Residential housing opportunities could include family care homes or larger group homes as they have been defined, or smaller-type insitutions that are smaller than the large state institutions that are symbolized perhaps by Columbus State or Orient.

Mr. Huston - I was wondering whether you could just say "institutions and care in surroundings and circumstances as close to normal as possible". Why do you need residential housing opportunities?

Mr. Hopperton - There are community programs that provide care. The problems that have existed for states such as California and New York have been that no housing has been provided. And that tends to be one of the most important aspects of the problem of what happens after persons are deinstitutionalized. I would feel that

Mr. Lobosco - I think the legislature can be affected in two ways and I think one of them is more direct than the other. One, and I think Mr. Hopperton mentioned this a few minutes ago, is that having this expression in the state constitution would go some way towards encouraging the adopting or acceptance of this attitude by members of the general public, thereby reducing hostile resistance to setting up residential-types of homes. And more directly, if the legislature is aware of the fact that the Constitution now has language which indicates that the population of Ohio is interested in or willing to accept normalization or a normalized treatment for these persons, they would be more willing to act. So, yes, in those two ways, I think it would be helpful.

Mr. Aalyson - Thank you. Questions from the committee?

Mr. Carter - Again, referring to the presentation that I heard yesterday, a rather interesting and I think correct argument was made that purely from the standpoint of economics, it is much less expensive to treat juveniles in the group home approach than in the formal institutions. Do you concur with that with respect to this area?

Mr. Lobosco - Yes I do and I would like to point out not only really with regard to the cost of upkeep of these houses as opposed to the large institutions but also with regard to the eventual result of normalized living which is....

Mr. Carter - Rehabilitation.

Mr. Lobosco - Rehabilitation, education, and vocational training.

Mr. Carter - So you think economically it makes sense then.

Mr. Lobosco - Yes, in more ways than one.

Mr. Aalyson - Other questions?

Mr. Huston - I still wonder why you have no thought to putting something in with regard to treatment and training. To me, institutions, in and of themselves, imply custodial care and your principal concerns, I think, are the treatment and training, are they not? Custodial care means "you're here, you're going to be here the rest of your life."

Mr. Lobosco - I would say that that is certainly true. And perhaps the word "institution" just standing by itself might imply something less than treatment, rehabilitation, and training. But the language here is "institutions for the benefit of". It seems to me that within that context and taking into consideration current developments in federal law, in case law and statutory law, it would be clear that in either an institution or residential housing, some sort of treatment other than custodial care, must be provided. I don't feel that it is essential that that be made explicit in the Constitution. As long as the Constitution expresses the basic philosophy of state which is to provide either an institution or, where appropriate, residential housing facilities for more normal treatment of disabled persons.

Mr. Carter - You know, Bob, we can talk later, but I think you have raised a very significant point. Maybe we ought to think in terms of changing the name of Article VII from Public Institutions to another category that recognizes this viewpoint.

Mr. Huston - To me it's a custodial type of provision because it talks about the penitentiary and institutions. Personally, I think you are missing the boat in dealing with just one small segment. I'm not quarreling with you, but I think you could use broader language and still do a lot more than what you are suggesting. That was my thought.

Mr. Hopperton - That's a very valid point. Will the committee be considering Article VII, Section 1 again? Would there be any opportunity to perhaps do a second draft of what we may like to suggest in terms of Article VII, Section 1?

Mr. Aalyson - We would appreciate any consideration you would give to it and any recommendations you may want to make.

Mr. Carter - I agree with Bob. I think you've missed the boat. You haven't taken a big enough view of the problem and what the potential solutions are. I'm not being critical. I hope I'm being constructive.

Mr. Hopperton - Sometimes, when you are dealing with a problem, you tend to see some specific abuses and I think you are right. Perhaps it could be expended to be even more positive than we have already suggested.

Mr. Carter - Would it be possible to include in that this question of the penal institutions as well, particularly for juveniles? It is even a worse situation than the mentally retarded, you know, the way we treat young people. There are capabilities within your group with dealing with recommendations in that area.

Mr. Hopperton - I don't believe we would suggest we have the expertise to deal with the penal and corrections and youth commission areas.

Mr. Carter - Doesn't Ohio State have some people in this area?

Mr. Hopperton - Not specifically dealing as intensively with the problems that we are dealing with, the developmentally disabled. I would think that state departments such as Corrections and Rehabilitation and the Youth Commission would be familiar with and expert in those areas and might be invited to participate in any further discussion.

Mr. Carter - I might say that the Commission is a volunteer group. None of us get paid for the time we spend on this. One of the things we try to do is to encourage people to help us on a volunteer basis. It seems to me that if we are going to tackle Article VII at all, we ought to take a much larger view. I would be very pessimistic, as a practical matter, of making this small change. We have to make a recommendation which then goes to the legislature, who is concerned with many, many problems. And a small change like this is likely to get lost in the shuffle. You know, priorities. But I think if we take a larger view of what we are really trying to accomplish, as you pointed out, Mr. Lobosco, that there is a very major change which has taken place between the 19th century and today, a century later. You can take a larger view and come up with something that is a real blockbuster that recognizes what we are trying to do today and make it a massive change, then I think your chances are much better of it seeing the light of day. And eventually it has to be approved by the voters. So it has got to be a large enough public issue to achieve constitutional recognition.

Mr. Hopperton - In terms of the technical drafting of an amendment such as that, it would be I think a fairly simple task to draft it in such a way as to cover Corrections and the Youth Commission . I think it would be something that the committee should consider in terms of having experts in that area come in and give their views on an amendment like that. If you would like, I could draft a second amendment to Article VII, Section 1 that would include those areas, but, again, I would not feel competent to speak with regard to the advisability of that type of amendment covering those areas.

Mr. Carter - Would you be willing as a citizen of the State of Ohio to perhaps contact the Youth Commission and others and see if you couldn't get their interest and support on this? We have a very limited staff and we really need citizen support to get things done.

Mr. Hopperton - Let me ask you how soon your next meeting will be.

Mr. Aalyson - Thirty days or more following this meeting.

Mr. Hopperton - Well, I would be most happy to take the responsibility of one, drafting a second draft of Article VII, Section 1, providing it for those two state departments, that is Corrections and Youth Commission as well as having further discussion with Mental Health and Mental Retardation.

Mrs. Eriksson - Have you discussed this with Mental Health and Mental Retardation?

Mr. Hopperton - Only in a very limited way. There has been a crush of legislative activity these days and I was very happy to get your invitation and did a quick draft on this first one, it was not discussed widely. The concept was discussed briefly at the most recent meeting of the Ohio Association for Retarded Citizens.

Mrs. Eriksson - We did send Dr. Moritz a copy of the memorandum with a notice of today's meeting.

Mr. Hopperton - I will take the responsibility for doing a redraft and contacting these other departments.

Ms. Buchbinder - As I was sitting and listening to this discussion I realized the similarity between this discussion and the discussion we had on the education provision in the Education and Bill of Rights Committee when it concerned mentally retarded and mentally ill people. We are all aware that there are things that are wrong, and this provision like that one was written at a time when people didn't know or didn't care enough to rehabilitate people. One of the things that occurred to me when you were listing institutions, residential housing opportunities, and then Mr. Huston suggested "treatment" you are sort of afraid you might leave something out that might prove useful. Eventually there might be other things, for example, a drug, discovered for the mentally ill. Why isn't that included in this provision? An alternative approach that you might consider, as opposed to listing the things that we know will be of benefit to these groups, just make a statement that things that will be of benefit to these groups will be done, without listing the specific things that we know now are of help to them.

Mr. Aalyson - As soon as you get into listing, of course, you get into the idea that someone might say that by listing them you exclude what is not listed. We are all familiar with that problem.

Mrs. Rosenfield - For a title, you might want to consider calling it "Public Responsibilities". And another thing is I thought of 2 people that might be worth consulting on the problem of corrections. There is a justice study group at the Ohio Academy for Contemporary Problems and the League of Women Voters of Ohio has a study that has been going on for about three or four years on both adult and juvenile corrections.

Mr. Aalyson - Are there other questions of the witnesses? If not, are there other witnesses who wish to be heard?

Mrs. Workman - Thank you, Mr. Chairman. I am the mother of four children all of whom are in high school. My name is Glenn Workman, and I am really here as a parent. I'm not here at this point representing an organization per se. I spent about 10 years working with the Ohio Association for Children with Learning Disabilities, which is where my interest has come from. I have three boys that have identified learning disabilities which fall into the category that Mr. Hopperton was discussing. Their learning disability puts them with an I.Q. that is average and above, so they aren't related I.Q. wise with mentally retarded. But the reason my interest is with public institutions is that many times our children that have learning disabilities end up in our public institutions. My children are not. This has been a concern to many of us who have been working with the area of special education for a number of years. And we have documentation that our children occasionally end up in institutions. The kind of psychological evaluations that we have to use at this time put us in positions where we have children that are on such a fine line. It's just a matter of timing of that evaluation whether it is going to turn out that they are going to end up with our statutory I.Q. that says that they are mentally retarded or educably mentally retarded or the fine line that is going to say in law that they are of average intelligence and above. That is a very hard situation to deal with. And I'm bringing that out to say that the way that we express our attitudes and our language within the Constitution are relevant to this situation. The idea of providing alternative kind of care that has been brought up to Mr. Hopperton's amendment to assure that the best care is provided in the least restrictive manner. That is why I wanted to speak to you this morning. To share with you a parent's view, one of those people that are out there in the community in the state, and explain to you how the Constitution is definitely affecting our children in the state of Ohio. It was over a year ago that I addressed the Education Committee and had touched on a particular article, not knowing at that time that your committees were in subject areas, and I hit two subjects that really weren't in that committee. And the one area that I did address was the outdated language in this particular article of the Constitution. Listening to the discussion this morning and your response to Mr. Hopperton's comments and Mr. Lobosco's comments, indicates that you are most willing to take a long look at how this article of the Constitution is going to affect the quality of care and if it is really going to do the job for those people that are in our institutions. You were asking earlier if Mr. Hopperton and Mr. Lobosco really felt that it was significant to add this language to the Constitution. Having worked with the General Assembly for the last year and a half, specifically in the area of special education, I wanted to add yes! Yes, we need language in the Constitution that is going to outline some base attitudes and groundwork to help us get the work done in the state of Ohio that we need to do. Many of us that are working with the legislature are being bounced around. "It isn't in the Constitution. We have all of these other priorities and we don't have time." I'm not saying that all are that narrow-visioned, but some of them are. It will certainly establish a constitutional right for those parents that need to use the Constitution.

Mr. Carter - I might add that I think those youngsters are very fortunate to have a mother like you. This committee has also been dealing with the question of initiative and referendum and, although it is a very difficult road, I'm not suggesting that it is a panacea. There are ways other than appealing to the legislature to accomplish some of these goals. They are difficult ways but they are possibilities.

Mrs. Workman - I would say that the legislature is beginning to become much more open minded, and their vision is broadened, but because of so many other priorities in the state of Ohio, finances, for instance, it is a long hard pull for people in institutions or under any type of special education situation. I might suggest that while you are pulling in people from the Youth Commission and the Department of Corrections, that a number of people in these institutions would have needs that would come under

the Department of Education and possibly you might want to call on the division of special education for some input.

Mr. Aalyson - Other questions? Thank you very much. We appreciate your coming and your contribution. The next section before us for discussion is prison labor which is Article II, Section 41 and I understand we have one witness present.

Mr. Yost - That is correct. My name is Stephen T. Yost. I'm administrative assistant to the Director of the Department of Rehabilitation and Corrections. I would simply suggest on behalf of the Department of Rehabilitation and Corrections that Article II, Section 41 be repealed. We feel that it highly restricts our abilities to such a great extent to supply a variety of employments, both to near-releases, such as has been discussed in your memorandum, that is persons who are subject to a work release program. But also, more importantly, I think, it incapacitates us considerably with our ability to provide valuable work experience for those inmates who are incarcerated and have no immediate expectation of release. I would suggest that possibly were it felt necessary to have an article such as this governing prison labor that the first two lines of Section 41 would be adequate with a minor amendment. That would be to read, "Laws shall be passed providing for and regulating the occupation and employment of prisoners sentenced to the several penal institutions and reformatories in the state." I think that that would be sufficient. I think this is a serious economic question. I recognize this. There have to be clear delineations drawn as to whether or not the labor of prisoners, the work of prisoners would be in competition with private industry. And certainly this could better be handled through a more flexible system which is the statutes, and perhaps even a regulatory commission. I would also note that the language appears in the statutes to prevent our entering into contracts with the federal government, to provide such articles as the Federal Bureau of Prisons, for example, provides boots for the U. S. Army. I think they charge $25 or $30 per pair. We would be very interested in competing with the federal government in this area. For example, we have the capability of doing a great deal of printing, and that is a very highly restricted area right now. We're only presently allowed to use approximately one-third of our capacity. I'd be happy to entertain any questions regarding our suggestions.

Mr. Aalyson - Are the services, for example, such as printing and bootmaking which you have just suggested, services which cannot be provided by the private sector? You talk about competing with the federal government. . . Would you, in competing with them also be competing with the private sector?

Mr. Yost - Well, to some extent I suppose we would. However, I think that that is a matter that could be more closely regulated. In a sense we already compete with the private sector in supplying furniture for the various state departments.

Mr. Aalyson - Are you suggesting only that we should be able to furnish materials or manufactured products as the Constitution now provides to state agencies or . . .

Mr. Yost - I am suggesting that we be given broader discretion to sell our product, whatever that may be, and that any regulation, economic regulation, would more properly lie with the General Assembly rather than in the Constitution. And that only a broad granting of power to the General Assembly to regulate this sort of activity is really necessary. The federal government regulates prison labor in contracts with the federal government, for example, by executive order and by statute.

Mr. Carter - As I understand the thrust of your argument, what you would like to see is the elimination of constitutional limitations on what can be done and leave it up to the legislature.

Mr. Yost - That's very succinct and accurately stated. That would allow greater flexibility. Certainly prisons are undergoing a considerable amount of reform in the law and this would allow the General Assembly to react to changes by court decision and so forth and the will of the people, essentially, with regard to what can and cannot be done by a prison.

Mr. Aalyson - Do you advocate the right to be able to sell your goods in the private economy as opposed to other state agencies or charitable agencies, for example?

Mr. Yost - Well there are certainly federal law and federal constitutional restrictions against such a procedure. I'm simply saying that we do not need to further regulate it by such a constitutional provision certainly as this. I don't think the state constitution requires that. No, I'm not necessarily advocating that.

Mrs. Eriksson - What are the federal constitutional restrictions that you are speaking of?

Mr. Yost - Primarily the commerce clause, which gives the federal government the power to regulate commerce by the state in competition with private industry.

Mrs. Eriksson - In interstate commerce, however, what would keep the state prison industry from selling its tables to other persons in the state, from selling prison industry generally within the state?

Mr. Yost - I think statutes could be enacted to prohibit that. I think this could be taken care of by statute if the need were seen by the legislature. I just don't see that it is necessary under the Constitution. It may at some time be desirable. The legislature might feel that it would be desirable for the prisoners to provide some particular product in competition with private industry, feel that the private industry is not capable of providing it.

Mr. Aalyson - I'd like to hear some for instance, a specific example where you feel you have been restricted by this?

Mr. Yost - The printing example is probably the greatest. We are not only restricted within as to providing no competition with state industry whatsoever, but we are also restricted in this to any number of departments within the State of Ohio. There are about three departments, I believe, that we are able to print for.

Mr. Carter - That's by statute though, is it not?

Mr. Yost - Yes.

Mr. Aalyson - Not by a constitutional prohibition.

Mr. Yost - No, however, the constitutional provision of course, is open, prohibits the distribution of any printed materials outside the state and also to the federal government, as I would read it.

Mrs. Eriksson - The constitutional provision prohibits you from competing with private printing industry on the market . . .

Mr. Yost - It also prohibits us from providing any printing services to the federal government.

Mrs. Eriksson - That may be. But as far as printing for state agencies or any political subdivision, the constitutional provision does not prevent that.

Mr. Yost - I would note that with the growing prison population which has been well publicized and I'm sure you are all aware of, the ability for us to provide useful activity and beneficial, we hope, for inmates, is becoming more and more difficult. It is a tremendous burden to the taxpayers when we have to operate Ohio penal industries at a loss. The statutes of Ohio prevent us from operating at a deficit and so forth and therefore we simply have to restrict our activity to the market area that we have.

Mr. Aalyson - I'm wondering how you are going to accomplish what you might hope to accomplish by changing the Constitution. Not that I necessarily am in favor of the present provision. But how are you going to affect what you want to do by changing the Constitution? It seems to me that you have more statutory regulation right now.

Mr. Yost - Well, that is certainly more easily subject to change and when the General Assembly has the Constitution to rely upon they do not really need to react. It's very difficult to change this particular . . .

Mr. Aalyson - What is there in the constitutional provision which restricts you which you feel would not be restricted by if we changed it? I don't see anything really in here that points to your problem.

Mrs. Eriksson - You see, this is an absolute prohibition against persons in penal institutions working at a trade wherein the product or profit of his work shall be sold, farmed out, contracted, or given away. I think this is a prohibition against any kind of competition on the market with any private industry . . .

Mr. Carter - Excepting those disposed to the state or political subdivision.

Mrs. Eriksson - Yes, which is contained in this last section. But I think what he is saying is that in fact if you repealed this there would be nothing prohibiting the penal printing industry from competing with National Graphics unless the legislature chose to prohibit that.

Mr. Carter - Leave it up to the legislature.

Mrs. Eriksson - Yes.

Mr. Aalyson - Well, I think that gets back to my question. You're advocating the right if the legislature grants it, to be able to compete in the private sector.

Mr. Yost - I think so, but what I am principally advocating is the ability for us to increase our capacity so that we can provide employment for the number of prisoners that we presently have in Ohio and are likely to have in the future.

Mr. Aalyson - By getting into competition with the private sector?

Mr. Yost - Under circumstances as regulated by the General Assembly, yes, I guess you could say that.

Mr. Carter - It seems to me that the question involved here is an age-old one as to what limitations should be placed on government to compete with private enterprise. We've been fighting that battle for a long, long time, federally and statewide. There are very valid reasons for what you are saying. I'm not denying that, but there are valid reasons on the other side as well. It's a tough question.

Mr. Yost - What I'm saying is the manner of any such competition could be more

flexibly regulated at a level that is unconstitutional. I'm not saying that we should have an absolute carte blanche to compete with private industry, but there certainly are areas where private industry may not be capable of handling feasibly or economically that we could compete in for example. I'm not saying that we set up a new General Motors within the prison system.

Mrs. Eriksson -We had viewed the restriction mostly in the context of prohibiting a work-release type program, and I wonder if you would address yourself to that?

Mr. Yost - I would say that certainly a change in my judgment would be required. We have several court decisions which indicate that a work release program, where you release a prisoner to go out and work, and he's paid like a normal person, but his product is being used by a private person for profit, is prohibited. There is no statute, I think, that could be enacted that would allow work-release with the Constitution as it is presently stated. The impact of such a program is probably relatively marginal since there are not really that many prison inmates which would be amenable to release on such a program. It is a relatively small impact. However, we would certainly desire the capability of doing that.

Mr. Carter - Let me ask you this question. This is an economics question rather than a legal question. Suppose for the sake of argument that it was necessary to allocate to the cost of the work produced at a penal institution at a minimum wage, for example. And that it would be required that the price charged for the product had to fully reflect those costs and other costs. In other words if there was cost accounting on a reasonable basis. My question is do you think penal institutions could compete with private enterprise?

Mr. Yost - It's difficult to say. I think that we possibly could in some areas.

Mr. Carter - It depends really, I think, on the work ethic, the amount that is involved. Is it possible to do that?

Mr. Yost - I think it is, given the proper equipment. I feel that we would be capable in some areas. Certainly not in many. I think production of office furniture, for example, I think we have been rather successful with that.

Mr. Carter - The next question is how efficient can they be?

Mr. Huston - I have a couple of questions. I didn't hear you saying this directly, but are you saying that you feel the General Assembly should place the restriction on competing with private industry in view of the fact that they have the responsibility for allocating funds for the penal institutions and that they may want to weigh the advantages of having competition with private industry to supplement the cost of operating those institutions, in lieu of having to operate them out of the public coffers?

Mr. Yost - Yes, I certainly think that is correct. They're in a better position, I think, to weigh the flux and changes in the economy which would certainly influence any decisions as to what level any governmental entity, not only the prisons, with private industry, if at all.

Mr. Huston - I have another question. You recognize that any attempt to amend the Constitution to eliminate the competitive element would probably have strong resistance from the business and labor community? Do you feel that there would be any possibility of amending this section to eliminate that?

Mr. Yost - Certainly if you expand it to the extent that we should provide services to the federal government, if nothing else, and leave the language as it is and

simply add some language, or to the federal government and its political subdivisions as well as it is treated here in the last sentence with respect to the state of Ohio.

Mr. Huston - Recognizing that it would be difficult to amend this to eliminate the competitive element, are there any other amendments that you would suggest that would assist you with your work-release program? Although you indicated that those were of a minor nature.

Mr. Yost -I chose my words badly there. The impact of those does not affect a large s egment of our prison population, just a few percentage points of our total population. Yes, I think we could make some suggestions along that line. Frankly I think any expansion or change in this section would meet with some opposition for the reason of competition. I think that . . .

Mr. Carter - I wouldn't mind if the state of Ohio competed with the federal printing office for example.

Mr. Huston - No, but as he says at the present time they can't and they are limited even in the state of Ohio by legislation, so whether or not, even if your Constitution permitted it, whether or not the legislature would permit it would be open.

Mr. Yost - I guess what I'm saying is that these judgments are more appropriately left with the legislature because they can be made in a more timely fashion with more timely data and information available.

Mr. Carter - I think we probably want to leave some time for the other, but I want to make just one closing comment. We've learned on many many occasions that things that are in the Constitution are very difficult to get rid of for one reason or another and that we have to be concerned with the practical aspects of this thing.

Mr. Aalyson - Further questions? Thank you very much.

Mr. Yost - Thank you.

Mr, Aalyson - I appreciate your time and we will certainly take your suggestions into consideration.

Mr. Yost - We would be happy to make specific suggestions, by the way, regarding work release.

Mr. Aalyson - We would appreciate that if you could send something of that character to Mrs. Eriksson.

Mr. Yost - I'd be glad to.

Mr. Aalyson - Always looking for help. That enlarges our staff. We will now skip down on our agenda to apportionment. We will now move on to Article XI which concerns itself with apportionment and districting. We do have some persons here who would like to testify with respect to that provision.

Mrs. Rosenfield - I'm Peg Rosenfield, League of Women Voters of Ohio. You are all aware of the sort of byzantine structure of the League to understand why I have some strange constraints on me. We don't have steady positions that affect us very much except that we have a long standing one supporting one-man one-vote and a sort of principle of protecting the right to vote of every citizen. So I can't say a lot officially for the League, but if I can talk sort of for myself as an informed amateur. I can't even guarantee that the League would support an article on this, but if we come up with a really good one, I think we can because I think there are enough of

us who are really unhappy with what we have now, that we would like very much to get it changed. I have the feeling that I haven't looked at this well enough because I think that there is a fairly simple straight-forward solution and that always makes me suspicious.

Mr. Carter - I can't help but interrupt to make a comment, if I may. I think you have all heard the saying that for every complicated problem there is a simple solution and it is invariably wrong.

Mrs. Rosenfield - Right! And this is just how I feel that this has got to be. I must not understand the problem. But reading the different compositions, it seems that the real crux of the problem is the composition of the board that does the apportionment. And the ones from different states, and I was looking through these and trying to identify in each one who really makes the decision, and it was always the person who picks the tie breaker. And it seems to me that Hawaii has the solution, which is that the members pick the ninth. There are various good ways, in Hawaii, Illinois and Michigan of selecting the even number. I like the idea of the leadership of both parties of both houses selecting the people and maybe letting the party leaders select people. And I think maybe the part in Michigan about a candidate for governor of a third party who received at least 25% should be given some voice on it and then you just enlarge the commission to allow for it, and then that even number has to get together and by ways best know to them, pick the tie-breaker. And that seems to me the best way of picking a tie-breaker. I know we do it in the elections commission. I think my objection to the elections commission is that it is too small. Five is maybe not quite enough to give enough representation of different views. But I think that is a terrific way of picking a tie-breaker. Maybe it's passing the buck but it is not vested in any one official. And of course they are going to do a lot of political giving and taking within it, but that's what the whole thing is about. There was one other thing, not in those three, that I liked, but it may not be necessary, and that is assuring representation from the small and large counties. I think it would happen, I just think the appointing people on any of those would be politically astute enough to see they got representation from all over the state. But that seems to me the best kind of thing to start from, maybe 8 or 10 people picking their own tie-breaker. That's why it seems so simple that I thought there has got to be more to it.

Mr. Aalyson - Thank you - questions?

Mr. Graetz - My name is Bob Graetz and I am with the Ohio Council of Churches. We are in the process, along with the League and Common Cause of working through this whole matter so you are ahead of us. Ann, I don't know whether you sent me these materials, but I haven't been able to locate them so maybe I can pick up another set of them. This will be a matter for discussion at a meeting of the commission on government reform of the Ohio Council of Churches on February 4, but we will not at that time reach any definite position on the issue. But there is one piece of this that I would like to share with you that some of us have been talking about individually. That is the concept of changing the number of the members of the legislature so that legislative districts are multiples of congressional districts. And the approach that some of us were talking about was simply making the number of senate seats twice that of the number of congressional seats and doubling that number for the number of house seats. It would mean raising the number of senators from 33 to 46 and lowering the number of representatives from 99 to 92. So it would be a small increase.

Mr. Aalyson - What is the rationale for doing that?

Mr. Graetz - The rationale for doing that is to make it much easier for citizens to relate to their districts. They would know that if they are in a particular house district they are also in a particular senate district and a particular congressional district. So that when people come together and try to work in small groups in a local area . . .

Mr. Carter - Then you would have only one districting situation for both congressional and state.

Mr. Graetz - That's correct. And I realize that that could present some problems in terms of the federal constitutional provisions. As I say, we have not worked these things out. Three of our organizations and probably some others are going to be working together trying to figure out what some of these simple answers may be. All I'm presenting to you now is a concept that some of us have been talking about for several years and have not really worked through yet. Our concern is to make it as easy as possible for common ordinary citizens to relate to the structure of government. And as it is now, when we have our church groups back home who are setting up networks to deal with particular members of the legislature, they find that they have to split up, and some work together to deal with one member of Congress and some relate to another. It creates difficulties. It's hard enough to get them activated and our concern is that we make it as easy as possible. A second thing, obviously, that you are all concerned about and we are too, is finding some kind of language for the Constitution that would guarantee more compactness in the drawing of district lines. I can just share with you that we have that concern, we share that concern with you. And we have not discovered any language that could do that yet. My impression is that the language of the Constitution is reasonably good on that score. I'm not sure how to guarantee that the intent of that language is carried out. It obviously has not been in the past. So that really is all that I have to share with you this morning.

Mr. Aalyson - Thank you. Any questions from the committee?

Mr. Hetzler - My name is David Hetzler. I'm the executive director of Common Cause for the state of Ohio. I'd like to review just for a moment what our relationship with this issue is. As you probably know. Common Cause is a citizens' lobby group and we are interested in government reform as it relates to the process and structure of government. Mostly in the areas of what we call money and secrecy. How big money or any kind of money influences the political process and secrecy in the process. The gerrymandering issue is not a national issue for Common Cause as yet. But it was generated actually out of the Ohio organization. Our interest comes from the one-man one-vote concept, and also in terms of the ability of citizens to, as easily as possible, participate in the political process. The current gerrymandering system, the current apportioning process in the state, is not a good one. So approximately a year ago, our legislative issues committee began to study the issue and we have produced a position paper based on a whole host of information from Ohio and around the country. We have also produced a model apportionment bill which didn't just come out of Ohio but came out of our national office as well. So that it is now a priority, one of the four issues that we are now working on here in Ohio. And at the moment I'll just indicate perhaps the kind of support that would perhaps be available in the future. The national office is exploring the possibility of the Ohio Common Cause organization's position on gerrymandering being a seed project for the possibility of instituting it on a national level. So that's in the words.

Just a few brief comments with regard to some of the basic things that we are concerned about in terms of gerrymandering. First of all, I think the make-up of the board and how it gets chosen is probably only one way to begin to minimize partisan abuse and to maximize citizen access. And incidentally, the model bill we have here is only a draft and it is not cast in bronze. The problem of how the board is created and who sits on it is something we are still trying to grasp. However, the suggestion we have in our draft bill is a seven member board. The seventh member, or tie breaker, chosen by the remaining six. Although, as I say, if there is any other suggestion better than that one, we are open to it. That has some problems with it, one of which Peg mentioned. That is, that there may be some political goings on, as she said, giving and taking within the group, which we would probably view as negative. That is what you may end up getting is a sort of cuttings of the deals. From the negative aspect if you want to look at it that way. "You give us this district and we'll give you that district", sort of approach. So that we would suggest that the make-up of the board no matter how you do it probably is only one way, or one aspect of trying to reform the system. The others we think remain in the Constitution. And that is we think that the board, the apportionment board, however it is made up, has to be guarded very closely by constitutional language, providing for the process, providing for the make-up of districts, the compactness of it, the issue that Bob mentioned, the issue of contiguous districts we are very interested in. For the same reasons that the Ohio Council of Churches mentioned. That is, we need a political map which makes some sense, congressional districts relate to state districts, et cetera. For anyone who has done any political organizing for citizens groups, the problem is practically insurmountable if you take a look at the political map as it is today. It makes it very, very difficult for persons to really impact their legislature.

Mr. Carter - May I interrupt just to ask you one question on that point? Of course, the number of congressmen is determined by national conditions. We lose congressmen in Ohio because we are not growing as rapidly as other states. Do you think there is any realistic possibility of convincing the legislature that they ought to be subject to reduction of the number of legislators?

Mrs. Eriksson - No.

Mrs. Rosenfield - It has been done. In Massachusetts, the legislature finally reduced itself in size from something like 240 to 160.

Mrs. Eriksson - The Ohio General Assembly reduced itself in size, too, when reapportionment took place but to have it subject to the number of congressmen strikes me as being frankly an impossibility.

Mr. Graetz -Another feature of this is that it makes it much easier for a member of the legislature to aspire to Congress.

Mr. Carter - No doubt about that. I agree with that.

Mr. Hetzler - That is the other point that we were going to make and that is that it does foster competition? Because if a given congressman knows that he or she has two or three state legislators wholly within his or her district, young turks, if you will, who having done well in Ohio legislature, might be after his district. It does provide for a certain amount of competition which now does not exist or tends to be limited compared to what it could be if we were able to make the districts, the three levels, contiguous with each other. And as I said earlier, it fosters citizen participation. If you were able to look at our organizational structure and

look at our organizational map, it is incredibly complex and it is very difficult for the citizens to affect the legislative process, because of the districts and the way they are set up. And as Bob mentioned, we are also in the process of trying to set up some working groups with the League and the Ohio Council of Churches and I have spoken with the AFL-CIO, Mr. Smith, and we are going to speak with some of the other statewide groups of various sorts. The Ohio Chamber of Commerce is being approached, among others, to see if we can't get together on some language that really makes sense. And incidentally, in terms of the initiative petition, as difficult as the process is at the moment, our organization has had considerable experience with the initiative petitions in other states and it is a part of our planning at the moment.

Mr. Carter - My guess is that it is the only practical way.

Mr. Hetzler - Yes, judging by the sort of reaction that we have gotten from the legislature on our gerrymandering proposal, you are probably right. Incidentally, we are attempting to introduce our gerrymandering proposal now.

Mr. Carter - I have some hope that the Commission might take a stand on what you are talking about.

Mrs. Eriksson - Do you have copies of either your position paper or your proposed legislation?

Mr. Hetzler - Yes, I would be glad to forward all the information that we have to you. Unfortunately, the gentleman who was supposed to speak to you this morning was the gentleman who developed this whole position, was held up in an ice storm in southern Ohio and he was unable to make it.

Mr. Carter - I think it's a very important subject and certainly a very difficult one to tackle. I certainly don't think that the Commission ought to sweep it under the rug.

Mr. Aalyson - Questions? Thank you very much.

A date for the next meeting was discussed. It was agreed to have the meeting the evening before the Commission meeting , the evening of February 24, and the next morning, the 25th. The meeting was adjourned.

Ohio Constitutional Revision Commission
What's Left Committee
February 24, 1976

Summary

The What's Left committee met on February 24, 1976, at 1:30 in the Commission offices in the Neil House. Committee members attending were the Chairman, Craig Aalyson, Dick Carter, Robert Huston and Katie Sowle. Ann Eriksson and Brenda Buchbinder were present from the staff.

Mr. Aalyson - Good afternoon, ladies and gentlemen. The What's Left Committee is discussing a number of topics this afternoon, primarily in continuation of a meeting which was held during January, at which some of the topics were also considered and during which some of the witnesses who are now present were also present as witnesses then and some of the witnesses agreed to assist this committee by proposing drafts of constitutional provisions which we might like to consider in our deliberations. In view of the fact that there are a number of persons here who testified at the former meeting with respect to the consideration of the public institutions or public welfare area, I think we will proceed with that. At the earlier meeting, Mr. Hopperton, who appeared as a witness, agreed to give us the benefit of his ideas in regard to a draft.

Mr. Hopperton - Thank you, Mr. Aalyson, and members of the committee. As a follow-up to the meeting we held last month and the suggestions made during that meeting, Glenn Workman and Jerry Lobosco and I attempted to get together numerous people who would be interested in Article VII, Section 1. We also developed a working draft to be discussed at that meeting. The meeting was held yesterday afternoon. Invitations to that meeting went to Steven Yost, of the Department of Rehabilitations and Corrections; William W. Weisenberg who is in the audience from the Ohio Youth Commission; Mr. Joseph Gentlecore of the Ohio Developmental Disabilities Incorporated; Mr. Joseph White from the Academy for Contemporary Problems; Mr. Robert Miller of the Ohio Association of Retarded Citizens; Mr. Greg Ensign, who is staff legal counsel at the Department of Mental Health and Mental Retardation; Mr. Ron Koslowski, who is with the State Developmental Disability Planning Council; Mr. Alvin Hadley from Children's Services in Franklin County; Ms. Jean Szabo from the Department of Mental Health and Mental Retardation and Columbus State Hospital; and Mr. Carl Reiser of the Ohio Society for Crippled Children and Adults. Attending yesterday's meeting were the following people: Glenn Workman, Jerry Lobosco, of the Franklin County Council for Retarded Citizens; Bill Weisenberg; Joe Gentlecore, Joe White, Ron Koslowski, and Jean Szabo. The other invitees could not attend. The people who assembled informally yesterday afternoon considered at length Article VII, Section 1 and what the purposes of such a constitutional provision might be. And very surprisingly, and very happily, by the end of that meeting we were able to come up with a draft that we all felt comfortable and satisfied with.

And I would like to present that draft to you as members of the committee and to Mrs. Eriksson now. This would be suggested draft amendment to Article VII, Section 1, which would replace the public institutions section that is presently in the Constitution. Let me read the suggested draft amendment. "Services to persons who, by reason of age, disability, handicap, or behavior, require specialized care, treatment or habilitation, shall always be fostered and supported by the State; and shall be provided in the least restrictive manner appropriate to the circumstances of each such person subject to such legislation as may be prescribed by the General Assembly." This draft, I think, is responsive to some of the suggestions made in the last What's Left Committee, in terms of providing general principles dealing with the area of

treatment and care for certain persons in need. We attempted in our deliberations yeaterday to stay away from legislative type language, and not provide anything in Article VII, Section 1 that would be too specific, too detailed or that would take flexibility away from the legislature. We tried to stay away from specific treatment modalities. And we also decided to suggest as we have here an amendment to Article VII, Section 1 rather than deletion of Article VII, Section 1. Deletion, of course, would mean that the state and the citizens of the state would have to rely, I think, upon the general police powers of the state for coverage in this area. We felt that it was important to have an article such as the one we suggest to describe state responsibilities in this area. So I would like to submit this draft amendment for your consideration at this time.

Mr. Aalyson - Thank you, Mr. Hopperton. Does any member of the committee have any questions of Mr. Hopperton about the suggested amendment?

Mr. Carter - I like the general approach that you have here, Mr. Hopperton. I want to comment you and your group for helping us in this regard. I think we discussed at the last meeting that this is kind of a citizens' movement and this is certainly in the best spirit of that, so we appreciate it. The question that comes to my mind in reading this is whether or not we want to mandate in the constitution such services or make them permissive to be handled in detail by the legislature. I'm a little concerned about a mandate. I wonder if you have any comment on the importance of a mandate versus making it clear that the legislature has the power to do so.

Mr. Hopperton - I think it was the consensus of the people who met yesterday afternoon that we would support a constitutional mandate for provision of services to the types of persons indicated in the amendment. It is important, we felt, I believe to do this in terms of spelling out public responsibilities in this area. I think this was done, even though there was a recognition that theoretically state constitutions are viewed as limitations on power rather than grants of power. I think we also felt that in practice, many times the state Constitution is viewed more as a grant of power, in practice, if the legislature doesn't find specific language saying it should do something, then the tendency is that it may not do those things. We felt very concerned and very committed to stating certain public responsibilities that would be a clear signal to the legislature of responsibilities the state should undertake in this area. So we felt that the mandate was appropriate. It is a very general mandate. It's only speaking to basic principles. And it clearly allows for legislative judgment in the last clause as the former Article VII, Section 1, did.

Mr. Carter - In the development of constitutional amendments that we are talking about here in this room, this is the very first early stage. It has to go through, as far as we are concerned, of course, the Commission itself. And then after that it has to receive the approval of the legislature and then finally it has to, of course, be voted on by the people. It seems elementary but I'm sure you are aware of this. What I'm going to suggest is that it strikes me that in the interest of what you are trying to do, it might be difficult to get all of these approvals by saying "services to persons, etc. . . shall always be fostered and supported by the state." That's kind of like writing a blank check in some respects. It concerns me as to whether it is politically possible to do this.

Mr. Hopperton - I'm not sure whether I could provide insights as to whether it is politically possible to do that. I would say that generally, this amendment follows the general form of the present provision that deals with public institutions. It would appear that public institutions are mandated under present Article VII, Section 1. Our intent and this doesn't speak to the political question that you raised, was

that a new Article VII, Section 1 take into account new concepts and new principles in the area of treatment and care and habilitation of these types of persons. And not be limited just to institutional care. We felt that institutional care which is mandated now would be included within services.

Mr. Carter - Understand, Mr. Hopperton, I like the approach very much. But let me suggest that if you were to make a change, changing the word "require" to "requiring" and then deleting "always," would that interfere with what you are trying to accomplish? It would read "services to persons who by reason of age, disability, handicap, or behavior, requiring specialized care, treatment or habilitation, shall be fostered and supported by the state." I would be very concerned, I think, if I were a voter or someone else reading this "shall always" that someone could go to the court and say the state owes me this kind of support because of the Constitution without the benefit of the legislative contribution and thinking on this.

Mr. Hopperton - In terms of your specific suggestions, I personally would have no problem with either one of those changes, but I can only speak for myself.

Mr. Carter - I understand.

Mr. Hopperton - Again, this was meant as a draft for your consideration, your amendment, your massaging, as you might see fit. I personally would not have a problem with "requiring" and deletion of the word "always."

Mr. Carter - I like what you have come up with.

Mr. Huston - What is your concept of the definition of "behavior"? Do you include within that the criminal element?

Mr. Hopperton - I think I might defer to Bill Weisenberg of the Youth Commission on that question.

Mr. Weisenberg - I would say unequivocably "behavior" would include anti-social behavior as determined by the legislature, when it enacts criminal and penal statutes, which is a moral and a legal decision. I think it was the intent of the committee that both the juvenile and adult correctional system which is included as a part of the criminal justice system be made a part of this draft amendment.

Mr. Huston - Do you think there is any conflict between the purposes that we establish here, principally for the people that can't help themselves due to disabilities that were foisted upon them by something that they didn't do, should we treat in the same way the people who are voluntarily, you might say, involved in problems?

Mr. Weisenberg - This is a personal opinion, and from a personal standpoint, my answer would be "yes." I would have to say, you use the term "voluntary" and I think the studies that are ongoing now show that many acts committed by so-called criminal offenders may not be voluntary, but in fact involuntary acts or acts caused by some medical condition that an offender is under. At the same time, the trend in correctional thinking, both on the juvenile and on the adult level, is that those who may be able to help themselves under certain types of supervision and care within a community don't need reform or total incarceration. And that there are some people who can help themselves even though they voluntarily commit acts that we determine to be anti-social. So I think people who need treatment, care or habilitation because of behavior, would fall under that. I think voluntary vs. involuntary should not be the standard which is used in providing services to human beings.

Mr. Carter - Another way of putting that is who is wise enough to say for decades to come, as human knowledge increases in these areas, let's leave flexibility so that the legislature can respond.

Mr. Weisenberg - I would agree with that. I think as Mr. Hopperton stated earlier, we should try to create language that is both broad and flexible, that is in the best interest yet creating a document that has a lasting, enduring effect. That has been the traditional basis upon which constitutional language has been so framed.

Mr. Carter - Should be framed.

Mr. Aalyson - Other questions from the committee? Are there other persons present who wish to speak to this amendment? Mr. Graetz?

Mr. Graetz - I don't have anything specific to offer except that it's just serendipitous that I happen to be here when this is going on and I feel certain that the Ohio Council of Churches would support language similar to what Mr. Hopperton has introduced here. We are deeply concerned about making certain that the state provides for a wide variety of persons who need special attention. And we are concerned about that being offered in the least restrictive manner and as much as possible in locally-based institutions or agencies.

Mr. Aalyson - Are you in agreement, Mr. Graetz, and I will direct my question also to Mr. Weisenberg, that we would better accomplish this by having a constitutional provision rather than by eliminating a constitutional provision and leaving this to the legislature under the powers it has inherently?

Mr. Graetz - Frankly, I believe it ought to be in the Constitution. I am not saying that I do not trust members of the legislature, but I think that there are times when they act in a capricious manner and I think it is far better to make certain that the constitutional protection is there, so that if need be, we can use the judicial system to require actions that may be required at some later date.

Mr. Weisenberg - I would definitely opt for including some language in the Constitution on the basis that I believe the legislature does need the guidelines under which it is to set the parameters for society to function. At the same time, I think it is critically important today that we do have language which spells out the essential services that people need. Because what has happened over the past years is that we as citizens have relied upon the intervention of the federal courts to dictate the way our lives are run and have made legislatures subordinate to the judicial branch of government. And I think setting out the parameters under which human services will be provided and spell out a mandate on how the general assembly will look at this, will place the General Assembly where it does belong, on an equal plane with the judiciary. I think this is of critical importance in today's society. We have relied far too often on intervention by federal courts, if I may repeal myself, to accomplish social goals and social purposes, and the legislature has then become reactionary to what the courts are saying. I think this gives the General Assembly an opportunity to move ahead in this area.

Mr. Aalyson - Don't you feel that the courts might be more proscribed if there were not a constitutional provision upon which they could operate? In other words, if we eliminate a constitutional provision in this area, would not the legislature retain its prerogative to enact legislation in this area by inherent power whereas the courts, without having a constitutional provision to act upon, would be eliminated from involving themselves almost at all unless they were talking specifically about a statute?

Mr. Weisenberg - It's a difficult question to answer but I think it is important to realize that with or without a provision in the Ohio Constitution, the U. S. Constitution would give some basis to the federal courts to act based upon the Bill of Rights as it is applicable to the states through the 14th Amendment. So even absent the Ohio constitutional language, I believe the mandates of the federal constitution would dictate some of the services that people will and could get.

Mr. Aalyson - Do you feel that the retention of an article in the Ohio Constitution would tend toward a situation where the federal courts would be less likely to intrude in this area, at least in Ohio?

Mr. Weisenberg - Yes, so long as the General Assembly acted upon the mandate of the Ohio Constitution. I think inaction would produce judicial action.

Mr. Aalyson - Thank you very much. Mrs. Workman?

Mrs. Workman - I am pleased with the statements that are being made and the concern for Article VII. Certainly, being a part of working out this draft, I do feel that it has included the needs of the aged, and the needs of those whom I have expressed are in between as far as education.

Mr. Aalyson - Mr. Lobosco?

Mr. Lobosco - Thank you, Mr. Aalyson, members of the committee. On this occasion and on the occasion of the last meeting, I will confine my remarks simply to supporting Mr. Hopperton's statement. Naturally, I am in agreement with this draft provision. I'd like to point out that as representative of the Local Council for Retarded Citizens we are concerned with the inclusion of an appropriate constitutional provision not only because it will provide a basic mandate for legislative action but also because it will symbolize the state and the people of the state, it will symbolize their commitment to progressive and humane treatment and care for disabled and otherwise handicapped citizens of the state. The suggestion, of course, of merely deleting any provision of this type was considered, and in consultation with my agency, it became obvious that many of the members felt, may of whom were parents of disabled children, that it was important to have a basic statement of support for these services.

Mr. Aalyson - Thank you. Are there any other questions? Bob?

Mr. Huston - I would like to dissect this just a little bit. In your language where you talk about "in the least restrictive manner" what do you mean by that?

Mr. Hopperton - I can speak with respect to developmentally disabled and mentally retarded persons. Perhaps other members of the committee who met yesterday would want to speak to other areas. "Least restrictive manner" would mean, for instance, if a mildly retarded person is capable of independent living, that he be given the opportunity to live independently. That that person be given every opportunity to maximize his or her own opportunities. If the least restrictive alternative happens to be a group home in a community, then that opportunity could be provided. However, if the person is profoundly retarded, severely retarded, and can only be cared for because he or she is totally dependent, in a public institution, then that would be the least restrictive alternative. So it is a concept that means maximizing the opportunities for the person to live in as normal or as close to normal circumstances as possible appropriate to his or her own circumstances.

Mr. Huston - Do you think that is clear? I can understand where you people that deal with it all of the time, that it is probably very clear. But to the uninitiated into this area, to me it doesn't really make as much sense in there as you have indicated it should. " . . .shall always be supported by the state and provided in the least restrictive manner". To me "least restrictive manner" could mean in connection with the behavior problems, that you are not going to incarcerate because you say "the least restrictive." I'm wondering whether or not that is proper for a constitutional provision. Attempting to, you might say, dictate to the General Assembly, or limit the General Assembly as to what they could do. I have problems with that language "provide in the least restrictive manner." And when you go on "appropriate to the circumstances of each such person" it appears to me that what you are talking about here is that you have to treat each individual. You can't have a program, but you have to look at each individual and you have to treat them, or the legislature has to treat them in a particular way, individually, not as a program.

Mr. Hopperton - In terms of mental retardation and developmental disabilities, again, I would feel that "least restrictive alternative" "least restrictive manner" is a totally appropriate concept and is basic general concept that is appropriate for constitutional language. I think that your question with regard to persons with behavioral problems really should perhaps be answered by Bill or someone in the corrections area.

Mr. Weisenberg - I would think that what we mean in the corrections area, and having spent four years in the adult correctional system, not as an inmate, I might add, and also the past year in the juvenile system, what we are talking about is a break with past tradition. An alternative to traditional means of incarceration. Because the traditional notions of confinement and incarceration spoke to the great bastions in this country. The old Ohio Penitentiary on Spring Street. What we are talking about is dealing with people. And what we mean by least restrictive environment, we talk about in terms of control and supervision, rather than in terms of a place or a location. That was the mode of the early 19th and 20th century, but is not the mode of the 1970's and what is hopefully the future. I think when we talk about least restrictive manner we talk about a condition, a state of control, a state of supervision. I believe that that is what the legislature of today is taking a very close look at.

Mr. Aalyson - Mr. Weisenberg, do you think it is appropriate, and you may have been asked this question before, to attempt to treat in the same constitutional provision problems that afflict the criminal element as opposed to problems that afflict such persons as mental retardants?

Mr. Weisenberg - I have no personal problems with dealing with it in the same constitutional amendment.

Mr. Aalyson - Can you tell me why not?

Mr. Weisenberg - My feeling is we're dealing with people, we are dealing with human beings. The tradition has been to treat the criminal as though he had leprosy. Many of the people who commit crimes have tendencies to demonstrate anti-social behavior. There may be nothing wrong with them. At the same time there may be problems. We are talking today about increasing the number of professionals in the social and behavioral sciences in our correctional system both in the juvenile and the adult level, for people who do need some type of assistance, who can't care for themselves. And their anti-social behavior is a way of acting out, to tell us either their frustrations or some need that they do have. So I think when we talk about providing human services, we should be as inclusive as possible, instead of creating a class structure with people.

Mr. Aalyson - Do you recognize the concept that perhaps crime, and maybe even a large portion of it, could be purely voluntary?

Mr. Weisenberg - I would respond by saying that a lot of it is probably very voluntary.

Mr. Aalyson - You wouldn't classify the person who is incarcerated for committing a voluntary crime as one who is laboring under a disability as that term is used in this proposed draft?

Mr. Weisenberg - Maybe not the term "disability". It depends how we classify the term "unemployment" or "poverty" or "economic deprivation". And we read more and more that that is very related to the issue of the incident in crime especially in large metropolitan areas and in our ghettos. And that many times the acting out of criminal tendencies or criminal acts is a response to these conditions. That may fall better under a handicap. I think we are dealing with a much bigger problem in talking about crime than crime itself. And I think that the persons who we are going to be speaking to should be dealt with in a similar fashion as those who are suffering under a disability or suffering because of either youth or old age. I think when we speak to age we must remember we're talking about young people as well as old people.

Mr. Aalyson - Thank you. Bob?

Mr. Huston - I have problems with, you might say, the appropriateness of relating this to the circumstances of each such person. The problem that I have with it is that it looks as though this is a mandate to the legislature not to deal with people as groups, to pass laws for particular problems, but to deal with people as individuals. Is that not what this indicates?

Mr. Aalyson - Mr. Lobosco?

Mr. Lobosco - My understanding of the concept that is signified by that phrase "least restrictive manner" or sometimes phrased "alternative" is that concept is founded in a philosophy that government is justified in intervening in an individual's life only to that extent necessary for protection of the public good. And that the phrase originated, historically, at least regarding the mentally handicapped persons in our society, because there were only two alternatives. One was to allow them to live at large in the community. The other was to lock them up in isolated, segregated facilities under conditions where practically all of their civil rights were suspended. That is, they were locked up, they were not allowed ready access to communications outside of the institution. They were not allowed to exercise even very basic control over their own lifestyles. The phrase, to me, signals the recognition that a person can be, for example, mentally retarded, but not really a fit subject for institutionalization. Because we are recognizing that mental retardation as a class is overly broad. There are many different types and degrees of mental retardation. I don't think that the phrase, as it is used in this draft, would mandate an individualized plan of care for each individual covered in the language. I do think that it indicates to the legislature that before you do group people together, you must make sure that you are grouping them appropriately. Let's not incarcerate, whether in a benevolent or a penal institution everyone simply because they fit under a rubric which is very broad and perhaps very vague.

Mr. Carter - I would wonder if, perhaps, the two points of view, and I share Bob's view, couldn't be corrected by using "circumstances of such persons" rather than "each such person". Do you have any difficulties with that?

Mr. Lobosco - For myself, I have no difficulties with that.

Mr. Carter - I agree with you, you don't want to get in the business of having

legislation where every person has to be handled as individuals.

Mr. Huston - Yes, this is the problem that I have with the present draft. I'm not criticizing this, I'm just trying to dissect it and point out areas that could be misinterpreted and could make it very difficult to sell either to the legislature or to the people at large.

Mr. Carter - Or to the commission.

Mr. Huston - Yes.

Mr. Aalyson - Mr. Graetz?

Mr. Graetz - Mr. Chairman, and members of the committee, I would like to point out to you that the basic public policy statement of the Ohio Council of Churches regarding the criminal justice system is entitled "Toward a Humane, Person-Oriented System of Criminal Justice" so that we are deeply concerned about the necessity for the state to develop a program that does indeed meet the needs of each individual person. We would not object to minor changes in the language such as were suggested here. But I think that though we would not argue for eliminating all programs and substituting them with individual program for each person, at the same time we would want to try to structure the language in such a way that the legislature would realize that there is a concern to fit the treatment to the needs of all such persons.

Mr Huston - Shouldn't that be a matter that is brought to the legislature's attention at the time they are considering the legislation rather than attempting to do it by constitutional provision that is very difficult to enunciate?

Mr. Graetz - A philosophical statement can be made in the constitution so that they have a guideline to go by, then I think we are much farther ahead, because then when they come to the point of supporting or opposing certain pieces of legislation, we can point to that language and say this is what was intended by the people when they adopted this provision.

Mr. Aalyson - Of course the treatment in the least restrictive manner and of each such person by the draft is conditioned upon the fact that the legislature shall prescribe the method. So the statement of policy is there and may be appropriated in view of the fact that it shall be restricted to what may be prescribed by the General Assembly. Any other comments? Mrs. Workman?

Mrs. Workman - Yes. I would like to indicate to the committee that within the care and treatment of aged people, that terminology is the concept that is being used. Particularly, it is being used in protective services areas that we are working on now. And also in educational philosophy, that very same terminology "of the least restrictive manner" is a part of the educational concept.

Mr. Carter - I am really very much supportive of the concept "of the least restrictive manner". It seems to me, I am no great historian, but I have seen studies about the changes in understanding over the centures of the treatment of people that show aberrations of one kind or another. We could go back to the debtors' prison days where if you just owed money you were thrown into prison. The witchhunts back in the days of the puritans. If you showed certain aberrations, they would string you up and put you in a gaol of some sort. I think that the human thrust has been to develop our understanding of these aberrations, and we've come a long way. We have a long way to go to understand the nature of these things and to be wise enough to create the circumstances where they can be best handled. I like this, myself. That's a random statement, but I do.

Mrs. Eriksson - Could I ask Mr. Hopperton or one of the other persons to focus on the word "habilitate"? That word bothers me a little bit. We're accustomed to the word "rehabilitate", of course, and I assume that you used the word "habilitate" deliberately. I find little help in the dictionary, however.

Mr. Hopperton - "Habilitate" is a word we decided to use because it is a very, very broad concept, broader than education, broader even than, we felt, "rehabilitation". It includes education and it also includes, for instance, in the area of mental retardation, giving very basic life skills, such as toilet-training, to an individual. For that reason, it is a term appropriate to mental retardation, developmental disabilities. I think it is a term for many of the same reasons appropriate to mental illness. I think I might defer again to Mr. Weisenberg for comment on the appropriateness of that term in the area of corrections.

Mr. Weisenberg - In corrections, we have relied on using terms like "reintegration into the community", or "rehabilitation". And we have never assumed at all that the persons we were dealing with were integrated into the community to begin with or were habilitated to begin with with the basic skills necessary to make it in the community. And traditionally have started to try and rehabilitate people without first ever looking to see if they have the basic skills and basic know-how and were ever a viable part of the community to begin with. I am speaking personally, because I can't speak for the Department of Rehabilitation and Corrections.

Mr. Carter - Is it a good word? Is it a word that has meaning and substance?

Mr. Hopperton - It is a word that has already been defined in the Revised Code and in recently enacted S.B. 336, dealing with the mentally retarded.

Mr. Carter - I like the word much better than "rehabilitate".

Mr. Aalyson - Does it include the concept of rehabilitation in your judgment?

Mr. Hopperton - Yes. I think the intention in S.B. 336 was not to deal with rehabilitation, but I think the definition is so broad that it includes rehabilitation.

Mr. Aalyson - Do you by the use of the word "habilitation" here in this draft amendment intend it to include rehabilitation?

Mr. Hopperton - I think the answer to that would be clearly yes. It was the largest possible category or term that we could come up with. We intended that to include education, rehabilitation and similar skills, training.

Ms. Buchbinder - I wanted to ask either Professor Hopperton or Mr. Weisenberg about the word "behavior". It's a new word. I haven't seen it in any of the other constitutional provisions of other states, and it refers to corrections. Is it in here to refer to any other kind of group? It's an unusual word and very general.

Mr. Weisenberg - Speaking for myself, and I'm not a behavioral scientist, and maybe someone who deals with mental health and mental retardation or developmentally disabled field might be able to best answer that, I think the word "behavior" was intentionally designed to look to the correctional or criminal justice area and not so much possibly to the other areas that this amendment seeks to include.

Ms. Buchbinder - I could think of some other things that someone might want to include under "behavior" that we may not anticipate.

Mr. Huston - Yes.

Mrs. Eriksson - It is a very broad term, and the behavioral scientist includes political scientists and social scientists. A very broad group of people who are not dealing with deviant behavior, necessarily. I, too, would question its use.

Mrs. Workman - The term "behavior" comes up again in education. There is a section of special education that deals with emotional behavior where there are problems within the regular classroom study, where often these students may simply be excluded from the school because of their behavior. And those are often the children who end up in the institutions, either correctional or benevolent.

Mr. Carter - I wouldn't be concerned about it being too broad, because it is qualified by "requiring special care, treatment, or habilitation." The legislature would decide.

Mr. Hopperton - And there are other limitations on the legislature in terms of other state and federal constitutional provisions in terms of what would be reasonable and in conformity with due process and equal protection.

Mr. Carter - What I have out of this discussion, if I may read what I think has been said, "Services to persons who, by reason of age, disability, handicap, or behavior, requiring specialized care, treatment, or habilitation, shall be fostered and supported by the State in the least restrictive manner appropriate to the circumstances of such persons, as may be prescribed by law." Would that still fulfill the thrust of what you're talking about, Bob?

Mr. Huston - I think I could support this.

Mr. Carter - I think that's what we are trying to say.

Mr. Aalyson - Yes.

Mr. Carter - Well, I, for one, would like to congratulate this group for giving a lot of thought to this, and I would think that if we had this in here, we could eliminate not only section 1, but sections 2 and 3 along with it. And that would be this whole statement. I think that's good constitutional revision.

Mr. Huston - Sections 2 and 3 deal with the selection of penitentiary directors.

Mrs. Eriksson - Sections 2 and 3 are obsolete, really. There are no directors of the penitentiary.

Mr. Aalyson - It would appear then that we have concluded our discussion with respect to Article VII, section 1. Is there anyone present who would want to be heard or be heard further that we have not heard from? Thank you very much, then. We certainly do appreciate and understand the considerable time and effort that has taken place in reaching this draft amendment. We go through this each meeting, I think, and so you'll never get a more sympathetic audience than you have today.

Mr. Hopperton - Mr. Chairman, on behalf of the ad hoc committee for Article VII, section 1 we'd like to thank you very much for giving us a full and complete hearing.

Mr. Aalyson - Since we do have witnesses present who are interested in apportionment, we will procedd to agenda item number 4. There was discussion at the last meeting with regard to the subject. Mr. Graetz, do you wish to be heard in this area by way of preparatory remarks or do you want to contribute to the discussion as it goes along?

Mr. Graetz - I have nothing more to add at this point beyond what I stated last time. We indicated last time that we have a group of people that will be coming together to work on this issue, but it is probably going to be a matter of months before we come

to any kind of consensus to present to you as such.

Mr. Aalyson - Fine. Mr. Hetzler, from Common Cause, do you have any remarks?

Mr. Hetzler - You have a copy of Mr. Pease's legislation which both myself, and Bob and the Council and others aided in the drafting. It contains...I noticed you handed me a copy of only the resolution - S.J.R. 41.

Mrs. Eriksson - Yes. I couldn't get a copy of the bill. I looked at the bill.

Mr. Hetzler - I have a copy of the bill, S.B. 477. We are pleased that it has been introduced. We support these on the same three premises that we laid out at that time, that is, it leads to reform of three areas: the make-up of the apportionment board itself, reform of language in the constitution in the form of guidelines and it contains the concepts of openness and accountability in the process of creating apportionment plans. This bill, we believe, with some small exception, follows those three points that we think are important.

Mr. Carter - I would like to ask, first of all, am I correct that there is nothing in the constitution about congressional districting?

Mr. Hetzler - That is correct.

Mr. Carter - That means that that has simply become a function of the legislature, then.

Mrs. Eriksson - Correct.

Mr. Hetzler - The resolution would change that.

Mr. Carter - Okay. I haven't had a chance to understand what this is. Is this the idea that was talked about of having the same districts for congress and the legislature?

Mr. Hetzler - No, not completely as we had envisioned it, at least as it was discussed here. It does talk about compactness and so on.

Mr. Carter - But there is no correspondence automatically...

Mr. Hetzler - No.

Mrs. Eriksson - Although there is a statement that as nearly as possible they should correspond.

Mr. Carter - As one of the many things that the Commission is to take into account.

Mr. Hetzler - Right.

Mr. Carter - I would like to bring up, Mr. Chairman, if I may, this question that I think Mr. Hetzler brought up at the last meeting of the desirability of having common districts for congressional purposes and so forth. The more I think about that the more I think there is a great deal to be said for it from the standpoint of good government. I am concerned and am aware of the problem that was identified at the last meeting of having the number of state legislators dependent upon influences outside of the state. With the national apportionment of the number of congressmen. However I think that it is sufficiently important, that I would like to give it a good go around before we pass it by. Of course we have the immediate question with 23 congressional

districts now and following the numbers that were suggested of having 4 representatives and 2 senators, we would end up with 138 legislators instead of 132, so that had some possibilities for the legislators. Of course, if we were to lose another congressional seat, we would drop down to 132 which is just where we are now, but it would mean that we would have more in the senate and less in the house, which I happen to think is a pretty good idea anyhow, because there are too few senators, I think, to cover all of the bases. I came up with the conclusion myself that if it were practicable, I kind of like the idea of having a number of political districts, if you will, that is equal to six times the congressional districts. And the purpose of the districting body, then, would be to establish the districts and then each one has a representative, each two has a senator, and each four has a congressman. That is tremendously appealing to me, from a theoretical standpoint. I am much less optimistic about it from a political standpoint, but I think we ought to give that a go.

Mr. Graetz - Another thing that we may have talked about last time, but I can't recall for sure that argues for that approach is that it can be presented to the public as a way of enabling much greater participation. We talked about it in terms of our organizing people for action. It would help to sell it at the time it becomes a ballot issue.

Mr. Carter - Mr. Graetz, I am much more optimistic about selling the public than the legislature.

Mr. Graetz - We have mapped out a timetable that starts out with an attempt to get this through the legislature, followed by possible failure, and then going the initiative route.

Mr. Carter - It seems to me that there are two basic questions, and both of them very difficult. First is the number of districts that are set up. Second is how you draw the lines - that's this commission problem. I personally would like to think in terms of a standardized political district - that's the wrong word, but a political district that can be identified by a state senator, state representative, congressman. I think that makes sense.

Mrs. Rosenfield - I have a whole different problem. Can the Ohio Constitution be involved in drawing congressional districts? The U.S. Constitution says something like "The legislature shall have the power to draw districts." If you set up a commission that is not all appointed by the legislature, can the legislature delegate its authority to do congressional redistricting to a body some of whose members are appointed by the governor or someone other than the legislature?

Mr. Carter - Let me ask Ann that question. If the federal government says the legislature has the power, wouldn't that necessarily infer that the state constitution necessarily has the power?

Mrs. Eriksson - The federal statute says essentially that the districts shall be drawn as provided by law and normally the interpretation would be that the law includes the constitution, but that isn't the question - the question is, and even though the Constitution creates the Commission and that may be perfectly okay, the actual districting is not being done by law, it is being done by a constitutional body, but not by the legislature, by law. It is being done pursuant to law, but not by law. The question has been researched but there is no clear answer to it.

Mr. Hetzler - We are not particularly locked in to the makeup that we had proposed in which 2 members would not be appointed by the legislature. One would be appointed by the Governor and one by the party that came in second at the last gubernatorial election.

The question has been raised to us - whether or not there is any need for a representative from the governor's office to be on there at all? It is a legislative matter and has little or no relationship to the governor's office. There are states that do not have representatives of the executive branch on the apportioning body. Offhand, other than the governor's personal political interest in the makeup of the legislature, I can think of no rationale that says that the governor ought to be involved in the apportioning process. Other than his partisan and political interests.

Mrs. Eriksson - There are, of course, some states where the governor does the whole thing.

Mrs. Rosenfield - If I can bring up another matter. Do we really want to take districting out of the hands of the obvious partisan people who are out front, you know who they are, how they got there, and why. They are very public figures. When the board is one step removed from that, all you are really doing is taking them one step away from public vision, but the same kind of political things will still be going on. They will be behind the scenes, but will not be right out there in front where everyone can see them.

Mr. Hetzler - We have also heard that argument. First of all, under the old process, there may be some merit to it. That is, the smoke filled room process, behind closed doors, without public notice. You might not even know who is on that board, if he is not an elected public official. But under this new process, the sunshine law will change the game somewhat. Secondly, the things that are suggested in Pease's bill for the publication of plans prior to passage and for the public meetings that are to be set up, to view the plans prior to their voting on them. That helps to a certain extent. The other point that has been raised is, don't we want to have political types of people on this board? Aren't they the only ones who really know about apportionment? Who else knows about it? Joe Blow citizen? As opposed to Joe Blow politician who knows the game? Our response is that we do want Joe Blow citizen to be involved and that there are citizens who are not elected officials who know about politics and apportionment and districting; who know the process and know the system and who could be appointed to an apportionment board.

Mr. Carter - What do you think of using the elections commission as proposed in Senator Van Meter's bill?

Mr. Hetzler - I'm not sure whether that is the best procedure. I've not thought that through.

Mr. Carter - One advantage is that it would avoid a proliferation of boards and commissions. I don't know too much about it. Each party submits 5 names and the secretary of state chooses two from each party and those 4 get together and choose a fifth who is the chairman.

Mr. Hetzler - One problem with the current Ohio Elections Commission is that it is not independent. It relies on the secretary of state for staff and for funds.

Mr. Carter - It bothers me to create another government organization to do this because it's job is concentrated every 10 years. How can you have a staff that is knowledgeable that can turn on and off every 10 years. There's a lot to be said for using the elections commission and the resources of the secretary of state.

Mr. Hetzler - An independent body could still use the resources of the secretary of state in terms of research and information, without necessarily being dependent on him.

Mr. Carter - Why would we want to have another body other than the elections commission?

Mr. Hetzler - I certainly share your concern with the proliferation of government agencies. I think we would be willing to consider putting apportionment in the hands of an existing committee - we'd have to take a look at what that committee is and what kinds of ties it has.

Mr. Carter - I don't know much about it, but I assume it's the one that decides on election contests or...

Mrs. Rosenfield - It's the one that decides on violations of the elections law.

Mrs. Eriksson - Nolan is chairman of it.

Mr. Carter - Then I would feel very comfortable with it.

Mrs. Rosenfield - The statute would have to be rewritten to broaden its functions.

Mr. Graetz - There are two questions that are more critical than the composition of the group that does it. One is to make sure that the constitutional language protects as much as possible against gerrymandering. I don't think this does too much to change the language. Two, that the whole process is out in the open to expose whatever attempts at gerrymandering might be going on. I think that whatever group comes together to do the job, that whoever is going to do it will be the back-up supporting staff. That's where the basic work is going to be done and not so much by those people who are selected in whatever manner.

Mr. Carter - This whole business of gerrymandering - one man's gerrymander is another man's ideal solution. We find it easy to talk about it in the abstract, but as the staff memo points out, and I thought it was well done, there are many forms of distortion that can take place. Even if you had it perfectly one man one vote, or if you try to make a geographical square, it still comes out to be judgment, when we get right down to it.

Mr. Hetzler - Sure. There is no question about that because you are never going to get a perfect system number wise. There have been attempts to do that using computers, taking it completely out of any judgment and putting all of the numbers in a computer and having it print out something. Apparently, that hasn't met with too much success. But it seems to me, as Bob pointed out, necessary to examine closely the language in connection with whatever we will decide out to be there with regard to gerrymandering and how districts can be set up. One approach to that, that I don't believe is in the existing bill, is to set up priorities.

Mr. Carter - That's just a way of trying to establish, a priori, as to how the judgment shall be applied.

Mr. Hetzler - That's true.

Mr. Carter - It seems to me that you have got a good example of that right now with the Governor challenging the judgment that was made some time ago. I'm not trying to say that he is right or wrong, I don't know, but what he, in essence, is saying is that the judgment of those people does not follow the constitution. Now, who is to say? How do you define good judgment? I don't know of any way to do that.

Mrs. Rosenfield - What do you mean by priorities? Whether it's more important that it be compact or whether it's more important that it fit the one man one vote....

Mr. Hetzler - No, not the one man one vote, but the compactness. For example, in saying that where possible they shall contain whole counties...

Mrs. Rosenfield - We have that.

Mr. Hetzler - Yes, but we haven't prioritized that.

Mrs. Rosenfield - Yes it is.

Mr. Carter - It's part of the constitution.

Mrs. Rosenfield - Yes, it says it very specifically. But I don't see how you can improve on districts being compact and composed of contiguous territory in a non-intersecting contiguous line. I think the definitions are there, but as you say, it is how you interpret them.

Mr. Carter - Well, I suppose, Mr. Chairman, that we've got a number of issues to discuss. How do you want to organize the discussion?

Mr. Aalyson - I'm wondering whether we want to proceed on this particular item on the agenda at this time. Certainly, we have benefitted from the viewpoints of those persons who are present as witnesses, but I'm not sure that I feel competent myself at this point to proceed because I don't know that I've digested everything I heard or read to the point where it would be appropriate for me to discuss it. If others feel that we are in a position to discuss it, I would be happy to go forward. But I think that I would rather have time to study this particular section further before we discuss it.

Mr. Carter - I think that's appropriate. Could I ask a couple of questions of our three witnesses? Does the League have any position or do you think any position could be developed on the commonality between congressional districts and state legislative districts?

Mrs. Rosenfield - We don't have a position. Our state board is meeting in March and we are going to discuss it at the state board. We really don't know internally whether we have the authority for the state board to make this decision, or whether we have to go back to our members and take a consensus process.

Mr. Carter - How do you feel about it?

Mrs. Rosenfield - I think it's a marvelous idea. Now, my whole problem is whether politically it could work. And I think if we go for it, we'll end up having to go through an initiative petition.

Mr. Carter - (to Mr. Hetzler) I know you support it. You brought it up.

Mr. Hetzler - Well, ironically enough the official position of Common Cause, Ohio, does not support the contiguous congressional and state districts. It doesn't reject the idea. It just simply did not include that idea. In discussing it in the initial committee process, we couldn't get a consensus on the idea.

Mr. Carter - Mr. Graetz, you are representing the Ohio Council of Churches. Do you have any feelings on this subject?

Mr. Graetz - Very definite feelings. Our position has not been finalized yet, but I'm quite certain that we will come out strongly supporting the concept that we have been talking about, of commonality. And we have these long processes that we go through

also within our structures. On the basis of past experience, I can predict that that's where we will end up when it is finally said and done.

Mr. Carter - That's my first question. I have two more. My second question is this one of trying to make it specifically possible for the criteria that is used in this judgment question. I read the current stuff, as you did Craig, and I thought it was pretty darned good. I'm not sure there is a heck of a lot that I can add to it. I would wonder if there are any thoughts from any of the people here on that.

Mr. Graetz- For several years I have been trying to figure out a way to improve the language in the Constitution and I have not come up with anything.

Mr. Hetzler - I don't think we have any specific improvements, no.

Mr. Carter - Then my third question concerns the make-up of the board that determines the decision making of the board. Do any of you have any thoughts as to how this would be handled other than what you have already said?

Mr. Hetzler - No, not other than what was already said.

Mrs. Rosenfield - I think that is the critical variable. That if we are generally in agreement that the wording is pretty good, then the critical thing that determines how that wording is interpreted is how that board is made up. So if there is any way of making it informed and political but not so partisan. . .

Mr. Aalyson - Dick, I want to ask a question of you, if I may. Do I understand you to say, and the other persons essentially agree with what you are saying, that the ideal situation with regard to dividing up the state into districts would call for certain geographical and political divisions of the state each according to federal congressional districts each of which would contain multiple units that would provide for state representation?

Mr. Carter - The idea is this. You have a basic political, geographical division which elects a representative, to the legislature. Then a multiple of two of those would elect the state senator. And a multiple of four of those would then be used to elect the congressman.

Mrs. Eriksson - Are you talking about multi-member districts?

Mr. Carter - No.

Mr. Aalyson - Have you taken a map of the state of Ohio perhaps to outline this in your mind and drawn divisions and attempted to delineate them in regard to your theory?

Mr. Carter - No, the rationale for the theory is, and perhaps we are all a product of our local environment. I see the utter confusion in our own situation and knowing who our congressman, representatives and state senators are. We are particularly vulnerable because at one time we had 3 state representatives, we had 3 state senators and two congressman, from a town of 16,000 people.

Mr. Aalyson - This is because there is a juncture of three counties at that point, isn't it?

Mr. Carter - That's right and that's why I'm particularly sensitive. I was very persuaded by this concept which I had never heard until our last meeting. It has a lot

of advantages to the people. First of all, they can identify their district, and once they identify their district it is easier to find out who are their representatives. Secondly, it strikes me that from the political standpoint, it provides a ready-made channel for the representatives and senators to move up to congressmen by being identified with a continuum, subject to the whole question, that they can identify with. It just seems to me it makes a better relationship between the representor and the representee.

Mrs. Rosenfield - You wouldn't end up split in so many different ways, but your town might be represented by even 3 representatives.

Mr. Carter - It would be in 3 different districts, though.

Mrs. Rosenfield - State representatives. But you wouldn't have more than two senators, and with luck you would only have one senator, so that the two house people and the senator would naturally be working together because they are all representing the same people. More so than they do, I think, under the present system.

Mrs. Eriksson - I think you could end up with exactly what you have now.

Mr. Carter - Yes, it is possible.

Mr. Hetzler - Just in terms of population and if you have boundary peculiarities, absolutely.

Mr. Carter - But you would not have, I do not think, this constant disruption every biennium. We are now represented by Del Latta who comes out of Bowling Green. The next time it is the fella out of Findlay and the next time it is somebody out of Sandusky, as our congressman. We are in such a state of flux that it is almost impossible to keep track of who are your state representatives.

Mr. Hetzler - Even more importantly, it's not represented at all. It's not necessarily you can't keep track of them, the net effect of it is you don't get represented at all.

Mr. Carter - I'm not sure I buy that. But there certainly is no good relationship between our elected representatives and the people in our area. They're not even sure who they are representing.

Mr. Hetzler - It has some negative points which I think we ought to discuss. One of which, of course, is the bother of having to use the congressional boundaries every ten years to reapportion the state. The second of which is the political negative factor which has previously been discussed, that this sort of thing, at least on the surface, would not be advantageous to at least a certain group of politicians. So from that angle it has some negative appeal to it. At least in terms of the political realizites of it passing in the legislature.

Mr. Carter - One of the positive things is that there is only one reapportionment.

Mrs. Rosenfield - One every 10 years. If we get nothing else changed, I would like to do that. In all honesty, that is I think my main objection. It's not whether it is good or bad, but it's terribly confusing to people to find reapportionment can happen every 4 years, I guess.

Mrs. Eriksson - Are you speaking of congressional or legislative?

Mrs. Rosenfield - Legislative.

Mrs. Eriksson - Of course, we don't know whether legislative can happen every four years. As far as congressional is concerned, you could accomplish that without necessarily having common boundaries. There are some other very negative factors. One is the evenness of the house and senate. I think that that is a very negative factor.No, I mean that we would have even numbers in both the house and senate. That's a very negative factor. It's bad enough when it happens accidentally, but to be faced with that problem every day of your life, that you've got 46 people and 92, rather than 33 and 99.

Mr. Carter - That's a very good point. It never occurred to me.

Mr. Aalyson - You could provide for an election at large.

Mrs. Eriksson - This has happened in the senate from time to time, and resulted in an equal number from each party.

Mrs. Rosenfield - You have a built-in tie breaker in the Senate.

Mrs. Eriksson - You won't have once you've adopted tandem election. And that has been a very negative factor in the Senate when that has occured and it has occured.

Mr. Carter - What other negatives do you envision?

Mrs. Eriksson - Well, I don't buy this business about competition for the congressional seat. I think that it's important to separate the Ohio General Assembly from the congressional delegation to keep a separate identity. And to hope that some of the best people will identify with the General Assembly and will not be encouraged to try for the congressional seats.

Mr. Hetzler - I think that is a different slant on our position, which may have some merit.

Mrs. Eriksson - It might have that effect of making the congressional representative more alert, but I think the opposite effect is that it might encourage good people to move and I would like to see some of those good people stay here.

Mr. Hetzler - Well, sure. I don't have any problems with that.

Mr. Carter - There are a lot of people who don't want to go to Washington as a personal choice.

Mr. Hetzler - Yes, that's the other problem. I think individuals who are good make decisions in terms of I want to go to Congress because my style or whatever it is is appropriate as opposed to the legislature. I don't know. I still think that the overall net advantage of weakening incumbency, number one, and the overall advantage of keeping the incumbent, first term incumbent for that matter, on his or her toes, is worth it. And secondly, I think that we presume, of course, that young turks are even in existence at all in certain districts. They may be but they may not be. But certainly this kind of contiguous arrangements helps to take away the clouds that now exist, that hide legislators in hodge-podges of pockets so that one hardly know even where they are, let alone the ability to feel a candidate that can build a base of constituency that can oppose that candidate. We run into that problem all the time. We run into that problem in business where good people go up so fast that theyre gone. We have the same problem in volunteer organizations. Volunteers get so good they want to be paid and so you lose good volunteers and you get paid employees who go off and

and get jobs elsewhere. But I think that's a risk that you run which I think is worth it.

Mr. Aalyson - Is it then your idea, Dick, that every 10 years with perhaps the redrawing of the lines with regard to the congressional districts to see legislative districts would have to be drawn to conform to those and they'd fit within the geographical outline of the congressional districts?

Mr. Carter - That's a suggestion.

Mr. Graetz - We realize that the argument about the even number in the senate and the house was one of the strong arguments against this plan.

Mr. Carter - That's a very valid one. I hadn't thought of that one at all.

Mr. Hetzler - Do you know, from your own research, has there ever been any language or alternative to that and still get the same result? If there a way to have our cake and eat it too, here?

Mrs. Eriksson - I don't think there is. If you multiply it by 3 you're going to have a huge house. It always is going to depend upon the number of congressional districts. Which I think is also a disadvantage. Because what you are doing is saying to the general assembly that the number of representatives in the legislature depends upon what happens nationally. And there, again, you're making a tie of two bodies that I think ought to be separated as much as possible. So I think that's a disadvantage, too.

Mr. Aalyson - That could be eliminated by congressman at large or legislators at-large.

Mr. Carter - We used to have a congressman at-large.

Mr. Aalyson - He might be some sort of political ombudsman because he represents the whole state rather than one district.

Mr. Graetz - I know there are some states that have an even number of senators and an even number of representatives. Have you done any research?

Mrs. Eriksson - No, I haven't. In one of the Common Cause documents there are two states where, apparently, there is this relationship. And then several other states, where there is a relationship, as there is in Ohio, between the house and senate and some of those are even numbers. I don't know how it works there. I only know from my own experience here of the problems created when the Ohio senate has an even number of people, and was evenly divided.

Mr. Aalyson - Do you find as a practical matter that there is a tendency to divide evenly?

Mrs. Eriksson - If the possibility is there, it happens. As I say, it occurs even when it is not built into the system.

Mrs. Rosenfield - Yes, I think it is more likely to happen when you have an even number, because individual votes become much more critical.

Mrs. Eriksson - Right. And you can always keep your problem by just having two people of the opposite parties absent.

Mr. Graetz - Except that that does not help any in terms of passing legislation, with the constitutional majority that is required.

Mrs. Eriksson - Yes, that's right. Of course, you always have that.

Mr. Carter - That's another interesting question. If the constitutional majority is required, then an even split would not enable you to pass the legislation?

Mr. Graetz - You would never be able to pass a totally partisan bill, which in many ways might be a good idea.

Mrs. Eriksson - You might have problems just passing any legislation.

Mr. Carter - That might be good.

Mr. Hetzler - It might be good. It might also have the effect of stalemating legislation. Public pressure and media pressure could be used.

Mrs. Rosenfield - It could bring legislation grinding to a total halt on everything. You'd never have a budget passed.

Mr. Graetz - Think of the number of bills that might not have passed in the last year.

Mrs. Eriksson - Of course, if you have an even split, and you need your constitutional majority to pass a bill, but other business is simply conducted by a majority of those present and all these kinds of things can be very difficult to get through.

Mr. Carter - In other words, you like the idea of assuring a majority of one party or the other.

Mrs. Eriksson - Yes. Even in organizing. How do you organize if you have an even split? Which is why the lieutenant governor was put in there as the president of the senate in the first place.

Mr. Carter - That's a very good point.

Mr. Hetzler, Rev. Graetz, and Mrs. Rosenfield left, after the chairman thanked them for their help.

Mr. Aalyson - Let us start with the militia. We had our discussion of course, and I don't know that there was any significant change suggested by any of the witnesses nor by the members of the committee. Perhaps the consensus was that we just leave it alone. Does anybody have any suggestions on the militia article?

Mr. Carter - The other alternative would be to delete all of it under the theory that the legislature has the plenary powers anyway. But I think I would be in favor of leaving it alone.

Mr. Aalyson - I think so too, in view of the fact that the only persons who appeared or who were interested enough to appear were those persons who are probably most affected by it, and they felt that it ought to be retained. So we can mark that as retained in its present form.

Mr. Huston - I have no problem with it. In fact, the present provisions were put in there in 1961, so I feel that it is current.

Mrs. Sowle - I did read the minutes and summary of the remarks and saw no reason to interfere with it in light of the values that the witnesses felt it had.

Mr. Aalyson - We will proceed to prison labor, section 41 of Article II. We had one witness at our last meeting who was to have presented us with a draft which he felt would take care of some of the problems which they seem to feel it had for the correctional system. He called yesterday and said there had been a death in the family and he is unable to make it today. Ann has prepared for our consideration two alternative suggestions with respect to amending the prison labor article. Mr. Yost said that the Corrections Department felt that they should be able to compete in certain areas by the use of prison labor, especially in instances, for example, where they would be competing against a federal government agency in producing something, such as printing. Ann has drafted a section which would permit the prison people to make their goods available to the federal government or to any agency of it. We thought also of repealing the entire article as being an article which was not necessary under the present status of society, but I believe may have decided that perhaps that wasn't a good idea in view of the fact that we'd probably generate substantial opposition from labor if not from other persons. I would like to pass now to consideration of the alternatives. Alternative #1 deletes much of the language which is always salutary as far as I'm concerned in constitutional drafting and limits the provision to the following: "Laws shall be passed providing for and regulating the occupation and employment of prisoners sentenced to the several penal institutions and reformatories in the state." This seems to leave the thing, and maybe properly so, purely in the hands of the general assembly.

Mr. Carter - Are there such laws?

Mrs. Eriksson - Yes.

Mr. Carter - This change would not affect any of those laws as far as I can see. All it does is remove some of the restrictions. It would give more latitude to the legislature for future laws.

Mr. Aalyson - This specific suggested provision does not seem to specify at least constitutionally the idea that there will be no competition between prison labor and the private sector, for example.

Mrs. Eriksson - No. That's contained in other provisions in this section. Mr. Yost's first suggestion was to repeal the section and his second suggestion was if you want to keep something in the constitution, just keep this first sentence.

Mr. Aalyson - Do you feel that we would meet any resistance from, for example, organized labor or other sources if we were to eliminate the statement of policy from the constitution?

Mrs. Eriksson - I think you probably would, yes.

Mr. Carter - From a practical standpoint.

Mr. Aalyson - Do you think we could ever get this past the legislature, let alone the people?

Mrs. Eriksson - I don't know. It would depend upon how they viewed it. If labor realized that they still would have the forum of the general assembly to fight this particular battle, they might say they don't care what the constitution says, but on the other hand they might say that this is still a very real threat and we need this restriction in the constitution. I don't know about that.

Mr. Aalyson - I don't recall that there was anything in the research memorandum about it, but how many people are employed at prison labor and what effect could they possibly have other than a miniscule effect on commerce and competition?

Mr. Carter - It might be an impacting situation, in a local area.

Mrs. Eriksson - I think that's more likely. I doubt that they would have that much of an effect on an industry other than possibly printing. There might be an effect there.

Mr. Carter - Let's review for a moment to see what the real issues are. On the one hand, we have the desirability of providing employment for prisoners as part of their habilitation process and that's a good thing to do. The problem of course is that there are certain pre-costs, if you will, that are associated with that kind of labor and could be used to compete unfairly with private enterprise. So that's what you are trying to weigh, as I see it, in this thing. My view is that I would think that this would be an appropriate kind of question for the legislature to handle. As times change, as opportunities change. So I like the idea of laws being made tightening this. I'm stuck a little bit with the word "shall" but I'll pass that, "providing for and regulating" leaving it up to the legislature. I think it is a pretty good way of handling it constitutionally. Of course you could argue that simply deleting it would do the same thing.

Mr. Aalyson - I agree that the habilitation or rehabilitation of prisoners is probably going to be accomplished by this sort of thing. But I'm concerned with whether or not there is a practical chance of having this thing go through. If it were to be presented, for example, on the ballot with an explanation that we were removing from the constitution the language which prevents the competition between prison labor and private enterprise, I would think that the public would be likely to say why would we want to do that?

Mrs. Sowle - There is another element in the provision that people might want to be kept in the constitution and that is the provision concerning forced labor, that the prisoners shall not be required to work at any trade and so forth. Was that part of the original theory?

Mrs. Eriksson - Yes, to prevent the use of prison labor in such a fashion that it was going to be of financial benefit to private persons, either persons to whom the labor was contracted or the prison officials themselves. I would think the danger of forced labor to benefit others would be very much less these days.

Mr. Carter - As a matter of fact, if you drop that, it might help politically. Katie, if you read the minutes of the last meeting, you may recall that this alternative #2, the chap who was here made quite a presentation on the idea that they couldn't even compete with the federal printing.

Mrs. Sowle - Yes, I did notice that.

Mr. Carter - And I assume that's back of alternate #2 which is simply to leave it the way it is but broaden it so that they are at least allowed to compete with the federal government.

Mrs. Sowle - Now the other thing that I recall mentioned that, in the habilitation area, I gather, and that would be accomplished by alternate #1 but would not be accomplished by alternate #2, and that is permitting work release programs. It seems to me that even if we don't go to the extreme of alternate #1 we might want to attempt to open up alternate #2 to that extent. It doesn't seem to me that would pose a threat to private industry or a threat to labor.

Mr. Carter - It might to labor.

Mrs. Eriksson - You could write a provision in here that such a person released to engage in some normal occupation or trade would have to be paid what other persons engaging in the same trade are paid.

Mr. Aalyson - They wouldn't like that, I don't think. He would get the same pay and he might not be a union member, you guarantee the same pay in the constitution.

Mrs. Eriksson - But it wouldn't pose a threat of cheap labor. Of course, if it were a union shop, you couldn't hire a person like that anyway.

Mrs. Sowle - I wonder if the unions have cooperated in this type of effort at all.

Mrs. Eriksson - These are the kinds of questions we could have posed to Mr. Yost had he been able to come today.

Mrs. Sowle - Have we requested any opinions by the Chamber of Commerce on it, or by any of the union labor leaders? Would it help to do that?

Mr. Carter - Well, maybe putting this together what we might do is come up with a tentative recommendation using alternative #1 which I think is the best compromise, and forward it to the AFL-CIO and the Chamber of Commerce for comment.

Mr. Aalyson - Is Mr. Yost planning to submit to us a proposal?

Mrs. Eriksson - I do not know.

Mr. Aalyson: I think that since labor would be the one that would be most likely to be concerned with any change or modification of the present constitution that we should submit these alternatives to them and see if they have any suggestions or recommendations.

Mr. Carter: Wouldn't it be better to have a tentative recommendation for them?

Mrs. Sowle: Let us try out alternate #1 on them. We would know whether we were going to get an extensive response pretty quickly with that one.

Mr. Carter: With a brief rationale as to why. We could ask for a reaction with reason.

Mr. Aalyson: If they do react unfavorably to that, we could try alternate #2.

Mrs. Eriksson: You want just to send it to labor organizations or would you like to try it out on the Ohio Manufacturers Association as well?

Mr. Aalyson: I see no reason not to. I think labor is probably more interested. We should indicate to them that we would welcome any suggestions they might have for other language. The next item on the agenda is the in-term compensation increases for certain public officers.

Mr. Huston: We presented the second committee proposal to the Commission with the change in the word "affect" to "diminish" and indicated that the reason we were suggesting that was that there are situations where there are individual offices such as county auditors that could be trapped by being in office when a pay raise went in and not being able to obtain the benefit of it. But it seemed to me that the people were saying principally that the fact that the legislators couldn't increase theirs. I couldn't really get any real rationale why they didn't agree, other than the fact that they said that they ran for office knowing that the salary was at a certain level and they should be satisfied with t hat salary during their term of office.

Mr. Carter: Bob, I carried away the thought after listening to the discussion that there was considerable reluctance to change the word "affect" to "diminish" from the standpoint that everyone who was an officer would be constantly after the legislature for an increase in pay. I think that the legislative thing was more a question in the previous committee meeting, as I recall.

Mrs. Eriksson: The questions came up again about who does this effect? It is difficult to keep clearly in mind, I think, all of these other provisions. Mr. Skipton and Mr. Fry both raised the point that if we did change this, it would certainly result in constant pressure on the legislature to increase salaries that they are not now subject to because of this constitutional provision. The vote as I have indicated here now is 10 yesses and 9 nos, and I don't think we are going to get enough votes. So I thought you might want to discuss it again.

Mr. Carter: We never had a vote on the first committee proposal. At that meeting, the legislators were present and complaining about why the county commissioners should get preferential treatment over a state senator, for example, who is in a comparable situation. And as a result of that, we said we'd come back and see if we couldn't think of something that was any better. I think we came up with something now, the second proposal, that was less acceptable than the first one. My recommendation as of the moment, subject to the judgement of other people here, is that we come back to the first committee proposal. If we could modify it a little bit, that would be helpful.

Mr. Aalyson: I seem to recall that when we submitted the first proposal, there were two bones of contention. One senator did not see any reason why the members of the legislature could not change their salary during term. Another was concerned about the fact that

the auditors who were much in the same position as the county commissioners in that they did not set their own salaries, would not be relieved of their problem by the amendment as originally drafted. So I think what we were trying to do was to bring in the auditors but still exclude the legislators. I can't understand, the position of the legislators, since it would require not only an amendment here, but an amendment elsewhere to change their situation, that they wouldn't want to correct the inequities that might exist under the present section. But I don't know how we can change the wording beyond what we have to include everybody and exclude them. I haven't looked at it in that light. I thou ht we had accomplished that with our second proposal.

Mr. Carter: No, what they were concerned about is the constant pressure on the legislators to raise salaries. I think that the first thing we came up with is the right thing to do. In other words, what we were really concerned about is the obvious inequity when two people with the same job get paid differently.

Mr. Aalyson: The same argument obtains with respect to the auditor that obtains with respect to the legislators. They go into that office knowing what the salary is going to be.

Mr. Carter: And there is no discrimination between them.

Mr. Aalyson: Right, everybody is treated the same and that's not the case in the county commissioners' situation.

Mr. Huston: There are some other state offices that this would be applicable to.

Mr. Carter: P.U.C.O. I think, Bob, you pointed out at the meeting the ridiculous situation where the guy resigns and he's reappointed the next day just so he can receive the increase in salary.

Mr. Huston: That's right. That's the way they get around it.

Mr. Carter: Well I'd like to go back to the first committee proposal and submit it after this discussion.

Mr. Aalyson: Inasmuch as we seem to have encountered considerable resistance at the earlier meeting, do you think it's worthwhile?

Mr. Carter: I think we ought to do what we think is right. If we're turned down, we're turned down.

Mr. Huston: To me it's an equitable situation. The reason the legislators aren't included is that they set their own salary. I can't see that there is going to be any greater increase in pressure on the legislature under that one.

Mrs. Sowle: It seems to me that we could go back to them with the first proposal, and just point out to them the problems that we ran into with regard to the other ones that we see no way around those problems, but still regard the purpose of the first proposal as having considerable merit, and not placing pressure on the General Assembly the way the second one would. And hope that they will reconsider it.

Mr. Huston: Particularly in light of the times today where your federal mandate is equal pay for equal work. And these people today are doing that and they are not getting paid equally. It just seems inconsistent.

Mr. Carter: Very good. I think we should do that.

All agreed.

Mr. Aalyson: Proceeding then, chronologically, apportionment and districting is next on the agenda.

Mr. Carter: Why don't we leave that until later where we can have a philosophical open-ended discussion on it?

Mr. Aalyson: Public institutions. Essentially the same witnesses appeared as appeared at the last meeting, with perhaps the exception of one individual, and in effect reiterated their statements. But they did provide us with a draft which, with some revision after discussion with the committee has been more or less accepted at least as a working draft. The essence of the discussion was that those people who are involved in the field of care or rehabilitation of developmental disability or other forms of disability, or even criminal deviance, are of the opinion, number one, that the constitutional provision should be retained as an expression of policy by the people which may tell the legislature to act where it might not under plenary powers. Two, there is a modern trend toward less restriction on the civil rights and lifestyles of those persons, consonant with the threat that they present to society, and these less restrictive means of treatment or aid or housing should be utilized wherever possible and in the least restrictive circumstances. And that these expressions of policy would be put into effect by the legislature and be subject to legislative review of the actual effectuating of the programs through the General Assembly. They did present us with a draft amendment. It was felt by members of the committee that it was an amendment which was perhaps too restrictive on the General Assembly in that it seems not only to mandate the care but individual treatment for everyone without an opportunity for group programs, which might be just as adequite, and it was in line with those suggestions that we have amended the draft amendment to read as follows: "Services to persons who, by reason of age, disability, handicap or behavior, requiring specialized care treatment or habilitation, shall be fostered and supported by the State in the least restrictive manner appropriate to the circumstances of such persons, subject to such legislation as may be prescribed by law. Now I think "subject to such legislation as may be prescribed by law" needs a little bit of change.

Mr. Carter: I was just going to say "of such persons as may be provided by law." "Provided" is generally the term that is used.

Mr. Aalyson: Okay. I think it was the concensus of the committee that this was a worthy objective. On the other hand, we wanted to give the legislature as much room to maneuver as possible, especially in view of the fact that there are ongoing developments in this field that may have to be taken care of in the future and which is easier done than by constitutional amendment. One individual was present today who was not present last meeting, who is with the Ohio Youth Commission, Bill Weisenberg, and he was concerned that we not overlook including, or at least providing for somehow, treatment of people who have behavioral problems. And I define that to mean tendencies toward criminal conduct. So he felt that they could be treated under the same article. I'm not so sure about that in my own mind. But he wanted to be sure that there was provision in the constitution for treatment of those people who are more or less compelled by circumstances or compelled by environment, or whatnot, to exhibit criminal behavior.

Mrs. Sowle: Might he have been talking about something else as well, and that is that the jurisdiction of the juvenile court and juveniles committed to the Youth Commission one of the big categories of youths committed to the commission by the courts are status offenders. These are children who are not adjudicated delinquent on the basis of any conduct that would be criminal if engaged in by adults. But children who are there because parents teachers, or others, made complaints about them.

Mr. Carter: Truancy, running away from home, etcetera.

Mr. Aalyson: He was concerned with that specifically because of his feelings, and perhaps as substantiated by his experience, of course, that once they are in the system, they might tend to become hard core criminals because of the present method of handling their problems.

Mrs. Sowle: Yes, absolutely. One reason I think this language is very interesting is that there is a series of cases in New York in which on the basis of language such as "in the least restrictive manner appropriate" not in any piece of legislation or the constitution, but in a series of opinions by one of the appellate divisions in New York, they have been sending back cases to the juvenile courts saying the standards you are to follow with respect to status offenders, particularly, is treatment in the least restrictive manner possible. And they have been mandating that the juvenile court very specifically inquire into alternative methods of treatment and have not permitted them simply to say, "This is what is going to happen."

Mr. Aalyson: That's very interesting. Mr. Weisenberg felt that there was too much court intervention.. And yet it seems to be the courts who are moving the system towards this more humane and...

Mr. Carter: What he said was that because of the void in the constitutional and statutory areas the federal courts were being forced under the federal statutes to act. That's the way I read it. Am I wrong?

Mr. Aalyson: I don't know. I had the impression that he felt the courts were usurping legislative functions.

Mr. Carter: I think what he was trying to point out is that the legislative function should be spelled out in state law.

Mrs. Eriksson: The language "in the least restrictive manner" is in the mentally ill bill, that has passed the House. And it is in the retarded bill. So it is in both of those pieces of legislation.

Mr. Aalyson: The witnesses were uniform and strong in their opinion that the section should not be repealed, that there should be a statement of policy which would tend to persuade the legislature that they should continue to act and not just stay away from this area.

Mrs. Sowle: That sounds marvelous to me, but I also see this language just as applicable to the court system. In other words, in making dispositions of juveniles, for example, it seems to me this language is highly applicable. It would be a constitutional provision similar to the rule adopted by some of the courts as to the nature of juvenile treatment.

Mr. Carter: Even with the qualification "as may be provided by law"?

Mr. Aalyson: I think so. I think that the courts would tend to view this as a liberalizing type of amendment which would be taken into consideration by them of the ultimate purpose constitutionally of what should be done for people in this situation.

Mrs. Sowle: I see what you mean "as may be provided by law" but I'm not sure it would be restricted to legislation.

Mr. Aalyson: I don't think so. I think that the courts would certainly view this as a liberalizing trend as set forth by the people. They would tend to view any law as a result of the consequence of liberality.

Mr. Carter: If the legislature did nothing pursuant to this change in the constitution, would that have any effect at all on the courts?

Mrs. Sowle: Let's see. "Services to persons who by reason of age....or behavior shall be fostered and supported by the state in the least restrictive manner appropriate..."

There was discussion about the wording.

Mr. Carter: Incidentally, this is where the word "habilitation" came in.

Mrs. Sowle: It's a good word.

Mr. Carter: We questioned whether it was a real word.

Mr. Aalyson: I was specific in asking, because I felt that it might come up in the interpretation sometime, whether they intended to include the concept "rehabilitation" under the broader term "habilitation" and they said they did. I don't know whether the notes that are kept of our considerations or our discussions will ever be before a court, but I asked that question specifically for that purpose. "Services to persons who, by reason of age, disability, handicap, or behavior, require specialized care, treatment, or habilitation, shall be fostered and supported by the State; in the least restrictive manner appropriate to the circumstances of such persons, as may be provided by law."

Mr. Huston: I have problems with that broad language, because I can construe as meaning that the state can pass laws that would say that I can't get treatment nor my son get treatment nor my daughter get treatment if I can pay for it. Because it says "in the least restrictive manner appropriate to the circumstances of such persons." What are the circumstances of such persons? I think that it is just too broad. I don't see how any court could interpret this language at all.

Mr. Aalyson: Would "needs" be any better there?

Mrs. Eriksson: "Circumstances" could mean financial circumstances.

Mr. Carter; How about saying "in the least restrictive manner appropriate as may be provided by law"?

Ms. Buchbinder: The statute says "in the least restrictive alternative available and consistent with treatment goals."

Mrs. Eriksson: That's quite a bit different from financial circumstances of persons.

Mr. Aalyson: Why not "in the least restrictive manner consistent with treatment goals"?

Mr. Huston: You also have your behavior problems here. You're going to take a person who's got a wealthy father and they are going to say under this that you can just put him in the care of his father, because his father has influence. And they are treating that person individually under the circumstances appropriate to his case. Which I think might not be appropriate.

Mrs. Sowle: I think that is often done in juvenile dispositions. If a family can handle the problem...

Mr. Huston: But it is not necessarily the handling. It's the influence the person has in getting their child out of trouble. That's the problem. And it may not be for the benefit of the child. I can see going back to the behavioral problem. I can see having individual care for all of the other areas here where, maybe not individual care, you might say least restrictive care. But I could argue that the least restrictive might be to give my child back to me.

Mrs. Sowle: Well that's favored under the juvenile system.

Mr. Huston: It may be but it may not be the appropriate remedy for that child.

Mr. Aalyson: Wouldn't that be for the legislature to decide?

Mr. Huston: This is the problem. But they are going to have to pass legislation to permit that.

Ms. Buchbinder: You could say "in the least restrictive manner available and consistent with such requirements" referring back to the required specialized care, treatment and habilitation.

Mr. Huston: I think that you have to have treatment in there somewhere.

Ms. Buchbinder: By saying "such requirements", would it refer back to specialized care, treatment and habilitation?

Mr. Huston: It might have to. The way it is now the legislature really does not have much of a guideline because it's too broad.

Mr. Carter: You could use "consistent with such requirements..."

Mrs. Eriksson: Could "consistent with such requirements" mean anything else?

Mr. Carter: It's a little sloppy.

Mr. Aalyson: "Requirements" doesn't necessarily mean specialized care, treatment and habilitation.

Ms. Buchbinder: How about "such needs"?

Eriksson: Well, then again "needs" can also mean financial circumstances. Something like "consistent with the prescribed care, treatment or habilitation". Well, I don't know about prescribed habilitation. I'm still not sure I know what that means.

Mr. Huston: Doesn't "care and treatment" include habilitation?

Mr. Carter: Not necessarily. It depends upon the way you define "habilitation".

Mr. Huston: To me, treatment should include habilitation.

Mr. Aalyson: And maybe even care.

Mrs. Sowle: Is this supposed to cover prisons, too?

Mr. Huston: Yes, and that's the problem.

Mr. Aalyson: I don't think it should.

Mr. Huston: And you are classifying the mentally ill and the ...

Mr. Carter: "habilitate", in the dictionary, means "to supply with the means".

Mrs. Sowle: "Means" to do what?

Mr. Aalyson: Apparently, "habilitate" has been defined statutorily in other areas.

Mrs. Eriksson: He said it was defined in S.B. 336, the bill dealing with the retarded.

Mr. Carter: I'd like to have a word that we didn't have to refer to the dictionary.

Mr. Huston: To me, you've got to make these as clear as possible to be understood by the legislature and the people themselves.

Mrs. Eriksson: Webster's Seventh says that "habilitate" means capacitate; number two meaning is clothe, dress; or to qualify oneself.

Mr. Aalyson: "Treatment" I think is broad enough to encompass the idea of care and habilitation or rehabilitation. And it can include medical treatment or any kind of treatment.

Mrs. Eriksson: Do you think that it does in fact include care if that is all that is required? There are some categories of persons for whom the only thing to do is care for them.

Mr. Carter: Yes, I think that's a good point. "Care and treatment" and we could stay away from habilitation.

Mrs. Eriksson: If we drop the concept of habilitation, I have a feeling we will make the corrections and youth people unhappy.

Mr. Carter: To say the least. Yes, I agree.

Mrs. Eriksson: And I can appreciate their concern. If you are going to keep in the corrections and offender type people...

Mr. Aalyson: How about "training" instead of "habilitation"? I got the impression from listening to these folks that they are looking at the opportunity to train these people if they never had any training or to retrain them if the training which they had is inadequate to serve the purpose of their going out and contributing to society.

Mrs. Eriksson: I think they might say that "training" is too narrow a word. That it accomplishes only some kind of vocational or educational purpose.

Mr. Huston: To me it makes it difficult to put in the constitution when you have such a broad concept that is almost incapable of definition.

Mrs. Sowle: Why were the words "fostered and supported" used instead of "provided"?

Mrs. Eriksson: Those are the present constitutional words and they were trying to keep the framework of the present constitution.

Mr. Carter: I don't like "fostered and supported" either. What was your suggestion?

Mrs. Sowle: Just going back to "provided". "Shall be provided in the least restrictive manner..."?

Mr. Aalyson: If you say "shall be provided" it almost carries the connotation that you have to do it. "Fostered and supported" on the other hand, gives the idea that you lend your support to the idea without having to spend any money, necessarily.

Mr. Carter: That's a good point.

Mrs. Sowle: Except if you say, "in the least restrictive manner".

Mr. Huston: To me, that word "manner" also is pretty broad. Actually what they're interested in, I think, is the way it was used in H.B. 244, and that is "least restrictive treatment setting".

Mr. Aalyson: They want it to be provided, to be an absolute, but in the form most suitable to the goal they're trying to achieve in the individual case.

Mr. Huston: That's right, but provided "in the least restrictive manner" really is too broad, in my opinion. The word "manner" is just such a broad word. Personally, I think that should be a legislative area and not a constitutional area as to how it is provided.

Mr. Aalyson: I'm rather inclined to agree with you, Bob. I don't see how in the constitution we're going to come up with language which is at once broad enough to serve the purpose and at the same time restrictive enough that we don't provide a mandated pot of gold. And I also have some difficulty with treating criminal behavior in the same fashion as you treat other behavior. I'm not saying that one who is involved in criminal behavior should not have the same care or attention to his problem. But I think they may be different problems. Some criminal behavior is purely voluntary. There are no environmental or educational or other restraints. There are some fairly well-educated and well-to-do criminals who do it for kicks of just because they want to better their financial position, nothing else.

Mrs. Sowle: To combine them in here is difficult because there is no one purpose for penal treatment. The purposes behind the penal system are partly rehabilitative, partly to protect society, and partly to punish. And one of the problems in the juvenile system historically was simply that everyone said that all they were doing was treating. But really what we were doing was we were doing all three of these things. The failure to recognize it led to the failure to recognize a lot of the constitutional rights that are now being recognized. But to say this about the penal system is to be blind to what we really do. We do at least three things in it, and not just care, treatment, and habilitation. We also protect society from dangerous people and punish them. I take it that there has been no interest in changing the other sections of Article VII, just the purpose section. The Directors of Penitentiaries.

Mr. Huston: We can just eliminate them.

Mr. Carter: With the idea that they are either obsolete or statutory.

Mrs. Sowle: Yes, and the purpose in attempting to redraft section one are the purposes that have been testified to by the various persons?

Mr. Aalyson: There are two I think. Retention of a statement of public policy in the constitution and two, recognition that there have been modern trends in the treatment of individuals who are handicapped in some fashion or another and who require some sort of treatment or care or habilitation.

Mrs. Eriksson: "habilitation" is defined in S.B. 336 in the Ohio Revised Code, as "the process by which the staff of the institution (this is the mentally retarded bill) assists the resident to acquire and maintain those life-skills which enable him to cope more effectively with the demands of his own person and of his environment, and to raise the level of his physical, mental, social, and vocational efficiency. Habilitation includes but is not limited to programs of formal structured education and training."

Mr. Carter: That's helpful.

Mrs. Eriksson: But that means that whoever wishes to interpret the constitutional provision is going to have to look to something that the General Assembly has already enacted.

That's a reverse process.

Mr. Aalyson: On the other hand, that might not be too bad if we have a definition of it already and have indicated in our comments that that is the definition that we are using when we use that word here in this. It could eliminate a lot of difficulty.

Mr. Huston: I agree. I think that word "behavior" should come out. I think we're getting in over our heads.

Mr. Aalyson: On the other hand, "behavior" can mean something different from criminal behavior, and so if the person is behaving in a fashion that is not criminal and yet is a deviant type of behavior, you might want to do that. You could of course, say "non-criminal behavior".

Mrs. Sowle: Laudable as all of the purposes are that have been testified to, and I am particularly of the belief that this policy is particularly appropriate in the juvenile area as you were mentioning in the meeting, Dick, but as much as I believe in these goals personally, I do question whether they should be in the constitution. There are trends in treatment, like everything else. And it seems to me those are legislative matters. And let me point out one thing that I can't be very specific about because I don't know very much about it, but there are some people at the law school who are involved in programs concerning mentally disabled, that is funded by a federal grant that a lot of people in the law schbol are involved in.

Mr. Aalyson: Professor Hopperton, I assume, is one of those and he testified here.

Mrs. Sowle: Yes. Now through some discussions connected with that, it was brought to the attention of the faculty at one point that there is a huge debate raging in the undergraduate and graduate departments, not in the law school, but elsewhere in the university about this normalization of treatment for mentally disabled.

Mr. Carter: As to what's most effective you mean, and how it should be handled?

Mrs. Sowle: Right. And I was particularly interested in the committee's minutes that reported the meeting and the testimony that that term was used. Not everybody believes in that. One of the things that caused a lot of tension between these two factions has to do with the ones who believe in normalizing treatment as standing in the way of legislative grants and legislative provision of money for current institutions in need of money. And I just wondered when I saw some of this language whether one of these groups might rise up and say that the language of this is going to hurt us in getting needed money for institutions. I don't mean to be taking a position one way or another because I'm not equipped to, but that is a legislative problem it seems to me.

Mr. Aalyson: I agree. I think we should be as cautious as possible and should leave to the legislature the mechanics of this thing as nearly as possible without restricting them. And in particular without restricting them to providing treatment of any kind which may presently be the vogue but which, 5 years from now, may not be.

Mrs. Sowle: Yes. I'm reminded in this thing of a lot of the early talk about juvenile courts. The turn of the century programs, many of them, were built into the constitution. The theories were very laudable at the time and brought about a lot of good things. But what really is being talked about now as the big idea in the juvenile area is not to have them in any state service programs at all. That these things ought to be left to the schools, they ought to be left to social and private things. And these ideas do change with time.

Mr. Carter: Let me read to you the Hawaii provision. "The state shall have power to

provide for the treatment and rehabilitation, as well as domiciliary care of mentally or physically handicapped persons." What I'm getting at is that maybe, first of all, the word "shall" should not be used. I think I would be in favor of having some statement as to the intent of the state that this is a proper public purpose. And then to leave it up to the legislature to impliment it in view of what the science and knowledge of mankind has.

Mr. Aalyson: If we stop at the end of the first semicolon in the original draft if comes close to that. "Services to persons who, by reason of age, disability, handicap or behavior (and we will come back to that) require specialized care, treatment or habilitation shall always be fostered and supported by the State." You might want to leave out "always" and you might want to talk about "behavior".

Mrs. Sowle: That's a little broader than the Hawaiian provision which talks about mentally and physically handicapped.

Mr. Aalyson: I don't think if we say "shall foster and support" that we are requiring them to do anything.

Mr. Huston: If you want to include behavioral problems, all we have to do after the word "age" is insert "mental or physical disability or handicap" and to me "mental disability" can include behavioral problems. And take out "behavior".

Ms. Buchbinder: But that might not cover the criminals.

Mr. Aalyson: "or other handicap"?

Mr. Huston: We say "mental handicap".

Mr. Alyson: "Services to persons who by reason of age, mental disability, physical disability or other handicap..."

Ms. Buchbinder: You said that some people steal because of a desire to possess something, and that doesn't seem to be a handicap.

Mr. Aalyson: That's not a mental disability or handicap.

Ms. Buchbinder: So the provision doesn't cover criminals anymore with this new language.

Mr. Huston: Well, we don't want to cover the voluntary criminal. I don't think we want to cover them.

Mr. Aalyson: I don't either.

Mrs. Sowle: Why not?

Mr. Aalyson: The guy who has a good job, fairly good education, and just says I'd like to have $5,000 more.

Mrs. Sowle: You don't want to foster and support any services for him.

Mr. Aalyson: No. He's making a choice. He has no environmental, educational or other impediment which has compelled him to the crime, just greed.

Mrs. Sowle: I have no trouble with the present language. I have no trouble with including behavior or criminal behavior. The state has a practical problem. Do you want to provide some services for that person or do you just want to warehouse him for five

years and turn him out again and let him do it again.

Mr. Huston: I think that is a legislative matter not constitutional.

Mrs. Sowle: I do too. I think it's all a legislative matter. But as long as we are stating purposes, it doesn't seem to me that it hurts to state very broad purposes about behavior.

Mr. Carter: Why don't we start this out as we so often do and say "Laws may be passed" to accomplish the following, and then we would be doing exactly what you are saying, Bob.

Mr. Aalyson: Laws may be passed to provide services to persons who, byreason of age...

Mr. Huston: Not it is too much of a mandate. Because we say "services shall be provided" the way this is set up now.

Mr. Carter: Leave it to the legislature as to what they want to do. This is a statement, a general provision, that the state has a responsibility in these areas and it is up to the legislature to provide the details.

Mr. Aalyson: I don't disagree. I want to call to the committee's attention that these persons who are apparently involved in the situation seem to feel that there should be a stronger statement of public policy.

Mr. Huston: Oh, I realize that. But the problem is you say you're going to go out and take this criminal and put him in somebody's home for care, and people aren't going to look kindly to that. And this is the extreme. And if people are very unhappy that's what they're going to say. I think that leaving it up to the legislature and just putting a purpose in there. I do think that we should bring the mental disability in there. We just say "disability and handicap".

Mr. Carter: The present constitution says "Institutions shall always be fostered and supported..." They want to get away from the concept of narrowing it to institutions.

Mr. Aalyson: And are we, by restricting it to services eliminating the provision of institutions?

Mr. Carter: I don't think so.

Mr. Huston: We say "specialized care".

Mr. Carter: You could add "services to and facilities for".

Ms. Buchbinder: The word "facilities" was used in Sub. H.B. 244.

Mr. Aalyson: It would read something like this: "Laws may be passed providing services to and facilities for persons who require specialized care treatment, and habilitation by reason of age, disability, handicap..." whatever you want to add to it could be done.

Mr. Carter: I would personally vote for leaving "behavior" in if it were qualified in the way we are talking about. I think you might support that if it's qualified.

Mr. Huston: If it were qualified. Everybody is engaged in behavior, and to me it's so broad, I'm afraid they might put me away. My wife might have me put away because I am behaving inconsistent with her norms.

Mr. Aalyson: If we say laws may be passed we're leaving it to the legislature to define

behavior, I think.

Mrs. Sowle: I rather like that business of just going back to the portion up to the semicolon. True, that doesn't say laws may be passed. It is stronger, it does use the word "shall".

Mr. Aalyson: "Shall foster and support". That doesn't necessarily mean monetary support.

Mr. Carter: No, it doesn't.

Mr. Huston: But I think if a court were interpreting it, I think there is a good chance they would interpret it to mean monetary support.

Mr. Carter: Particularly because of the present constitution having the same phrase.

Mr. Huston: What does "support" mean if it doesn't mean that?

Mr. Aalyson: Let me ask a question of you, Dick. Is there provision being made for preservation of minutes, discussion, or what have you, of this commission and this subcommittee so that if the court has a question as to what was intended by the use of a particular phrase or a word they can go to the discussion and say, "Aha, this is what they meant"?

Mr. Carter: We have talked about that before. The first thing the courts would like to go to is legislative intent. Unfortunately, in the state of Ohio we don't keep legislative minutes, so as a result, there is a big void there. It isn't like congressional hearings with records kept. And in the absence of that, probably the only thing they could latch on to would be to go back to the commission who made the recommendation.

Mr. Aalyson: The courts can go back to our discussion which shows what the commission intended by the use of a particular word or phrase.

Mr. Carter: And back to the committee, too.

Mr. Aalyson: What if we say, "Services to persons shall be fostered by the state..."?

Mr. Carter: I would be concerned then as to whether the argument might be raised that state moneys could be used for that? If we change it entirely, we don't have to stick with the word "foster".

Mrs. Sowle: Why did they use "fostered"? This was not addressed to juveniles. The state, in many of these areas, often does no more than foster privately offered services for the blind. It's always been done in the juvenile area where the courts have been able always to, in disposition, call on available private, social service, and religious agencies and say this child will be taken care of in that private agency. So "fostered" and "supported" may have been chosen for purposes not covered by "provided".

Mr. Carter: Do you want me to read you the definition, the one we are talking about? "To promote the development or growth of, encourage, cultivate."

Mrs. Sowle: The state, then, can encourage institutions for the benefit of the blind, for example, under this provision, and that's a different concept than is covered by "provided."

Mr. Aalyson: If we take out the word "support" it may have the effect of creating an interpretation that you are not entitled to financial support. I personally don't feel that we need a constitutional statement that the state wishes to provide for those who cannot otherwise provide for themselves. I don't think that needs be stated. In other

words, I don't agree with the position of some of the witnesses who say we need this constitutional amendment because it is going to persuade the legislature to do something which it otherwise might not. I think the legislature is going to take care of the lame and halt without a constitutional provision.

Mrs. Sowle: I agree with their purposes, basically, but I'm not sure I see it as a constitutional matter.

Mr. Huston: We can just make it very brief and say "The General Assembly may pass laws to provide for specialized care, treatment or habilitation of mentally or physically handicapped persons." That leaves out a ge, but it does take into account the criminal element or anybody who is mentally handicapped.

Mr. Aalyson: Why not just say "handicapped" instead of qualifying it by "mentally" or "physically"?

Mr. Huston: To me, you bring in the least restrictive manner by vritue of your specialized care. "Specialized care" could be handling what they speak to as the least restrictive manner if that is the treatment or the best care that's available.

Mr. Aalyson: I got the impression that when they referred to the least restrictive manner they are saying in the manner which will be least likely to impinge the least on their civil rights and lifestyle.

Mr. Huston: Well, but this is going to lead to nothing but litigation, time after time, in my opinion. Every time they want to put a person in an institution, they're going to have litigation.

Mr. Aalyson: I will agree with that.

Mr. Huston: And, to me, I don't think we should be fostering litigation in that area. There is plenty of it now.

Mrs. Sowle: Yes, and there is plenty of basis for the theory of right to treatment without putting this in.

Mr. Aalyson: I think the reason maybe they put it in is because it is consistent with the idea that the constitution more often is thought of as a vehicle for imposing restraint than granting.

Mr. Huston: Right. Establishing restrictions. And they do use it in this H.B. 244. It deals with mentally ill persons "to assure adequate treatment of mentally ill persons, to provide for the maximum use of the least restrictive treatment settings and voluntary hospitalization, to provide orderly and reliable procedures for the commitment of the mentally ill consistent with due process of law."

Mr. Carter: Let me suggest this. "Laws may be passed to provide services to and facilities for..."to make sure there is no question about that, "persons who by reason of age, disability, handicap or behavior..." leave that in for a moment, "require specialized care, treatment or habilitation." Now, another thing we could do with that, if we don't like to lump together the behavior and habilitation of the handicapped people, is that we could split it into two parts. "...for persons who by reason of age, disability or handicap require specialized care and treatment, or by reason of behavior require habilitation."

Mrs. Eriksson: I think habilitation goes with disability also.

Mr. Carter: You think "treatment" is not enough?

Mrs. Eriksson: If you separate them like that, it sounds as if you are only providing habilitation for persons with behavior problems. It might not be construed to be included in your other problems.

Mr. Carter: I would personally have no problem with leaving behavior and habilitation in the way we have it. Provided it starts out with "Laws may be passed...". In essence, all this is is a statement of just kind of "god and motherhood" which really doesn't add anything to the constitution except a statement of intent by the citizenry.

Mr. Aalyson: And a withdrawal of a former statement of an intent to foster. We are doing that.

Mr. Carter: We are saying that laws may be passed to provide services to and facilities for. It seems to me that would cover it pretty well.

Mrs. Eriksson: But you are substituting a "may" for a "shall".

Mr. Aalyson: You are substituting a choice for a mandate, I think. I'm not arguing against it, but I'm just saying that that is the present constitution. And that was once thought to be desirable.

Mr. Carter: That was tied in with the institutions, of course.

Mr. Aalyson: Yes, I agree. I don't know whether it was limited to institutions.

Mr. Carter: Yes. It says "institutions shall always be fostered..." I'm inclined to think we ought to drop out this "in the least restrictive manner". At first I was in favor, but I agree that that is argumentative. As insights and knowledge changes, it might be inappropriate to have that kind of statement in there. Leave it up to the legislature.

Mr. Huston: Is this your language here? "Laws may be passed to provide services to and institutions for...?

Mr. Carter: "Facilities for". We're trying to get away from the word "institutions".

Mr. Huston: "...and facilities for persons who by reason of age, disability, or handicap or behavior require specialized treatment, care, or habilitation."

Mr. Carter: Yes.

Mr. Huston: I think as long as you put in there "facilities" I think behavior can go in there because you are going to provide facilities for...

Mr. Aalyson: I think it leave it to the legislature which is maybe where it ought to be.

Mr. Huston: You are going to provide facilities for those behavioral problems. They may be incarcerated in facilities.

Mr. Aalyson: But they could be treated, too.

Mr. Huston: That's right. I think that's a good thought. If we get the facilities in there I think that could apply to the behavioral problems. And if the require treatment they can get treatment. But it is up to the legislature to determine it. I think that's a good way of handling it.

Mrs. Sowle: I'm sure we won't make happy those various interests that are represented before the committee.

Mr. Huston: To me, I just don't think we should be breeding litigation by language in the constitution. If you put "maximum" or "least" in any law or any constitution, what is "least" and what is the "maximum"? These words are matters of judgment. And you are going to require a court to make those determinations in each case.

Mrs. Sowle: It seems to me this does the job.

Mr. Carter: Would it invalidate anything that's on the books now? Do you want me to read what I understand we have just to make sure we say what we want? "Laws may be passed to provide services to and facilities for persons who, by reason of age, disability, handicap or behavior, require specialized care, treatment, or habilitation." Maybe we could do it this way, "...to provide facilities for and services to..." and get the "to"s further apart.

Mrs. Sowle: I think that's a very good solution.

Mr. Carter: I think I could defend that to the people that were here.

Mr. Aalyson: The place to go is to the legislature to persuade them that there is a more humane concept of treatment and they should provide for it. My personal feeling is that you ought always to keep government from intruding on a person's lifestyle and a person's rights, and I think the rest of you feel that way, too. But I think you do that with the legislature, not with the constitution. I think both functions would be served by this language.

Mr. Carter: I guess we have got a committee recommendation on that, then.

Ms. Buchbinder: I think earlier everyone had a negative attitude about their ability to come up with some language that would cover all of these purposes, that it's good that we were able to find something satisfactory.

Mrs. Eriksson: The next items are very brief and I believe they are just a question of discussion. The only thing that I think is not raised in this memo on amending the constitution is something like the Florida provision, which has sort of an automatic constitutional revision commission in their constitution every ten years. This memo is just a discussion of what we have in the constitution at the present time. So if you want to discuss any other possibilities that I think would be appropriate to discuss in this context.

Mr. Carter: That's the only state that does that, as far as I recall.

Mrs. Eriksson: As far as I know that's the only state that does that. I don't really know of any experts or groups interested or anybody to consult with. I think it's just a question of the committee discussing that problem.

(There were recording difficulties for items 6 and 7 on the agenda but the discussion is described below)

Mr. Carter mentioned that in Florida, there is constitutional status for the constitutional revision commission, and that was a consideration when discussing the methods of amending the constitution in Article XVI, Sections 2 and 3.

Mr. Aalyson read the two provisions under consideration in the Miscellaneous Article. "Section 1. Columbus shall be the seat of government, until otherwise directed by law. Section 3. An accurate and detailed statement of the receipts and expenditures of the public money, the several amounts paid, to whom, and on what account, shall, from time to time, be published, as shall be prescribed by law." He noted that the memo said that

these sections were causing no problems, and he did not see any reason for changing them. The other committee members agreed.

Article XVI, Sections 2 and 3 were discussed in a separate memo. Mr. Aalyson said he only had one thing underlined, a question concerning whether a limited constitutional convention was possible under the Ohio constitution. Ms. Buchbinder said the memo expressed the view that it was not known whether a limited constitutional convention could be called. The secretary of state's office had been contacted and said they didn't know whether one could be. One never had been, and section 3 specifically states the question which must be asked every 20 years, in which a limited study cannot be stipulated. Section 2, on the other hand, does not specifically prescribe the question, and it is possible that the legislature could phrase the question in such a way as to the limit the convention voted on by the people, or limit it when it is being organized. Mr. Carter said he didn't think it was of any great importance whether a limited convention was possible under the constitutional provision. The committee voted to make no changes in the sections.

The meeting was adjourned.

Ohio Constitutional Revision Commission
What's Left Committee
May 11, 1976

Summary

The What's Left Committee met on May 11 at 2:30 p.m. in the Commission offices in the Neil House. Committee members present were the chairman, Craig Aalyson, Katie Sowle, Robert Huston, and Douglas Applegate. Present from the staff were the Director Ann Eriksson, and Brenda Buchbinder.

Mr. Aalyson - Welcome, ladies and gentlemen, to another meeting of the What's Left Committee. I assume, by reason of those of you who are present, that the committee did not lay to rest Article VII of the Constitution, which concerns itself with public institutions, and most of you who are present would like to be heard again and we wish to hear from you. I'm going to speculate further that perhaps the chief difficulty with the suggested amendment which the committee itself has come up with is the failure to contain any language which has to do with the provision of benefits or aid to certain classifications of individuals in the least restrictive manner according to the circumstances in which they find themselves. Mr. Hopperton, you seem to have led the discussion earlier, and I would like to call upon you at this time.

Mr. Hopperton - Thank you, Mr. Aalyson. Let me, if I might, pass out another draft amendment.

Mr. Aalyson - You all did receive, did you not, copies of the summary of the discussion last time?

Mr. Hopperton - Yes, we did. Our ad hoc group of informal representatives met again yesterday afternoon to discuss the March 5th draft language that the committee had suggested. And also to consider what we might wish to propose back to the committee this afternoon. So on behalf of the ad hoc group, we would like to thank you for the opportunity to again come back and speak before the committee. Persons who were invited to yesterday's meeting were Glenn Workman of Ohio State Legal Services; Steven Yost of the Department of Rehabilitation and Corrections; Bill Weisenberg, of the Ohio Youth Commission; Joseph Gentlecore of Ohio Developmental Disabilities; Joseph White of the Academy for Contemporary Problems - the Administration of Justice Project; Robert Miller of the Ohio Association for Retarded Citizens; Walt Lawson of the general counsel's office of the Department of Mental Health and Mental Retardation; Ron Kowslowski of the Office of Developmental Disabilities and DMHMR; Alvin Hadlee of the Franklin County Childrens Services Board; Gerry Szabo of Columbus State Hospital; Carl Reeser of the Ohio Society for Crippled Children and Adults; Doug Rodgers of the Ohio Legal Rights Service; Dean Michael Kindred of the Law School and project director of the Law Reform Project which I work on; and Jim Kaufmann of the Academy for Contemporary Problems; and Gerard Lobosco of the Franklin County Council for Retarded Citizens. Messrs. Lobosco, Kaufmann, Kowslowski, Hadlee, Kindred, and a representative of the Ohio Society for Crippled Children and Adults attended. And in addition, Steve Yost of the Department of Rehabilitation and Corrections who is here this afternoon, attended, as is Walt Lawson and Gerry Lobosco (and Kindred).

That ad hoc committee again considered Article VII, Section 1. It was the consensus of those in attendance yesterday afternoon with regard to the March 5th draft, that there were problems. First, we felt that there was no mandate included in that language. It was more of an equivocal statement, more a suggestion to the General Assembly that they might have to pass laws with regard to the categories of

persons and with regard to services for them. In addition, it was felt that the language added nothing to what has been achieved in terms of legislation or litigation in the area of right to treatment for certain categories of people. In fact, the draft language might even weaken the right to treatment concept. In addition, it was felt that since the language did not provide a mandate, that perhaps it did not add anything to the Constitution itself, and that it would be excess baggage in the Constitution. It did not assist in providing a clear statement of public responsibilities or a clear right to the persons covered. For those reasons, it was the consensus of the group that it would be better to totally abolish Article VII, Sections 1, 2, and 3, rather than having any of the sections and in particular the Section 1 which was incorporated in the March 5th draft. So our recommendation with regard to the March 5th draft, from our standpoint is it would be preferable to not have that language in the Constitution. However, we did go further in terms of proposing an alternative and that is what I passed out a moment ago. The ad hoc group attempted to draft an amendment that spoke to most of the concerns that we found in the transcript of the February 24th meeting. And, in doing so, we took a significantly different approach than we did in the other amendment that we proposed to your committee. You'll note that this amendment is significantly narrower in its scope and coverage than our earlier draft. It deletes the categories of "behavior" and "aged" from the classifications covered. It deletes language with regard to individualized treatment. It does offer a very direct statement of a mandate or right with regard to right to treatment and habilitation. And it is limited in its coverage to persons who may be civilly confined by the state not criminally confined, or confined under criminal statutes. In effect, we feel what it does is set up treatment or habilitation as the quid pro quo for civil confinement by the state under statutes such as Senate Bill 336 or the recently passed House Bill 244. It does suggest again the least restrictive alternative language. However we feel that it provides a more concise statement of that principle than was provided in the first draft that we presented to you on February 24th. It covers only civil commitments not criminal commitments. We feel that it is most appropriate to include in a constitutional provision principles such as least restrictive alternative that tells the legislature and the executive branch that it cannot curtail basic rights and liberties anymore than is absolutely necessary. In addition, it establishes a guideline for accommodating certain constitutionally protected rights and constitutionally protected groups, on the one hand, and legislatively protected or advanced interests in the areas of public health, safety, and welfare. In addition, I think it encourages the broader use of alternatives to hospitalization in the most restrictive setting and would encourage the seeking of a full range of somewhat less confining residential settings. Basically, the least restrictive alternative requires that they use less drastic means rather than more drastic means in terms of settings for those persons civilly committed. I think it was the concensus of the group yesterday that the concepts that we've suggested in this draft are constitutional in nature. They deserve consideration for inclusion in the Constitution. We feel that they state a basic principle of enduring nature and something that is above and beyond the scope of mere legislative language. So we would suggest that the provision that we are offering back to you would fix in the Constitution a very widely accepted social value that has been incorporated in the right to treatment and the least restrictive alternative.

Mr. Aalyson - Thank you, Mr. Hopperton. Questions of Mr. Hopperton from members of the committee?

Mr. Huston - How would your draft be implemented?

Mr. Hopperton - The draft, I think, implicitly leaves it to the General Assembly.

Mr. Huston - Supposing they don't act?

Mr. Hopperton - Fortunately in Ohio, I think, the General Assembly has already acted and largely what this provision would do would be to fix or lock in the provisions that have already been legislatively adopted in 244 and 336. So that is not a fear that I personally have that there would be a failure of the General Assembly to implement.

Mr. Huston - Could you give me some examples of least restrictive alternative settings?

Mr. Hopperton - I think one example, and perhaps other persons who are here might like to contribute as well, would be, perhaps, at Columbus State Hospital, instead of institutionalizing involuntarily committed persons in the large barrack-like buildings of institutions, cottages on the grounds or perhaps even in the surrounding community could be developed.

Mr. Huston - How large should the cottages be?

Mr. Hopperton - That I think is a decision left to the administrators. Hopefully they would be smaller and more in line with the normal residential kinds of settings. I don't think that that specificity could be spelled out in the constitutional provision nor should it be.

Mr. Huston - This is one of the problems that I have with using adjectives or adverbs in connection with a constitutional provision, whether "least", "most" or "average" or things of that type because it is not definitive in any way as to rights. It's a very vague language that breeds litigation, as you probably know, being a lawyer. Vague or indefinite language in any law or the Constitution, all it does, is breed litigation all the time. Somebody is asserting a right that they have. How do you think we can avoid that?

Mr. Hopperton - I'm not sure that this provision would necessarily invite litigation. But I'm not sure that that causes me personally a problem. I think that the equal protection clause and the due process clause of the federal constitution rightfully have resulted in some litigation. I think also that constitutional provisions are essentially general principles. They are and cannot be, in a basic document, stated with that much specificity. I think it is a useful principle. It does not establish a basic right in and of itself. The basic right that we are talking about in this provision is the right to treatment. And the least restrictive alternative principle by inclusion along with it, does provide a guideline for interpreting the right to treatment by legislators, by administrators, and perhaps also by courts.

Mr. Huston - Do you think there is any conflict between the fact that these people are confined and that you provide that they are to receive treatment in the least restrictive alternative setting? Do you think it could be argued that they shouldn't even be confined?

Mr. Hopperton - Certain persons can be, and I think should be confined under the civil confinement statutes. I have no problem with that. I think what this is saying is that if they are confined then the state is under some obligation to look at the range of alternatives in which to confine those persons. Some persons may well merit confinement in the most restrictive settings. Others, while meriting confinement, may do best in terms of their treatment, their rehabilitation, their

recovery, their development; by being placed in a less restrictive type of setting.

Mr. Huston - How far do you go as far as confinement is concerned? When is a person confined? Suppose that you had a person that you wanted to put in a residential atmosphere and put him out in a normal home, such as a foster home or that type of home. Would they still be confined?

Mr. Hopperton - They type of confinement that I think of is confinement under court order. So that is the confinement. I'm not sure that that is responsive to your question. It would be certainly a confinement where the person was not free to leave willy-nilly or on a voluntary basis.

Mr. Lawson - My name is Walt Lawson. I'm with the Department of Mental Health and Mental Retardation and was present at the meeting yesterday and the discussion of this proposal. I'd like to make some statements on behalf of the Department. I was going through a thesaurus today looking up synonyms for the word "confined" and three I found that were most closely associated therewith were "detained", "committed" and "in custody". Probably 45 minutes of our conversation yesterday was related to that word "confined" and how limited it should be defined or how broadly. I think I would have to agree with Bob that probably somebody under an involuntary court commitment would be considered confined, whereas somebody that was voluntarily placed would not be confined. And as to the questions about the least restrictive alternative setting, the point there is that each individual, based upon his own attributes and problems should be placed in the setting in which he can be treated and habilitated the easiest and the best. The thing I spoke to Bob about late this morning and he had had some discussion with Michael Kindred about is that our department feels with this particular amendment that the word "appropriate" needs to be placed somewhere in relationship to the "least restrictive alternative". And that is, as the phrase reads now, after reading it again this morning, we feel that it is probably too absolute. In other words it says that persons, period, have a right to be in the least restrictive alternative setting. And I think with no qualifier or modifier beside that such as "appropriate", I think that is where you are coming from when you ask the question about the least restrictive alternative. And I think it gives me problems as well. Possibly, adding the phrase on at the end of the proposal such as "that is appropriate" might suffice for our purposes. So it would read "provided in the least restrictive alternative setting that is appropriate".

Mr. Kindred - Can I just add one comment on that? I'm Mike Kindred and I teach at the Law School. The kind of language that is presented here is language that the General Assembly is already well familiar with, including Mr. Lawson's suggestion that the word "appropriate" should go into the phrase "least restrictive setting". In Senate Bill 336 and House Bill 244 they have dealt with the concept of the right to treatment and the concept of the least restrictive alternative. If I am not mistaken, at least in H.B. 244, the language used was "least restrictive alternative appropriate setting", or setting that is appropriate. That reference is there to indicate that what one is trying to do is to guard against unnecessarily restrictive confinement, that is confinement that is restrictive for purposes of convenience rather than for purposes of treatment. I think the best illustration of that is the dichotomy of a state institution where a person is removed totally from the community and dealt with in a closed structure, and community mental health centers where the individual can continue, if it's desirable, to reside with his family, to go to work, to receive medication on an out-patient basis. And with the improvement in chemical therapy of mental illness, there are many, many cases in which a person can be effectively treated in a community setting if a person will cooperate with the treatment by coming in to the out-patient treatment as they can be in the institution. It is sometimes administratively more convenient to lock the person up in the wards where

you have got him there every day to give him the shots and so on. But it is much more disruptive and much more restrictive of the person's liberties. And the legislature has responded to those kinds of policy concerns, understanding that in fact they are concerns that are expressed in federal constitutional decisions, both the right to treatment and the least restrictive alternative concept and they have adopted those concepts legislatively and haven't seen that they are in conflict. And I think that they are not in conflict. I'm talking about a person who is subject to confinement because of his behavior in the community. But once the courts have exercised their authority, it may be that from a treatment point of view, the person does not have to be locked up with locked doors and bars on the windows. An unlocked ward, a residential setting in the community, a community mental health center with out-patient services are all along the continuum in terms of more or less restrictive treatment settings. I hope you give very serious consideration to this kind of provision.

Mr. Aalyson - It is intended by your suggested amendment that the confinement or the treatment or both be in the least restrictive alternative setting, and do you intend, by the use of the word "setting" to connote a geographical position or something more than that?

Mr. Kindred - We talked about that yesterday and considered a different kind of language which would have said "setting or manner" because I think the word "setting" does refer to the environment in which the treatment is provided. And decided that it would be unwise to suggest to you that one include "least restrictive manner" language. The reason for that is that while a certain form of treatment may be able to be provided in a number of settings, to suggest that less drastic forms of treatment are necessarily better than other forms of treatment is really getting into the medical area. And in the process of legislative hearings on this matter, there was a good deal of medical testimony to the effect that it is often important to be able to use very substantial treatment measures in whatever settings are going to be used; to use, for instance, heavy doses of medication, rather than lighter doses of medication, for a shorter period of time. That if one tries to scale down the treatment, you run the risk of making the treatment ineffective. And a very substantial medical intervention may be by far the most efficient and effective means of dealing with the mental illness.

Mr. Aalyson - The term "setting" you are saying means environment or location.

Mr. Kindred - And one might well use "environment" rather than "setting", but it certainly is intended to have that connotation.

Mr. Huston - Do you, by this section, create a right by which state employees or the state government itself could be subject to civil liability?

Mr. Kindred - The State has already done that through legislation and through the waiver of sovereign immunity. And federal courts have indeed also held that there is a federal civil liability with respect to these same concepts.

Mr. Huston - When you define them in the Constitution, don't you just carve them in stone so that there is possible litigation and liability on the part of the State in a judgmental manner?

Mr. Kindred - I think that the clear effect of this is not to innovate at the moment because legislation essentially speaks in the same language. The effect of this is to do exactly as you say, and that is to carve it in stone. That is to recognize that in the implementation of these, it is going to be very tempting to abandon these

when one begins to face the difficulties of implementation and paying for these kinds of things. Obviously, the effect of putting it in the Constitution is to say that it is an important enough idea that the legislature has taken that position for the moment, and that's the right position to take and the federal courts are going in that direction in terms of saying that there is a federal constitutional right. And indeed there is federal statutory language as well that is very similar to this in terms of the right to treatment now. But as to say that it is a matter of state constitutional law, yes, these are two critical concepts. And I think that's a decision that has got to be made. Is it a critical concept that when a person is involuntarily confined because of handicap or disability that he should be treated for a handicap or disability? And is it a fundamental concept that that should be done with as little restriction of his other rights as possible?

Mr. Aalyson - Do you intend that the state shall be obligated to provide the habilitation or treatment in facilities that are existent or would the state be required to construct facilities that provide a range?

Mr. Kindred - Many of the facilities are in existence. That is, there are community mental health programs and there are state institutions. In part, it is a question of how the state institutions are administered. For instance, an open ward is less restrictive than a locked ward. So many of the programs and facilities needed do exist. But there is as well, the capital improvement budget for the Department of Mental Health and Mental Retardation, I believe for this biennium in the neighborhood of $200,000,000. So the State has recognized that it is carrying out its programmatic goals, its statutory goals, both of which are consistent with this, that indeed there is construction involved. There is a great deal of it going on and it is for the most part going on to develop the medium kinds of services that provide the spectrum that you need to deal with these programmatic and legal concepts.

Mr. Aalyson - Do you think the amendment would require the state to provide a broad spectrum of settings, if you please, if none now exist? And who is to determine what the range of the settings would be?

Mr. Kindred - I think the State is already obligated to do that, if it wishes to continue to involuntarily confine someone. I think the State is rapidly getting out of the involuntary confinement, to a very large extent. It is looking at is population that it has involuntarily confined for years and years and saying, "Why are we doing this? We don't need to do this." And they are looking at those populations because all of a sudden they are saying that there are costs in involuntary confinement. To the extent that the State wishes to continue to involuntarily confine people, I think the federal constitution imposes this requirement on them already. When it gets to the question of who decides, I think to a very great extent the legislature will make decisions and administrators will make decisions. If the decisions that they make are unreasonable or grossly inconsistent with this kind of a concept, there certainly is always the possibility that a federal judge in the case of the federal constitution, or the state's judge in the case of the state constitution, will step in and say that the State is out of compliance with the constitutional provision. And there is litigation in various places in the country where people are asserting this constitutional right. In Washington D.C., the courts have responded by ordering the District to come up with a long range program to develop suitable facilities. The bottom line always is the court. I think a great deal of it is already being done by the administration and by the legislature.

Mr. Lawson - I wish to emphasize to the committee and to point out that as opposed to, in some cases, Mr. Hopperton and Mr. Kindred's group, which is concerned primarily about the civil rights programmatic aspect of treating mentally ill and mentally retarded individuals, the Department is not only concerned about that in the programmatic sense but also the director, of course, has to consider the fiscal and practical

aspects of anything of this nature. The director has reviewed all of the prospective proposals for the Constitution and had some major problems with the original proposal as submitted by Bob's group. However, since the proposal is before the committee today, we feel that it meets what is already provided in the federal constitution and has been interpreted by federal courts and we feel it is good material, therefore, for a state constitution. And that is that basically what has been held is that those individuals who are involuntarily confined by the state must be released if they are not treated, is a basic summation of 20 pages or so. What we have before us now, I think, is, simply stated, what several court cases have held. That is that persons who are confined by the State for these reasons must receive habilitation in the least restrictive alternative setting that is appropriate. The Department is looking at it, both from the programmatic standpoint, plus adding the fiscal and practical impact upon the system, and we feel that it is a good proposal for your consideration.

Mr. Aalyson - I still have some problem with whether the adoption of this amendment would require the State to embark upon a major program of physical facility construction.

Mr. Kindred - I think it would require it to continue the program it has begun. I think if it were to stop at this point and do no more in terms of developing community facilities, one would have a very good state court claim under this constitutional provision. I think one would already have a good federal court claim. But this would certainly add a state court claim. The facilities that are now in existence in the State are really at two ends of the spectrum. There are community outpatient services and there are highly restrictive institutional services. There is a great deal that needs to be done simply in terms of modifying the existing institutional services so that they themselves are not more restrictive than they need to be. But there is a need for the development and there is an ongoing program for development of community residential programs and additional community coutpatient programs.

Mr. Lawson - The director of the Department has indicated in many news releases and legislative testimony over the past year and a half that this is exactly the direction in which he is heading. As a matter of fact he is projecting that three years from now he expects the institutions' population to be cut in half of what it is now. The Department is presently gearing a lot of its capital money as well as money to the communities for the building of facilities that will solve the least restrictive alternative setting problem. Plus the fact that there is a great deal of money spent in purchase of services whereby people are placed in residential homes of 8 people or less. I think this is a viable alternative to the least restrictive alternative setting question presented.

Mr. Huston - Who makes the determination now as to whether or not the person may go into a residential home?

Mr. Lawson - We have caseworkers who are responsible for the residents in the institutions and the people at the institutions who make a determination. If a fellow is placed in an institution and over a couple of years has been habilitated or treated there enough to move on, then they move him out into another ward or even another home or a community setting. I was up at Apple Creek two weeks ago, and up there of course they have maybe 4 or 5 least restrictive alternative settings even within the institution, going from a very closed tightly restricted ward down to where they have individual living quarters where a person takes care of his own clothing and his own bed and his own living area. And then once they feel they have progressed enough in that setting, then they are out to the community and they are placed in a home and they find a job for them.

Mr. Huston - In other words, you really have this to a certain extent now.

Mr. Kindred - S. B. 336 and H. B. 244 provide for periodic court hearings and the probate judge or referee is required in each of those hearings to review not only whether the person is subject to confinement but also to review the setting in which he is placed and to place him in the least restrictive possible setting consistent with his treatment, so that while there are provisions for staff determination along that line, there also are provisions for periodic probate judge or referee determinations and they are required to look at that same question and make that determination.

Mr. Huston - What is the posture of the bills today?

Mr. Kindred - Senate Bill 336 is now enacted and is in Chapter 5123. House Bill 244 passed the senate with one dissenting vote and the house with four dissenting votes at the end of the legislative session and in on the governor's desk and has the support of the director of the Department.

Mr. Huston - At that time, was there any budgetary implementation of this?

Mr. Kindred - There was a companion bill this year, House Bill 1215, which was sought by the Department and has come to be known as the Jaskulski bill. It is essentially a short-term fiscal bill designed to release funds for improvement of services and development of services. There was not a new general fund appropriation. It was the feeling of the Department that with the land sale fiscal mechanisms that were built into H.B. 1215 that they did not need a renewed appropriation this year. It also involves bringing existing facilities up to a certain standard and then getting federal Medicaid funds to pay for the care in those facilities, thereby being able to use the state resources that were used in those facilities over to improvement of another facility or to develop a community facility. So it is a complex budgetary process.

Mr. Huston - In this budgetary process, you indicate that there is a bill that is substantially similar to this amendment. Has there been any determination made as to what the cost of implementing your proposed amendment would be in the way of capital expenditures? With the present confined population, in connection with the least restrictive method, has anyone made a study to determine what this would cost the state?

Mr. Kindred - The Legislative Budget Office has issued a fiscal analysis of H.B. 244 both when it came out of the house and when it came out of the senate. It recognized that there are many questions in there that are almost impossible to determine. They did, I believe, report that with H.B. 1215 and the funding mechanisms provided there, there would not be a need for an additional appropriation this year. I don't think that that was addressed to the capital needs that would be implied there, because there are substantial capital funds in the present biennium budget and I don't know what the Department's plans are in terms of the next biennium.

Mrs. Sowle - I would like to make an attempt to see if I understand the purpose of the provision in light of the objections that the committee voiced last time we talked about a proposal. I think that I have only one remaining question. It seems to me that this proposal meets virtually all of the objections that various committee members had last time. There was considerable discussion at the last committee meeting of the effect on criminally incarcerated. This no longer applies to the criminally incarcerated and that involves different problems than are presented by the disabled and handicapped. So that's out of there. The least restrictive alternative setting language as opposed to least restrictive alternative manner is a

very different thing, it seems to me. We had all kinds of trouble, as I recall, with "manner". Did it mean finances, did it mean treatment? I think that was the thing that I objected to the most. I recall that Chairman Carter and I both were a little worried about freezing into the Constitution by a provision like this the thought of a period about an appropriate social approach such as was done in the area of juvenile law at the turn of the century. And that concept that was dictated in the area of juvenile law at the turn of the century is no longer thought to be appropriate. So I was worried about freezing into the Constitution the current thinking about some type of treatment that 25 years from now might no longer be appropriate. The change of the word "manner" to "setting" seems to me not to freeze treatment methods into this. I have a son who is a science fiction freak, and I went home to him after our discussion at the last meeting and I said, "Tell me about what happens on futuristic programs on treating these things" and he has read all of the fine print in all of the Star Trek stuff, so he came up with some very interesting treatment theories that I didn't know about that are possible in the future. But in effect, I think "setting" doesn't confine anybody to a treatment approach. "Manner" is different. The immunity problem doesn't give me any problem. Liability doesn't give me any problem because it is my understanding that the area of both liability of the state and liability of state employees largely turns on the immunity question. You run into that every time you pass a law, but I don't think this creates any special problems about liability or immunity. In terms of requiring the construction of facilities, I really don't think this requires a budget or a range of facilities. What this says to me is if you confine somebody who is disabled or handicapped, you can only do that under certain conditions. It seems to me to create a right on the part of the disabled or handicapped not to be confined more than is necessary. Now, the state doesn't have to build anything to conform to this type of provision. The state simply has to avoid confining a person to a greater extent than is necessary. The state doesn't have to confine him at all. But once it intervenes in the liberty of an individual, the physical liberty of an individual, it can only do so in certain respects. So I don't see any problems with requirements that the state do anything. It is a restriction on what the state can do with regard to the disabled and handicapped, as I read it. We have also gotten rid of in this draft the problem of requiring individualized treatment. It has been suggested that language concerning appropriateness be added. It would be my feeling that the minute you add "appropriateness" you get into problems of requiring individualized treatment. Now, I am not against individualized treatment, I'm for it. But I'm not sure we want to write that into a constitutional provision. It seems to me if you do you run into another set of problems that might make it a lot harder to get it passed.

Mr. Lawson - If I might comment, when you began your conversation, you said that by changing the word "manner" to "setting" you thereby got away from the treatment problem, and then you pointed out that by adding "appropriate" to "setting", you are getting back to the treatment aspect. I don't agree with that myself.

Mrs. Sowle - That may be.

Mr. Lawson - I think the word "appropriate" only applies to the physical facility requirement. And I think what we have to be very careful of there is the fact that you can't make it absolute. In other words, if you treated everybody in the least restrictive alternative then you are going to be treating everybody in their home. You aren't going to have anybody in an institution. Whereas if you say treatment in the least restrictive setting that is appropriate, then you are going to have some individuals who are going to be in locked wards, some in individual living quarters, some in group homes, some in community facilities, that type of thing. That's my impression.

Mrs. Sowle - Yes, that does meet part of my problem. If it is tied to setting then it does not require individualized treatment. I basically think this is a very very good proposal. I read an article given to me about least restrictive alternatives and wonder if it would be interesting to distribute that to the committee. It deals with the legal background of right to treatment and least restrictive alternative setting as a constitutional idea and as a legislative idea. It seems to me that this might have one effect that present equal protection rights do not have. It seems to me that disabled and handicapped are not treated as a protected class as such, not treated as a suspect class.

Mr. Kindred - There has been some suggestion in the literature that they should be but they are not treated as a suspect class.

Mrs. Sowle - Yes. Now would this have the effect of getting over that problem in the area?

Mr. Kindred - One does not get to the constitutional notion of the least restrictive alternative unless you're dealing either with a suspect class or a fundamental right. We are not saying that we are dealing with a suspect class here, but you are dealing with a fundamental right. And the cases have held consistently that confinement is restrictive on fundamental rights, and that triggers the notion of the least restrictive alternative. Almost all of the cases in the right to treatment area and in the due process area utilize the concept of the least restrictive alternative.

Mrs. Sowle - Confinement would concern a fundamental right. So this does not, in effect, create a suspect class for equal protection.

Mr. Aalyson - Along that vein, our suggested amendment would permit the legislature to provide facilities and services to all persons who by reason of age, disability, handicap or behavior, require it. This suggested amendment that has been handed to us today would limit the legislature at least so far as constitutional provision is concerned, to providing those facilities to only those who are confined. So it would immediately eliminate those people who are not confined as having the constitutional right...

Mr. Kindred - But the provision doesn't create a right. That's the problem. That is the legislature can create those services and facilities without that provision of the Constitution.

Mr. Aalyson - Which might be true even in the case of the confined people.

Mr. Kindred - But what this does is to create a right on the part of the person being confined.

Mr. Aalyson - What I'm asking is shouldn't we create that right in favor of those persons who are not confined, who are in need.

Mr. Kindred - Yes, I think you should, but I think you would run into a storm of fiscal and practical objections if one were to say that all persons who by reason of disability or handicap, need services, would have a constitutional right to them. I'm afraid we can't go that far.

Mr. Aalyson - In the case of the confined person, all you are providing is some court says that this person needs to be confined. Therefore, he is entitled to treatment. Why should he be entitled to treatment any more than the person who is not confined who needs it?

Mr. Kindred - Because the state is intervening in his life. It is restricting his choices. It is taking away the choice that he had before of being in the community, but mentally ill or handicapped. It is saying that if you are going to be mentally ill or handicapped, we are going to lock you up. And he's saying, if you are going to lock me up, then at least begin treating my handicap. That's certainly the theory.

Mr. Aalyson - What is the requirement in the proposed draft of the word "alternative"? Why is that there? Why doesn't it just read "the least restrictive appropriate setting"?

Mr. Kindred - I think that would be fine. I think it is in there for reasons of tradition.

Mr. Aalyson - Jingoism?

Mr. Kindred - In a sense that is a part of the language that has developed. I think if you said "in the least restrictive appropriate setting"....

Mr. Aalyson - How about "in the least restrictive appropriate setting available"? Does that bother you?

Mr. Kindred - It bothers me a little bit because I'm not sure what the implications of that are. But it could certainly be used to restrict the provision very substantially.

Mr. Aalyson - I'm getting back to my former thought. Would this mandate the legislature to construct a broad range of facilities that would have varying degrees of restrictiveness?

Mr. Kindred - As Mrs. Sowle mentioned, I think only to the extent that it wishes to continue to confine people who do not need to be confined in highly restrictive settings. It wants to confine people who don't require a highly restrictive setting, then it certainly must provide a setting that is less restrictive and appropriate.

Mr. Aalyson - If we added the word "available", then there would be no requirement for constructing new facilities, I think.

Mrs. Sowle - Let's say a person requires little confinement, but some, without trying to define that. If you say "the least restrictive alternative or appropriate setting available" you give the state the right to confine him in the least restrictive setting it has. Whereas under this it seems to me you can't confine him at all.

Mr. Aalyson - I think we are confusing the situation here. This draft amendment presumes confinement, whatever that means. Then it goes on to entitle the confinee to habilitation or treatment in the least restrictive setting. So if we say the "least restrictive setting available" then the legislature has no obligation to provide more than now exists, although they could.

Mrs. Sowle - Let's say you have a barrack-type facility for mentally ill and that's all the state has. If you have someone who is mentally ill and requires some confinement but not that type, it seems to me that if you add "available" to it, you're going to let the state keep him in that even though we have added the right to treatment.

Mr. Aalyson - Except that we have defined "confinement" I think to mean any legal restriction, not necessarily incarceration in a building of some sort.

Mr. Lawson - If you take that to the extreme and on the day the constitutional amendment becomes effective there is some terrorist group out there that blows up every facility for mental health and mental retardation in the state, then there is nothing available in which to confine people.

Mr. Aalyson - We're not talking about confinement, that's what's bothering me. The confinement is distinct from the right to habilitation and treatment. Confinement means that there has been some sort of legal restriction placed on his liberty, as I understand it. Once that legal restriction has been imposed, then he or she has the right to habilitation or treatment in the least restrictive setting. The setting does not concern itself with the confinement but with the environment within which the treatment or habilitation is taking place. Is that not correct? So that conceivably, the confinement could be in the worst sort of prison facility so long as he is taken out and afforded the right to habilitation or treatment in a less restrictive or the least restrictive setting.

Mr. Kindred - I think that in the context of mental health treatment and mental retardation habilitation, it's not a question of putting someone in a jail at night and taking them to a park for treatment for two hours a day. That is a treatment is provided in a setting, the setting is almost a part of the treatment, if I am understanding what you are saying. So I think that is the risk you run. That is, I would expect that as written, if this were simply to say in the least restrictive appropriate setting, that that does not impose upon the state an obligation to create every imaginable kind of setting. That is, that the word "available" is almost implied to a certain extent. But if you put the word "available" in what it does is to suggest that the state can discharge its obligation by having only one institution of one kind that has bars on the windows and locked doors, and that it can constitutionally confine and treat people there because there is nothing else available. Even though the people that it is confining and treating there, while appropriate for confinement, have no need to be confined that much. They could continue to live with their families and hold jobs, if the state would just provide a community mental health center where somebody could give the man a shot. I would hope that you don't want to go that far. The word "available" really is a substantial risk of watering the provision down beyond the flexibility that's needed. I think there is a reasonable amount of flexibility implied in the notion of "appropriate".

Mrs. Sowle - This probably wouldn't work, but let me ask it anyway. Would it meet any of your thoughts about the range of services discussed in what we came up with at the last meeting by using both of them? Is there a way that both of them can be used?

Mr. Aalyson - I don't know that I need to use the terms that were in our last suggested draft. That is not what my problem is. It seems to me that if we were to adopt language, for example, that said habilitation or treatment shall be provided in the least restrictive appropriate setting available, that there are a lot of things that are available, which, taken in conjunction with the term "appropriate" now exist and yet you would not be prescribing to the legislature the idea that they must construct new facilities which would provide a range of settings. There are already a range of appropriate settings, it seems to me. I'm concerned with the idea that you are making the legislature think that they have got to go out and make great capital expenditures on a range of settings.

Mrs. Sowle - I guess I just read it from a different angle than you do. Because I don't see that in it. I see in it, you don't require the state to do anything. All you are saying is that if the state intervenes, with regard to the liberty of a person, they can only do it under certain conditions.

Mr. Aalyson - That is, by providing the right to habilitation or treatment in the least restrictive appropriate setting.

Mrs. Sowle - Yes, but it does not have to intervene. It does not have to confine the person.

Mr. Aalyson - No, but it is going to. We know that there are going to be a certain number of confinements. Now, what are the state's obligations once it does that? The state must, with this draft proposal, provide the right to habilitation or treatment in the least restrictive (leave out alternative) appropriate setting. Now, if we say the least restrictive appropriate setting, must the state provide a certain range of settings or is it entitled to provide the least restrictive appropriate setting now available, and it would have to provide the least restrictive appropriate setting now available. And I think there is a wide range right now.

Mr. Kindred - Let me put it to you slightly differently. One way of looking at this provision now, as it is written, is putting in the word "appropriate" but not the word "available" is what we are saying is that the state can continue to civilly confine people which is a drastic intervention. There is no criminal offense involved. It can continue to civilly confine people, but it can only civilly confine people for whom it has appropriate settings. That is to say that if you have a person who under legal notions can be civilly confined if you had an appropriate setting, you are talking about an individual who, all he needs, is the community intervention. The community mental health center would do the trick. But all they have available is Lima State Hospital. You can't civilly confine that person. If he commits a criminal act you can confine him through the criminal process, and if he is appropriately confinable in Lima State Hospital, you can confine him there. But if the only appropriate treatment for him would be in a community health center and all you have got available is Lima State Hospital, then you can't civilly confine that person. And that doesn't frighten me.

Mr. Aalyson - Would this amendment do that, do you think?

Mr. Kindred - I think it would.

Mr. Huston - That's part of my problem. It restricts the confinement process so you can't confine a person if you don't have the least restrictive setting.

Mr. Aalyson - This presumes confinement to be followed by something. Persons who are confined....You've already got them confined. Now you are going to provide them something else.

Mr. Huston - The courts are going to turn them loose, if you don't have the least restrictive setting...

Mrs. Sowle - That's right.

Mr. Huston - And who makes that determination, that's the question.

Mrs. Sowle - As Professor Kindred was saying, if there is criminal conduct, there is a way to intervene. If a person is endangering himself or somebody else then the state always has the ability to intervene in those situations.

Mr. Aalyson - Even if there is only a potential danger?

Mrs. Sowle - Well, I don't know.

Mr. Kindred - Those are the cases we are talking about. We're talking about the cases where there is no criminal activity involved, but a judgment is made that in spite of that the state should intervene because of danger to self or danger to others, on some kind of predictive basis. And we're saying that in that situation, if they are going to confine then they must provide appropriate setting for treatment. And if they don't provide the appropriate settings for treatment then essentially the individual has the right not to be confined or the right to be released if confined and not placed in an appropriate setting. I think they are hard choices to make. And I think you are correctly seeing what the choices are. I must say I would rather have the provision with the word "available" in than not have the provision. But I think it would be a better provision without the word "available".

Mrs. Sowle - You said one thing that the ad hoc group didn't like about our language was that it seemed it backed away from a right to treatment.

Mr. Hopperton - I think it can be read that way.

Mr. Aalyson - You're thinking of the term "may" in "laws may be passed"?

Mr. Hopperton - Yes.

Mrs. Sowle - Because it implies that laws may not be passed, providing for treatment and so on?

Mr. Hopperton - Yes.

Mrs. Sowle - That makes sense. Although, if you put them together, and I'm not recommending that it be done, I'm just kind of wondering whether it can, would it be backing away from the right to treatment?

Mr. Kindred - If you put them together, I think you would have a few drafting problems but I think that the provision you suggest clearly would establish the right to treatment and that permissive language in addition to that would not diminish the right to treatment.

Mr. Lobosco - I'm Gerard Lobosco, with the Franklin County Council for Retarded Citizens. If I might speak to that issue. It seems to me that the word "alternative" should be included here because as Mr. Kindred suggested before, that implies availability without actually freezing the right to treatment settings to those facilities that are available now. One of the concerns expressed at the last meeting is that we not draft a constitutional provision which is in a short-sighted manner based on the current situation. Just as treatment may change, and we would need to provide a constitutional amendment to meet future changes in treatment. I think it's important not to rely on the current situation in terms of what facilities are available and say let's freeze it there by using the very specific word "available". A court, looking at the phrase "least restrictive alternative", could very well say it need consider those things that are available in the community, because only those things really are the alternatives. When the court is considering an ordered placement, and this is especially true I think in juvenile cases, the court is often faced with the choice of sending a youthful offender to a very high security facility or perhaps to a foster home or perhaps back to his own home. And the court makes that decision based on looking at those alternatives because those are the alternatives. The court might occasionally say that none of those is really appropriate but those are the only alternatives on that basis. I think that eliminating the word "alternative" might lead to an interpretation that the state needs to provide an infinite range of facilities available. But that including the word "alternative" implies that courts need only consider those things that are available in making their decision. So it seems to me that it meets the concern that you don't want to have to force the state

to have to provide an infinite range of things. And yet, on the other hand, we don't want to freeze a constitutional provision into a system as it exists now, because it may not be appropriate at some time in the future.

Mrs. Sowle - I think that is a good point about the meaning of the word "alternative". It does have a connotation of availability.

Mr. Lobosco - It seems to me that the court could very well say that if something doesn't exist, then it is not an alternative.

Mr. Aalyson - All of you seem to be suggesting in your reasoning and suggestions that somewhere down the line there may be a reversal of the present trend toward accomplishing legislatively what you are saying we should do constitutionally. Each of you seems to be saying the federal courts are going this way, the institutions themselves are going this way, the people in the field are going this way, we don't want them ever to go back. And I agree with that principle, but do you have any real notion that they are going to go back?

Mr. Kindred - It is based on fears of the uncertain future. We have a 200 year history in this country in which the concept of the right to treatment as a legal concept has only been occuring for 10 years. There was a period of 140 years in which institutions were used not for treatment but only for confinement without treatment, and I don't think it's silly to fear that. The Supreme Court has not spoken clearly on the subject and I can imagine that the present Court might well back away from the concept as a federal constitutional right and that if it did, state legislators, administrators and lots of other people would be very tempted to do only what the Supreme Court said it was required to do. And I think now may be a good time because the legislature has already endorsed the concept, to give it somewhat greater stability than is provided by legislative act.

Mr. Lobosco - I would like to say that the draft that we have proposed, however, doesn't speak to, and therefore isn't tied to anything that could be a fad in the context of medical treatment. Because really what it does is to enunciate a civil liberty that is independent of modes of treatment. It is not tied, even as indirectly as our former draft might have been tied, to something like normalization, which, as was pointed out, may very well turn out to be a fad. This provision does not depend on a mode of treatment, method of treatment, chemical goal oriented treatment or anything else. It simply states a civil liberty and in that sense it is more appropriate for a constitution.

Mr. Aalyson - Anybody else?

Mr. Lawson - From the Department's viewpoint, we had some major objections to the February 24th proposal. The committee has discussed combining the two. I think it would be good to have what I term the enabling aspect to say, after the whole thing, semicolon, "and the General Assembly shall pass laws"... But from the Department's viewpoint I would also like to request the committee to be careful, if it so decides to do that, in the language it uses, if it is going to be any broader than that, say in the context of either the February 24th proposal or the March 5th draft.

Mr. Aalyson - Thank you.

Ms. Cave - I'm Sue Cave of the Ohio Municipal League. We had objections to the first draft presented by the ad hoc group, but when the committee came out with its version, the Municipal League withdrew its request to be heard on the subject because we were satisfied with the second draft. While I have not seen the draft that was presented today, I have listened to the comments that were made, and I guess we are going to object to this one, too. We objected to the first draft on the basis that it was a statement of goals in the Constitution. I don't know how appropriate

that is. We had another comment on it, and our one big problem is with "least restrictive alternative setting". That to us represents a political concept and presents a zoning problem for our membership.

Mr. Aalyson - We would be happy to hear from the League, by way of letter or other form giving a more complete outline of your objections if you have any and your reasons for them. Thank you very much.

Mrs. Sowle - May I say one thing? I missed the meeting at which the ad hoc group first appeared and wasn't aware at that time of the kind of invitation apparently that the What's Left Committee extended to the ad hoc committee to think about this and perhaps present us with something that a far-sighted constitutional revision commission ought to be thinking about, and I do think that the ad hoc committee has done that and I know put in a great deal of thought and a great deal of effort, if not many words. But we all know how long it takes to work on drafting language. And I think that you have given us something to really consider. We don't know what or where we'll end up, but we all are trying to brainstorm what ideas ought to be coming before a constitutional revision commission today, and I think you have assisted us in that very ably, and we thank you.

Mr. Hopperton - We were very aware that the Municipal League had concerns about our February 24th draft. We were not aware that they had made any presentation to the committee.

Mrs. Eriksson - No, they had not.

Mr. Hopperton - The League, of course, today had the benefit of hearing what we had to say. In terms of being able to point out the strengths of our proposals today, we would very much like to be involved or hear whatever the League has to say, so that we might rebut anything that they might say that we might not agree with. Again, I think this proposal is a significant change from the February 24th draft, and I think it is important to keep in mind that we are talking about persons confined by the state and that may have an important effect on the view of the Municipal League. My principal point is that we would like to hear what the Municipal League or other opponents, if there are any, of this draft, might have to say to the committee.

Mr. Aalyson - We will take that into consideration and perhaps the League would forward you a copy of whatever they submit to us. Thank you.

Mrs. Sowle - I will send what Bob gave me, an article about least restrictive alternative, about the legal posture of it. Maybe it can be circulated.

Mr. Aalyson - I would like to hear from Bob Huston and get his ideas before we go on. And I would like to hear from Katie and Doug also. I know this problem has bothered Bob, and he has probably been thinking about it, a good bit, and I would like to start with him, if I may.

Mr. Huston - My principal problem is the creation of a right that is defined in a general or in a very unspecific manner, that is, using the word "least". I have always had problems in any legislative enactment using "least, most, maximum" or "minimum" or anything of that type because it really doesn't specifically define anything. It means what the individual looking at it at that particular point in time believes it to be. I haven't read any of this material that you have Katie. I think that one of the problems with this is that exactly what we have gone through today. This delineates or limits the right of the state to confine people. This actually is a limitation on the right of confinement if you don't have the least restrictive available setting. I have problems with that by virtue of the fact that

the settings are not constructed overnight. And if you have people that should be confined there is no way that you can build these things within a year or two because of the legislative process of appropriations. So you are going to limit the state in its ability to confine people, and people that necessarily should be confined, not only for the state's protection or the protection of the people in the state but also for the protection of the individual himself. Many people who are handicapped or disabled need the confinement for their own protection. The other problem that I have is that concepts change as to the rights of individuals and the methods of dealing with those rights, such as the womens protective laws. There was a time when the hue and cry of the women in the country, where today it is just the opposite. The juvenile laws are exactly the same thing. And I hate to see formulated in the Constitution rights such as this that can change. Because this whole field is a very volatile field as probably everyone knows. The aspects of the disabled and handicapped is a growing field. I have I think the same problem that Craig does with regard to whether or not the courts would construe this as a limitation on confinement or whether they would say once you have confined you have to construct facilities to deal with that confinement. It's the old question of which comes first, the chicken or the egg. Those basically are my thoughts on this. I'm not saying that I don't agree with the purpose of it.

Mrs. Sowle - First of all, I would like to make a remark on confinement. Personally, I have no trouble with the idea of creating a right not to be confined except in this type of setting simply because it is my feeling that what is happening and what has happened through the years in the area of the disabled and handicapped, of course we are not talking about criminal behavior, is over-confinement. Traditionally, people who are disabled and handicapped have been confined for at least two very bad reasons. One is to get them out of sight because they make people uncomfortable. Which is a terrible reason to lock somebody up who doesn't need to be locked up. Secondly, that we have overconfined because we have thought people presented threats who didn't present threats. Just because they behaved differently from other people. And in today's society we have much more understanding of differences in behavior and what causes it. So I really can't find anything to be frightened of in creating a right such as this would, because I don't think the dangers are in underconfining. I think they are in over-confining. And because behavior isn't criminal except to the extent that you have a severe danger of somebody being dangerous to himself or others. That's not criminal if it is because of mental disability, but I really don't think this is going to restrict confinement of people who are dangerous. The person who you don't know what they are going to do next. That's not the central problem at least to me. I do very much agree, at least in part, with your dislike of the use of words such as "least" or "most" or "maximum" or "minimum" except that we always have to use rather general terms in constitutional language. Does it tie down the term least any more in your opinion to add something about appropriateness? That is, "least restrictive alternative setting that is appropriate" because you key the degree term to something that you're measuring. Do you have any less objection to "least restrictive that is appropriate"?

Mr. Huston - The word "appropriate" in and of itself is a rather vague term. Maybe I'm too much of an exacting person that likes things spelled out, particularly in the legislative types of situations because it always ends up in litigation. You have to bring it to the court. The people themselves can't make that determination. Everyone has a different concept of what that term means and you don't resolve it without committing it to a third party. In the Constitution, you wouldn't want to use anything of the medical terminology or anything of that type. I was just trying to think of some other means of defining the term "least". I haven't been able to come up with anything. We have to work on that.

Mr. Applegate - I haven't had the chance to hear much of anything, especially coming in in the middle of this. But I have always found it very difficult to try to establish proper language because nobody can ever really get down to agreeing what it is. And then even after it is adopted and gets on the ballot and passed, you still don't know what it is because as it is always said that the law is what any sitting justice says it is at the time that he interprets it. Our work is to try to provide the people with something that they don't have to think too hard about doing. I was looking at this trying to establish disability and handicapped. For one thing, in what classification do we place the aged?

Mr. Aalyson - That was Katie's thought, I think, in perhaps suggesting a combination. Our original draft provided facilities to persons who by reason of age, disability, handicap or behavior require specialized care or treatment. I think this might benefit by being a little more specific or enlarging the categories. Disability or handicap could include age, I suppose, but it wouldn't hurt to say "age".

Mr. Applegate - Yes, to some people it is and to some people it isn't, but I guess ultimately it would be whatever would be considered a disability. What areas of institutionalization is there of the aged now?

Mr. Aalyson - And do we consider those folks confined?

Mrs. Sowle - You know, often they end up in mental institutions because that's the only place for them and relatives end up confining them. Now once they are confined, then they would come under this language.

Mr. Aalyson - How about the county homes?

Mrs. Sowle - I don't think that's confinement, is it? I wouldn't consider that confinement.

Mrs. Eriksson - No, not in the terms that these people are talking about because they're talking about involuntarily being committed. I have very serious problems with the expression "disability or handicap" because, although by removing the word "behavior", they are saying that in no way would it apply to any criminal behavior. But the question in my mind is....persons are confined to Lima both because of presumably a mental disability, because it has not been determined that they have committed a criminal act or it may not have been determined that they committed a criminal act at that time. And I just wonder whether or not this could not be read as applying to persons who fall in that category.

Mrs. Sowle - That's an interesting point.

Mrs. Eriksson - Because in that case you would have very serious problems. And I would think that, because you are creating a right here, I would question persons who are confined to Lima before it has been determined whether they committed a criminal act. They really are being confined because of a mental disability.

Mrs. Sowle - That's a very interesting point. And the other thing is, how do they confine them?

Mr. Huston - Normally, they are sent to Lima, and they may be arrested, but they aren't convicted and they are sent to Lima to determine whether they can stand trial so there really is no commitment on the basis of a criminal act.

Mr. Aalyson - Unless they determine that the plea is not a valid plea. They send them up there to see whether they had the mental capacity to enter a plea.

Mrs. Eriksson - I think that that's something that should be thought about is to make sure that persons who are in fact suspected of having commited a crime, although we don't know whether they have commited a crime.

Mrs. Sowle - I can think of two ways to get into Lima where you would be confined. Correct me if I'm wrong because I'm not at all sure about this. First, if somebody is found not guilty by reason of insanity, technically they have been found not guilty of a crime, but they are subject to involuntary confinement by virtue of that.

Mrs. Eriksson - Right, until they have been restored to competency.

Mrs. Sowle - And is that how the legislation reads?

Mrs. Eriksson - I'm not sure how the statute reads.

Mrs. Sowle - And then the other is where they are found not able to stand trial, and they too are confined. It seems to me that what we would have to do if we went with such language as this is to write in an explicit exception for that type of confinement. At least that would be one way to approach it. Because I think you might very well be right. All of a sudden this right would apply to the people that are in that border line somewhere between treatment as mentally disabled and treatment as people convicted of criminal acts...

Mr. Aalyson - Or people suspected of criminal acts.

Mrs. Eriksson - And who are, in fact, confined because they are determined to be mentally ill. That's one category that bothers me. And the other is the question of the aged persons who in fact are confined, but who do not really fall into the category of being dangerous to themselves or others. This would clearly apply to them and probably is intended to apply to them. But I wonder whether in fact with respect to those persons what kind of habilitation or treatment is appropriate. Because for some of those persons there may not be any habilitation or treatment appropriate. All you can do is provide care for them and that was the intention when the word "care" was inserted in the other draft.

Mr. Aalyson - That may be true of persons who are not aged but just incapable of being habilitated or treated in the sense that there may not be treatment available that can improve their condition.

Mrs. Eriksson - I don't know whether there are or not. Persons who are dangerous to themselves or others, and therefore can be involuntarily confined but for whom there is no habilitation or treatment in any setting. Are there such categories of persons?

Mrs. Sowle - That would make it even more persuasive that some such language as "that is appropriate" should be added. Do you think the addition of the appropriateness requirement would meet it?

Mrs. Eriksson - I think the addition of "appropriate" is very important. But even so you are giving persons a right to habilitation and treatment.

Mrs. Sowle - That is appropriate.

Mrs. Eriksson - I suppose you can argue that way, that there isn't any appropriate setting but they still have a right to habilitation or treatment.

Mrs. Sowle - To the extent that one would be appropriate.

Mr. Aalyson - We might be able to say something if we want to pursue this line to say that they shall have a right to care, habilitation, or treatment, as appropriate.

Mrs. Sowle - In the least restrictive alternative setting.

Mr. Aalyson - I don't know about alternative. I don't have anything against it. I just wonder why it is there.

Mrs. Eriksson - I think that is, as you say, "jingoism" which is not, to me, appropriate for a constitution. I'd like much better to put the word "appropriate" in there and take out the word "alternative" which I think does the same thing and is more meaningful. I think there is something to be said for putting "care" in there, on the basis that there are persons confined and possibly would not need to be confined in the sense that in fact they are not dangerous to themselves or others. But it is a question of caring for them and in that case the least restrictive setting would apply.

Mr. Huston - One of the problems of putting something of this type in the Constitution is that you have no means of defining the terms. By legislation, you can define the terms as to what you mean by "confinement" and what you mean by "treatment" and this way, you're putting it in and it is up for grabs what is meant. That's one of the problems that I find with putting in something of this type into the Constitution. You could even define "least restrictive setting", and I think they said they have in that one bill, didn't they? So that by legislation you can define these things but once they are in the Constitution, you really have no way of defining them.

Mrs. Eriksson - Except that the statutes supplement the Constitution, and I think that they have defined "habilitation" in the statutes.

Mrs. Sowle - Did the Bill of Rights Committee ever consider anything of this nature?

Mrs. Eriksson - No. Glenn Workman came to the Bill of Rights Committee but I do not believe that she spoke to this point at that time. Since the present section is simply talking about institutions, I had no idea where this was going to lead.

Mrs. Sowle - No, this has gone from one type of provision into a very different type of consideration. And I gather the Municipal League is very sensitive about any possible effects on zoning of group homes.

Mrs. Eriksson - That's right.

Mrs. Sowle - I didn't get that until late in the discussion.

Mrs. Eriksson - The League did not express it before. Sue came to the last meeting but it was not until after the meeting that she said they were much concerned about this if the implication would be that city zoning ordinances would be affected.

Mrs. Sowle - I don't know much about zoning laws so I don't know quite how it would enter in here.

Mrs. Eriksson - There are some ordinances which prohibit this kind of group home.

Mrs. Sowle - That I know, but how might a constitutional provision like this affect them?

Mrs. Eriksson - It might make them unconstitutional.

Mrs. Sowle - Interfering with a basic right?

Mr. Huston - Right. There was a case in Lakewood just within the past year or two where they wanted to establish a home for incorrigible children and give them a family atmosphere and foster parents. And there was quite a hassle about it. The neighbors were upset and said it was a violation of zoning laws.

Mr. Applegate - We get the same thing all the time. On local radio and television shows people call in and say "I feel so sorry for those people, but stick them someplace else".

Mrs. Sowle - It can create some real problems. There is no question it's a very difficult thing.

Mr. Aalyson - It seems to me from what I have heard from all of you that none of us really objects to the idea that persons who are confined by reason of disability or handicap or age or whatever categories, should have the right to care, habilitation or treatment. Our problem comes when we get down to "in the least restrictive alternative setting". And I could live with "they shall have the right to care, habilitation or treatment as provided by law". Leave it up to the legislature to give them the facilities that are the least restrictive. If we are going in that direction, it seems to me that if we are going ever to regress, if that is the proper choice of words, that it's going to be for a fairly good reason and that most people will have come to the conclusion that we should regress.

Mrs. Sowle - If the committee should go in that direction, I would rather not put anything in. I am, at least at this point, fairly persuaded by the argument of the ad hoc committee members that if you put in "as provided by the legislaure" in the first place you don't need it because the legislature has the power to do it.

Mr. Aalyson - Except you give them the right to the treatment.

Mrs. Sowle - No, not if you leave it up to the legislature to provide it.

Mr. Aalyson - "persons who by reason of disability or handicap" and you might want to add "age" but I consider a handicap or disability arising by reason of age to be a disability or handicap "...are confined by the state shall have a right to care, habilitation or treatment as provided by law". Now this seems to me to mandate the legislature to provide something.

Mrs. Sowle - They shall have whatever right the law provides is what it says to me.

Mr. Aalyson - Well what is the least restrictive setting?

Mrs. Sowle - What that says to me is if the state intervenes and confines somebody, restricts their liberty is what "confines" means to me, they shall do no more restricting of that liberty than is necessary.

Mr. Aalyson - Who determines that?

Mrs. Sowle - Who determines what due process of law is or equal protection? We live with that type of thing in the Constitution.

Mr. Aalyson - If they have it under the due process, then who do we even need this thing? And they seem to think we need it.

Mrs. Sowle - They think it would help. But I kind of agree. If we don't go beyond this, Bob Hopperton was saying that may even imply a backing away from a right to treatment.

Mr. Aalyson - I agree with that. I think that's true.

Mrs. Sowle - But what you said is of the same kind of provision where laws may be passed as provided by law.

Mr. Aalyson - Alright, shall have a right to care, habilitation or treatment, and the same shall be provided by law? I don't like the language....

Mr. Applegate - Why do you have to say anything? If you have a right to habilitation or treatment it is still up to the General Assembly to do it.

Mrs. Sowle - Yes, that's true. I thought maybe you were going to say something like, "persons who by reason of disability or handicap are confined by the state, shall have a right to care, habilitation, or treatment that is appropriate". That gives a right without using "least restrictive alternative". The same thing is provided.

Mr. Aalyson - How about "appropriate care"?

Mrs. Sowle - Right. "...shall have a right to appropriate care, habilitation, or treatment".

Mrs. Eriksson - Aren't you right back to individualized treatment, then?

Mrs. Sowle - Yes, I think so.

Mrs. Eriksson - That, I think, creates an unlimited kind of right.

Mrs. Sowle - Yes, I think you are probably right. I wasn't really advocating it. I was trying to see how it would compare with this. Do you think we ought to think on this a little more and let the Municipal League pound the table?

Mr. Applegate - Maybe they will come in with some language that is suitable to them. If you are looking for some ways out, we should listen to everybody.

Mrs. Sowle - And I could also circulate this memorandum that Bob Hopperton gave me.

Mr. Aalyson - Does anyone here have the same problem with using the word "available"?

Mrs. Sowle - I don't like "available".

Mr. Aalyson - The only thing that bothers me about this whole thing is that it may be construed by some court that the state has now got to go out, whether they have the money or other means and build these facilities.

Mrs. Sowle - Craig, there are a lot of cases in juvenile law, that's the only area I have really read at all about this end, but there are cases involving the right to treatment there because statutes give juveniles a right to treatment. That supposedly is why they are confined. Now, what the courts have done where they think the facilities violate the statutory provision is they say "You close that facility". There are lots of cases in the last five years in which courts have ordered facilities to be closed. First they order them to be improved. And there are some cases in the South, is it Alabama, where virtually all of the criminal penal institutions were ordered closed, and that is what they have done...

Mr. Aalyson - That is different from ordering them opened. The idea of having to construct physical facilities when there may be no money to do it is what is bothering me.

Mrs. Sowle - That's what is happening in Alabama. They are saying either you release those people who are incarcerated or build, one or the other. And I do think that is what this means. You either don't confine them, or if you are going to restrict their liberty you have to do it in this manner.

Mr. Aalyson - So you think whether or not there were adequate facilities would become a problem for the courts, as it has in the penal institutions in Alabama. You wouldn't construe this as mandate for the state to start building.

Mrs. Sowle - No, I see it arising the same way it does under the juvenile statutes. Somebody brings a habeas corpus action, and says I'm being confined in violation of Article VII, Section 1. And then the court would look at the cause of action, and proceed from there and see whether the person was being confined inappropriately, and see whether the section was being violated, the response would be the petition for release on habeas corpus would be granted. That's the way I see it.

Mr. Aalyson - I still have some problems with that. It seems to me that what you have got to provide is care, habilitation or treatment. Let me back up. It seems to me that first you should have the right to confine under appropriate circumstances. But concommitant with that right of the state is the right of the individual to receive care, habilitation or treatment and I go along, in the least restrictive setting that the state has available. If inappropriate even though available, and you can let the guy out, then you deprive the state of the right to confine under appropriate circumstances. Especially in view of the fact that there is a tendency toward this situation already, that we should let them confine them in the least restrictive setting that is available. Now one setting that is available is a private home.

Mr. Huston - Supposing you get someone to testify that people out there should all have individual cottages.

Mr. Aalyson - That's why I want that word "available" in there. I don't think the state should have to construct a lot of facilities to in effect coddle people. If the state has the facility available then it has to give them the least restrictive facility. But a private home is one of those. The state should not have to go out and construct buildings to make services available that are not presently unless they want to.

Mr. Huston - One of the problems that I find with this type of provision is that there is no opportunity to ration the assets of the state. The legislature can do that. They can say we've got so much money, we need so much money to build facilities for the handicapped and disabled, we have so much money that we can use for police protection. But if you put it into the Constitution, no one is going to make that judgment, because it is there and it is absolute.

Mr. Aalyson - Unless you say "available".

Mr. Huston - Yes, that's what I say. There is no way of ever getting a proper evaluation as to how the assets shall be distributed.

Mr. Aalyson - Is there anyone who does not think that it ought to be made a right to have habilitation or treatment?

Mr. Huston - The courts have said that. You can't confine them if you are not going to give them treatment.

Mr. Applegate - We deal with patients rights in the various statutes. That seems to be the direction. I think everyone who is living has rights. Although it didn't used to be that way. As you say, we used to stick them away, once you get past 65.

Mr. Aalyson - How can they do that? Who confines them? Some friendly judge signs the order of confinement? They're not confined unless the court orders it, I suppose.

Mr. Huston - In the asylum in Massilon, there are lots of elderly confined there. I went there once, I was never so grieved. I was sick to see the conditions those people were living in.

Mrs. Sowle - You don't really know how many old people are there.

Mr. Aalyson - Who commits them? Probate courts?

Mr. Huston - Probably. They're senile.

Mrs. Sowle - There was a church group in Athens that once a year would come to the president's home with the women from the mental institution in Athens. There were former professors from Ohio University in the group. there were all kinds of interesting people in the group. Many of them were just very, very old and had been there for years. Talk about not being a danger to themselves or others, there is just no way. I don't know how they got there. There were very old people and maybe they weren't in terribly good mental shape but they were perfectly harmless.

Mr. Applegate - I think they are slowly but surely getting the less dangerous mentally retarded in the local projects, and in your nursing homes and this type of thing for the elderly. But there are still many others, and this is really broad enough language that just covers everybody, the disabled and handicapped.

Mrs. Eriksson - The people you are talking about probably have been involuntarily confined and probably many of them are being moved out.

Mrs. Sowle - If they can find a place to move them.

Mr. Applegate - This says that the people who are disabled and handicapped and are confined by the state shall have a right to habilitation or treatment, but it doesn't say who is to give it to them. I assume that it is supposed to be that the state is supposed to provide that since they give that right. You can read these things and you just keep looking at them and looking at them and you can see ... how can you get so much into three little lines?

Mrs. Sowle - I hadn't seen the points that you were raising, either, Craig, that once they are confined, then they have the right to care. You can look at it emphasizing different clauses and phrases and then it changes meaning entirely.

Ms. Buchbinder - I was wondering whether confinement is included under our "specialized care" clause of our original proposal.

Mr. Huston - It probably would be.

Mr. Aalyson - I think the word "specialized" might be unnecessary. But I think we used it for a specific purpose. Any medical care is specialized care.

Mrs. Sowle - I think we were trying to get away by the use of the word "specialized" by just housing them.

Mr. Huston - Custodial care.

Mr. Aalyson - That amendment wasn't really imposing any obligation on anybody.

Mrs. Sowle - We might toy with the idea of combining them if anybody wants to stay with this at all.

Mr. Huston - If you attempt to get the present proposal passed by the electors, you may have some real problems. Because when you talk about confine and they have the right to treatment, the people, I'm afraid, might not react as charitably as we would like for them to.

Mrs. Sowle - I agree. I think that there might be great problems getting it past the voters.

Mrs. Eriksson - Would you like to see what we get from the Municipal League and distribute the article that Katie has?

Mr. Applegate - Maybe the League will come up with some less restrictive and appropriate language.

Mr. Aalyson - I think we are at an appropriate hour for adjournment. Perhaps we can look at this thing and come up with something before the next meeting. I'm actually rather pleased that we didn't reach apportionment because Mr. Carter who is very interested in this, is not present.

Mrs. Eriksson - Maybe you would like to dispose of prison labor. Did Mr. Yost have anything to say?

Ms. Buchbinder - Mr. Yost said that he preferred alternative #1, as we did, that it met with his requirements, and he also mentioned the up and coming trend of prisoners making restitution to their victims, and this way they could make some money to pay back those persons who they offended. He said he was satisfied with alternative #1.

Mr. Aalyson - What is alternative #1?

The provision was distributed.

Mrs. Sowle - I always think that's a positive move in the right direction.

Mr. Huston - I do too. (It was so agreed.) Just for my own information, have any amendments been put on the ballot that create rights with regard to selected groups?

Mrs. Sowle - In elections and suffrage, the only thing that I can think of is the right to vote, the mentally disabled right to vote. And that, I don't think has been before the voters, has it?

Mrs. Eriksson - No. It has been introduced in the General Assembly but it has not had any hearings.

Mrs. Sowle - It increased the voting rights of the mentally disabled.

Mrs. Rosenfield - Anyone could vote unless mentally incapable for voting.

Mr. Aalyson - Yes, otherwise people who were mentally incapacitated who were nevertheless able to vote, could be prevented from voting.

Mrs. Sowle - But didn't we put it in the context of leaving it to the General Assembly to define and got it out of the Constitution?

Mrs. Eriksson - The person would have to be adjudicated mentally incompetent.

Dates for the next meeting were discussed, and the meeting was adjourned.

This document (s) that follows was not published with the original volume. It was inserted into this volume held by the LSC Library. It is related to the topic of this volume, but it is unknown why it was not published with the original volume.

Ohio Constitutional Revision Commission
Judiciary Committee
February 5, 1974

Research Study No. 32

Judicial Removal in Ohio

The focus of this study is on the ways by which an Ohio judge may be removed from office when, through his acts or omissions, he has failed to measure up to the high personal and professional standards expected of all judges. The provisions of law and the attendant problems surrounding mandatory retirement of a judge at a certain age, disqualification to hear particular cases, and suspension for reasons of physical or mental disability are beyond the scope of this study.

Summary

Each of the approaches to judicial removal available in Ohio has a clearly identifiable basis in the Constitution. Generally, removal methods fall into three categories: (1) those which are traditionally set forth in state constitutions with some detail; (2) those which are set forth in statutory law; and (3) those which are the product of judicial rules. Although such a classification does not create mutually exclusive categories, it does facilitate the general overview of the subject.

Within the Ohio Constitution itself, two fundamental methods of judicial removal are set forth, not only in principle but with the major procedural elements necessary for their effective use: first, as do the federal and most state constitutions, the Ohio Constitution provides for the impeachment and legislative trial of judges. Conviction upon impeachment results in a judge being removed from office; second, the Constitution establishes a method of removal in the nature of legislative address to which judges are subject.

The General Assembly, pursuant to a mandate in the Constitution, has also enacted statutes providing two additional methods by which judicial officers may be removed: first, the General Provisions of the Revised Code allow judges and other officials to be removed for neglect or misconduct after a judicial proceeding which is initiated at the petition of a part of the electorate. Second, the statutes include the outline of a method by which judges may be removed by another type of judicial proceeding and set out the circumstances in which cause for such removal exists.

Judges may also be removed in accordance with rules of the Supreme Court, which have been adopted in fulfillment of statutory directions and constitutional grants of judicial power. The Supreme Court Rules for the Government of the Bar of Ohio give supplemental procedural and substantive details to the statutory methods of judicial removal. The Rules also establish disciplinary procedures whereby judges may be removed from office for violating the Code of Professional Responsibility, the Canons of Judicial Ethics, or the Code of Judicial Conduct which the Rules make binding upon judges.

Constitutionally Prescribed Methods of Removal

Impeachment

Impeachment is the method for removing unfit judges which is most common to state constitutions. The constitutions of approximately 40 states provide for impeachment brought by the lower legislative house and tried by the upper house. While it involves the bringing of formal charges and the holding of a trial, impeachment is

generally considered to be a legislative device and is found in Article II, the legislative article,of the Ohio Constitution. Article II, Section 23 establishes impeachment in Ohio. It reads:

> The House of Representatives shall have the sole power of impeachment, but a majority of the members elected must concur therein. Impeachments shall be tried by the Senate; and the Senators, when sitting for that purpose, shall be upon oath or affirmation to do justice according to law and evidence. No person shall be convicted, without the concurrence of two-thirds of the Senators.

This section is an original part of the Constitution of 1851 and is only changed in minor respects from Article I, Section 23 of the Constitution of 1802.

The language of Section 23 is clear in what power it vests and in the procedure to be followed by the General Assembly in exercising that power. Only the House of Representatives may impeach a judge or other official, and it may do so only on the concurrence of more than half the elected membership. Under the common law, as in Ohio, an impeachment proceeding is based on "articles of impeachment" which allege the complained-of misconduct of the subject official. Articles of impeachment serve a purpose similar to an indictment for criminal activity, and it is these articles which the House of Representatives must pass upon. Once the articles of impeachment are passed, the judge or other official who is their subject has been impeached, and what remains is the presentation of the articles to the Senate and the trial on the charges.

The Ohio Constitution places no affirmative duty of impeachment on the House of Representatives, regardless of how base or improper an official's acts may be. However, Section 23 does mandate action by the Senate after the House of Representatives passes articles of impeachment. The section states that the Senate "shall" try the impeachment.

The impeachment is presented to and prosecuted before the Senate by the House of Representatives. The House acts through Managers it appoints, and the Senate sits as a high court with each member under oath or affirmation. When the case has been heard by the Senate, the question is called as to whether the person who has been impeached is guilty as the House has charged. If two-thirds or more of all the Senators vote for conviction, the party impeached is found guilty of the charges contained in the articles of impeachment and is, thereby, removed from his office.

Two of the earliest impeachments of judges in Ohio occurred when the state was not yet a decade old. In the culmination of a power struggle between the judicial and legislative branches of the state government, Judges Tod and Pease, both members of the Supreme Court, were impeached as the result of their decisions, in separate cases, that aspects of a statute defining the powers and jurisdiction of justices of the peace were unconstitutional. Early in 1809, Tod and Pease were tried separately before the Senate. When the votes for conviction were taken, the two-thirds majority necessary for conviction was missed by a single vote in each case, and the judges were acquitted.

The Tod and Pease impeachments were considerations, at least in part, when the Convention of 1850 reviewed the then-existing impeachment provisions and modified them to their present forms. The original provisions in the Constitution of 1802

omitted any specific mention of judges as among those persons liable to impeachment.[1] Delegates to the 1850 Convention took notice of the Tod and Pease cases as they debated whether judges and justices of the peace should be given specific mention in a revision of the phrase "the Governor and all civil officers" which then described who might be impeached.[2] Finally, after recurrent debate and numerous suggested amendments (including ones which would have added provisions similar in intent to the present Article II, Section 38, which was not adopted until 1912), the present impeachment sections were presented to the Convention and adopted by it.

What is potentially the most difficult legal question with respect to impeachment and subsequent conviction under the Ohio Constitution is that of just what conduct on the part of a judge or other official constitutes grounds for impeachment. The issue is raised by Article II, Section 24, which outlines who is liable to impeachment, the allowable sanctions upon conviction, and the applicability of normal criminal proceedings to those who are impeached. The section reads:

> The Governor, Judges, and all State officers, may be impeached for any misdemeanor in office; but judgment shall not extend further than removal from office, and disqualification to hold any office, under the authority of this State. The party impeached, whether convicted or not, shall be liable to indictment, trial, and judgment, according to law.

The grounds are set forth in the first sentence of Section 24: impeachment may be for "any misdemeanor in office." The difficulty lies in the definition of the meaning of "misdemeanor."

The logic of the impeachment procedure described in Section 23 indicates that the House alleges the commission of a misdemeanor, and that the Senate is left to decide whether the allegation is well founded. Thus, the Senate must know what a "misdemeanor" is before it can "do justice according to law,"[4] in voting on conviction. However, "misdemeanor" is not historically given the same meaning within the context of impeachment as it is in the criminal law, and it has not been defined for constitutional purposes by the Ohio courts or statutes.

The Ohio criminal law regards a misdemeanor as an offense defined as such by statute and carrying a punishment of incarceration for up to and including one year.[5] For the purposes of impeachment, "misdemeanor" is extremely difficult to define succinctly, but it has as its base the concept of an offense against the people and the state--a subversion of the constitution.[6] Throughout Anglo-American legal history, when the issue has been confronted, the definition has been given in vague and elusive terms.

Terms such as "misconduct", "malfeasance","maladministration", "misfeasance", "ill behavior", and "abuse of office" are common to most definitions which have been proffered, and any of these words or phrases may be used to at least capsulize the meaning of "misdemeanor". As a term of art with reference to impeachment, "misdemeanor" certainly limits the grounds for impeachment but is not so narrow as to require indictable criminal action. Indeed, the concept of the impeachment of judges was developed in England well before the term "misdemeanor" was used in the criminal law to describe a category of lesser offenses and at a time when members of the bench were not subject to criminal indictment. However, as understood today, a judge or other official may be impeached and convicted for conduct which is also indictable.

Article II, Section 24 not only uses the term "misdemeanor", but it also says that the impeachable conduct must occur "in office." However, the scope of what impeachable misdemeanors are committed "in office" has not been defined in Ohio. Traditionally, such language has not always meant only those misdemeanors committed through the power of the office, but has often included action relating to the office which, while arising outside the sphere of official functions, is such as to shake the public confidence in the office because it was committed by the office holder. While cases to the contrary do exist, the English precedents, the federal impeachments, and many cases in other states suggest that to limit the scope of impeachment to official conduct would be to allow a serious defect in the theory of impeachment. For example, if a judge were only impeachable for his actions on the bench and in the cases before him, he could freely engage in a full array of unsavory behavior while off the bench--including such things as bribery, tax evasion, and debauchery--and regardless of how destructive to the integrity of the courts his actions were, he would be immune to legislative removal through impeachment.

A brief comparison of the Ohio impeachment provisions to the sections of the United States Constitution dealing with the removal of federal judges is helptul in emphasizing the manifold problems of impeachment and in presenting alternatives. The parts of the federal Constitution which deal directly with the removal of judges are as follows:

> The House of Representatives . . . shall have the sole power of Impeachment. (Article I, Section 2)
>
> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose they shall be on oath or affirmation . . . and no person shall be convicted without the concurrence of two thirds of all members present. (Article I, Section 3)
>
> Judgments in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law. (Article I, Section 3)
>
> The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. (Article II, Section 4)
>
> The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, . . . (Article III, Section 1)
>
> The trial of all crimes, except in cases of impeachment, shall be by jury; . . . (Article III, Section 2)

The text of the federal Constitution and the records of the Convention of 1787 raise a legitimate question as to whether it was the intention of the Framers to

include judges within the category of "all civil officers" and to make them subject to impeachment.[7] This issue may, however, be considered moot in that eight federal judges[8] have, in fact, been impeached, the first impeachment of a judge having taken place in 1803.

The removal of federal judges is complicated by the statement in Article II of the federal Constitution that they "shall hold their offices during good behavior," and the absence of any constitutional provision indicating the consequences of, or the removal procedure which might follow, a breach of "good behavior." While the question of whether a federal judge is subject to impeachment may be regarded as settled for the present, at least two practical questions persist as to judicial removal: first, is impeachment the only way to formally force a federal judge from his office, and second, does "good behavior" affect the range of grounds for the impeachment of a judge? These issues have been vigorously debated, but the more cogent arguments suggest that a judge's office held during "good behavior" is a public grant on a condition subsequent, that the grounds for impeaching a judge are no different than those for impeaching other "civil officers of the United States", and that the Congress has the power to provide by legislation for a method other than impeachment for removing judges whose "good behavior" has lapsed.[9]

The grounds for impeachment under the United States Constitution are somewhat clearer than those under the Ohio Constitution. Article II, Section 4 of the federal document lists "treason, bribery, or other high crimes and misdemeanors" as cause for impeachment. Treason against the United States is exclusively defined in Article III, Section 3, and bribery is well defined in the criminal law. Despite recurring assertions by legislators and others that "high crimes and misdemeanors" require a violation of criminal statutes or, alternatively, are whatever the Congress considers them to be, [10] there is substantial evidence that the Framers intended the words as a limitation on congressional power, that they chose the phrase with great care, and that they were fully aware of its historical meaning within the context of impeachment.

Another area of the law of impeachment which has not been clarified under the Ohio Constitution, or for that matter under the United States Constitution, is whether or not there is a right to judicial review of a conviction upon impeachment. The question is difficult to resolve, and the constitutions neither specifically allow nor exclude such an appeal. Nevertheless, the concepts of due process, the vesting of judicial power in the courts, the separation of powers doctrine, and the constitutional grants of jurisdiction to the Supreme Courts provide strong support for the assertion of the right to such an appeal.

In allowing for the impeachment of judges, the Ohio Constitution provides a powerful and historic tool for maintaining the public confidence in the judiciary and for removing from office judges unfit to preside over the courts of justice. But, by its very nature, impeachment is a""cumbrous, unmanageable, impracticable process."[11] The fact that no bill of impeachment against a judge has been submitted, let alone passed, in the Ohio House of Representatives during this century is evidence that impeachment is not a method of judicial removal preferred by Ohioans.

The Concurrent Resolution

Article IV, Section 17 is the second provision of the Ohio Constitution which sets out a method of judicial removal. It first appeared as an original part of the Constitution of 1851 and is not paralleled by any section of the Constitution of 1802. Section 17 reads:

> Judges may be removed from office, by concurrent resolution of both Houses of the General Assembly, if two-thirds of the members, elected to each House, concur therein; but, no such removal shall be made, except upon complaint, the substance of which, shall be entered on the journal, nor, until the party charged shall have had notice thereof, and an opportunity to be heard.

Judicial removal under Section 17 may be classified for comparison with other state constitutions as a form of address. Technically and traditionally, an address is a nonobligatory request made by the legislative branch to the executive branch that an officer of the government be removed from his position. It usually applies to the removal of judges only, as with Section 17, but some constitutions make nonjudicial officers subject to address as well. Address procedures or proceedings in the nature of address are available in approximately one-half of the states.

The Ohio provision differs from the classical concept of address in that the executive takes no part in the removal process. Section 17 requires only the concurrent decision by both houses of the General Assembly that a judge be removed from office. However, the section does provide that no judge may be so removed without the posting of the legislative complaint, notice to the judge, and the opportunity for the judge to be heard.

A noteworthy facet of the concept of address as a method of judicial removal is that it is available for taking an unworthy judge from the bench when his actions are not sufficiently culpable to warrant an impeachment proceeding. This is evidenced by the fact that there is no requirement that a trial be held, but only that the responding judge be allowed to present his position. However, in one significant sense Section 17 establishes a procedure which is more difficult to apply successfully than impeachment: whether the judicial removal be by impeachment or under Section 17, a two-thirds vote of the entire Senate is required; but while articles of impeachment may be founded upon a simple majority in the House, a Section 17 removal demands the approval of a two-thirds majority of both the House and the Senate.

Section 17 is like the provisions in most state constitutions which allow proceedings in the nature of address in that a two-thirds vote is set as the standard, and in that no specification of cause for the removal, such as the commission of "misdemeanors" in the case of impeachment, is made.[12] While no delineation of sufficient cause for removing a judge exists in Section 17, the requirement that the substance of the complaint against the judge be included in the legislative journal implies that some despicable act must have been committed or an otherwise unacceptable situation must have been created by the judge in question. Still, no judicial appeal normally exists for one removed from office by address or proceedings in the nature of address, and one can infer from this that the legislature may have the power to remove a judge arbitrarily, so long as the procedure of enrolling the complaint, providing notice, and allowing the judge a hearing is followed.[13]

The inclusion of Section 17 in the Constitution of 1851 received only passing debate on the floor of the Convention. The first report of the Convention's Standing Committee on the Judicial Department included a suggestion that removal of judges be allowed upon a mere concurrent vote of two-thirds of both houses of the General Assembly.[14] Subsequently, the proposal was amended to provide for journalizing the

complaint and giving notice and an opportunity to be heard.[15] There was recognition that a constitutional method of removal other than impeachment did not exist as to nonjudicial officers and the argument was made that judges should not be exposed to a greater liability of removal.[16] The delegates who presented this argument reasoned that the judiciary was chartered as a separate branch of government and should not be subject to a threat of legislative control.[17]

The history of Ohio shows that whether the address-type proceeding provided for in Section 17 is or is not more expeditious than impeachment as a method of judicial removal, and whether or not it presents a threat of potential legislative control over the judicial branch, it, like impeachment, has not been favored as an approach to dealing with unfit judges. As with impeachment, the address-like method of removal has not been used during the twentieth century.

Statutory Approaches to Judicial Removal

The people of Ohio adopted Article II, Section 38 as a part of the 1912 revision of the Constitution. Section 38 is in the nature of a mandatory direction to the General Assembly that it provide statutory methods for the removal of officers. The provision reads:

> Laws shall be passed providing for the prompt removal from office, upon complaint and hearing, of all officers, including state officers, judges and members of the general assembly, for any misconduct involving moral turpitude or for other cause provided by law; and this method of removal shall be in addition to impeachment or other method of removal authorized by the constitution.

The thrust of Section 38 is that judges and other officers should be subject to removal from office for moral turpitude and other statutorily stated causes, and that such removal need not be accomplished by impeachment or, in the case of judges, by the address-like proceeding of Article II, Section 17.

Much of the debate on the several proposals which resulted in Section 38 was directed to judicial removal, but, as can be seen from the provision as adopted, the Convention also sought to establish more expeditious procedures for the removal of all holders of public office. The Convention's final proposal came only after extended and vigorous debate as to the need for more effective methods of judicial removal and the utility of impeachment with respect to judges.[18] In debate, the impeachment of unfit judges was referred to as "an utter failure so impracticable as to be no remedy at all."[19]

Article II, Section 38, as adopted by the electorate, places upon the General Assembly the affirmative duty of establishing statutory methods for removing any officer for misconduct. The provision singles out "misconduct involving moral turpitude" as cause for statutory removal, but does not limit the General Assembly in denominating other types of misconduct as causes for removal. Section 38, while in part the result of dissatisfaction with the removal procedure under Article IV, Section 17, includes the procedural safeguard of that earlier provision by requiring that any removal made possible by statute shall be "upon complaint and hearing." The last clause of Section 38 states that removal methods created pursuant to the amendment are supplemental to impeachment and any other constitutionally created removal procedures, thus answering in the negative the assertions in actual cases that

impeachment and address are the only appropriate methods for removing a judge from office in this state.[20]

The General Assembly has responded to the direction of Section 38 by providing two statutory methods of removal to which judges are liable. Sections of the General Provisions of the Revised Code create a removal process affecting all officers, and sections of the titles on courts provide exclusively for the removal of judges.

The Complaint Filed by the Electorate

Revised Code Sections 3.07 to 3.10 specifically refer to Article II, Section 38 in establishing a procedure for removal of public officers which is initiated directly by the public and to which judges are subject. These statutes require the removal of an officer upon a judicial finding that he is guilty of "misconduct in office."

The first sentence of Revised Code Section 3.07 not only sets the framework for removal under this method and refers directly to Article II, Section 38, but also defines the "misconduct in office" which, when found, creates a vacancy in the office. The sentence reads:

> Any person holding office in this state, or in any municipal corporation, county, or subdivision thereof, coming within the official classification in Section 38 of Article II, Ohio Constitution, who willfully and flagrantly exercises authority or power not authorized by law, refuses or willfully neglects to enforce the law or to perform any official duty imposed upon him by law, or is guilty of gross neglect of duty, gross immorality, drunkenness, misfeasance, malfeasance, or nonfeasance is guilty of misconduct in office.

The procedure for removal based upon a finding of "misconduct in office" is codified in Revised Code Section 3.08. The proceedings are instituted by the filing of a complaint which delineates the charge and which is signed by a designated number of electors of the state or of the political subdivision whose officer it is sought to remove. The number of voters who must sign the complaint has to be at least equal to fifteen per cent of the total vote case at the last gubernatorial election in the state or the political subdivision whose officer it is sought to remove.

With respect to the removal of judicial officers, the statute specifies that the complaint is to be filed in the court of common pleas unless the complained-of judge is a member of that court, in which case the action is filed in the court of appeals. The statute also states that complaints against state officers shall be filed in the court of appeals for the district wherein the officer resides. Therefore, a complaint accusing a member of the Supreme Court or the courts of appeals of "misconduct in office" would be appropriately filed in the courts of appeals, as would one accusing a judge of the court of common pleas. Provisions of the statutes require notice to the officer who is the subject of the complaint, a prompt hearing, and that the hearing be a matter of public record. It is further provided that the trial court may suspend the officer pending the hearing. The Supreme Court has ruled that

a judge may not be found guilty of misconduct in office and removed except upon clear and convincing evidence.[21]

The decision of a court of common pleas in a removal case under these statutes has been held, as presumably would the decision of a court of appeals should it be the court of first instance, to be a judicial rather than political decision and subject to appellate review.[22] Revised Code Section 3.09 allows a single appeal, whether the first hearing be in the common pleas court or the court of appeals. Statistics on the frequency with which judicial removal under Revised Code Sections 3.07 to 3.10 has occurred are unavailable, although reported decisions show at least three instances which have arisen under these sections and analogous provisions of the predecessor General Code.

The Commission of Judges

The second statutory method the General Assembly has authorized for the removal of unfit judges is found in Revised Code Sections 2701.11 and 2701.12. This method applies exclusively to judges, and these statutes are expressly subject to the rules of the Supreme Court and outline the procedure more fully implemented by Rule VI of the Supreme Court Rules for the Government of the Bar of Ohio. The procedure under these statutes is discussed in detail in the section of this study dealing with judicial removal under court rules. Briefly stated, Revised Code Section 2701.11, which also concerns the retirement and suspension of judges who are physically or mentally disabled, provides for a proceeding before a commission of five judges, appointed by the Supreme Court,who may cause the removal of a complained-of judge when cause, as defined in Revised Code Section 2701.12, exists. As required by Article II, Section 38 and prescribed in Rule VI, these sections provide for a complaint and a hearing.

The specifications of cause in Revised Code Section 2701.12 are, perhaps, the most noteworthy aspects of these statutes. The section states in pertinent part:

> (A) Cause for removal or suspension of a judge from office . . . exists when he has, since first elected or appointed to judicial office:
> (1) Engaged in any misconduct involving moral turpitude, or a violation of such of the canons of judicial ethics adopted by the supreme court as would result in a substantial loss of public respect for the office;
> (2) Been convicted of a crime involving moral turpitude; or
> (3) Been disbarred or suspended for an indefinite period from the practice of law for misconduct occurring before such election or appointment.

The statute clearly indicates that the cause for removal must arise after the judge assumes his office. But, in applying this rule care should be taken to note just what event constitutes the cause. For example, under subsection (A) (2) the conviction is the pivotal event which must occur while the judge is in office, although the commission of the crime involving moral turpitude might be before taking office.

Subsection (A) (3) recognizes disbarment or suspension while in office for

misconduct prior to taking office as cause for removal. In so doing, the statute creates a theoretical gap in its coverage. It is possible that a judge could be disbarred or suspended for misconduct occurring while in office which would not involve moral turpitude or a violation of the applicable canons of judicial behavior, the latter situations being cited as cause under subsection (A) (1). Should this occur, it would appear that the judge would not be subject to removal under a strict construction of Revised Code Sections 2701.11 and 2701.12, and could only be removed under an alternative procedure.

By using the phrase "involving moral turpitude" as a central concept of cause for removal of judges, the statute has assumed one of the continuing difficulties of discipline for the legal profession. That problem is the definition of "moral turpitude" and the task of deciding just what conduct does in fact involve "moral tyrpitude".

Courts, including those in Ohio, have attempted on numerous occasions to define "moral tyrpitude", but there still is no single definition which is commonly accepted. Most often the courts offer only general definitions before going on to decide by undisclosed processes whether moral turpitude is present in the particular situation with which they are confronted.[23] But even from this case-by-case approach it may be concluded that "moral turpitude" involves base or vile acts which are done knowingly and which are contrary to justice and good morals.[24]

From an examination of specific cases of judicial removal in Ohio for misconduct involving moral turpitude, it is clear that the misconduct need not be in official conduct, but may arise in the judge's private life as well.[25] It is the character of the judge himself which is at issue, and not necessarily the nature of his conduct on the bench. For example, influencing a prosecutor to coerce and intimidate a person who will not respond to a judge's personal wishes has been held to be a judicial misconduct involving moral turpitude,[26] as has presenting false information, designed to mislead, about one's legal education and experience.[27] Moral turpitude is also involved when a judge publishes a falacious opinion with the intent that it will be taken seriously and as precedent.[28]

Judicial Removal under Rules of Court

The Supreme Court of Ohio most recently exercised its power in respect to the removal of judges when in February, 1972 it adopted the Supreme Court Rules for the Government of the Bar of Ohio. Among other things, the Rules bind all attorneys and judges to certain ethical standards, provide for the discipline of attorneys who transgress the standards, and supplement the statutory methods of judicial removal.

Rule VI, entitled "Removal of Judges", is the rule most directly related to the subject under discussion. (This Rule was originally enacted as Supreme Court Rule XXI in 1969.) Not only does Rule VI deal with judges who are accused of some act or omission which makes them unfit to hold the office, but it also provides for removal of those judges who are physically or mentally disabled. It is explicit that this rule was adopted pursuant to the authority granted by the General Assembly in Revised Code Sections 2701.11 and 2701.12. The rule reiterates many of the aspects of judicial removal set forth in these statutes, but is primarily directed to supplying needed details of procedure and definitions.

While Revised Code Section 2701.11 indicates only that the complaint against a judge must set forth the cause, Rule VI prescribes the form the complaint must take,

that only certain committees of the state or a local bar association may file the complaint, and the procedure for proper filing.[29] Elsewhere in the Rules an affirmative duty is placed upon the bar associations to investigate any complaint of misconduct which comes to their attention.[30]

The full range of procedural details prescribed in Rule VI can best be seen in a direct comparison of Revised Code Section 2701.11 and 2701.12 to the Rule, but only the major steps of the procedure, which are contained in both the statutes and the rules, are outlined here. First, the grievance committee of a regularly organized bar association investigates a suspicion or charge of judicial misconduct. If it is believed that a full hearing should be held, a complaint is filed with the Board of Commissioners on Grievances and Discipline of the Supreme Court. The seventeen member Board then investigates the complaint, and if twelve or more members find substantial credible evidence in support of the complaint, the investigation is certified to the Supreme Court. The Court then appoints a Commission of five judges to determine by a majority the question of removal. This Commission is composed of judges of courts of record located in any five appellate districts other than that in which the complained-of judge resides. If the Commission orders removal, the judge so removed may appeal directly to the Supreme Court.

Rule VI adds several noteworthy elements to the statutes. For example, the Rule affirmatively states that a judge is disqualified from performing his duties while awaiting the disposition of any indictment or information charging him with the commission of a felony.[31] The current practice under this part of the Rule is for the Supreme Court to issue an order suspending the subject judge as soon as the indictment or information becomes a matter of public record. The theory behind this aspect of the rules is to remove from the bench judges who might be unable to rule impartially, given concerns over their personal futures, or whose very presence on the bench might incite public distrust in the judiciary, regardless of the presumption of innocence. But beyond its theoretical foundation, this rule deserves attention because it is the only provision in Ohio law which ipso facto requires removal of a judge--albeit temporarily--upon the occurrence of the pivotal incident, namely the filing of the indictment or information, and without a hearing on the matter. Although it might be assumed, from the procedural guarantees in the Constitution, the statutes, and the balance of Rule VI, that the series of hearings and opportunities for the judge to be heard must be observed at every step, Rule VI does not so state, and simply indicates that the judge "is disqualified" pending the indictment or information. The question of due process, while perhaps problematical, has not been commented on by the courts.

Rule VI also expands on the delineation of causes for which a judge may be removed as set forth in Revised Code Section 2701.12 by adding "if he engaged in willful and persistent failure to perform his judicial duties, is habitually intemperate, engages in conduct prejudicial to the administration of justice or which would bring the judicial office into disrepute . . ."[32]

Rule IV binds all attorneys to the Code of Professional Responsibility and all judges to the Canons of Judicial Ethics. New standards of judicial behavior became effective in December, 1973, when the Code of Judicial Conduct was adopted. Rule IV has not yet been amended to mention the new Code. This Code is designed to replace the Canons of Judicial Ethics and binds all persons not in a judicial office on the effective date of the Code when they take a judicial office and all incumbent judges upon the beginning of their next term in office. The procedure for imposing discipline under these sets of standards is set out in Rule V. In so doing, and by

prescribing suspension from the practice of law and disbarment for willful breaches of these tenets of behavior, Rule IV establishes the basis for another approach to removing an unfit judge.

The statute[33] and the rules[34] clearly state that a judge's loss of the privilege to practice law constitutes cause for his removal from office, but the fact that judges must be attorneys[35] and that attorney-judges have an obligation to follow the Codes and Canons, has been interpreted by the Supreme Court to mean that an indefinite suspension or a disbarment works a forfeiture of judicial office[36] and is in itself grounds for removal. The Court has further held that an action in quo warranto lies to enforce the vacating of the office.[37]

The situation results that the disbarment of a judge can give rise to his direct removal under the forfeiture of office concept or it can constitute cause for a proceeding under the statute or rule which exposes him to the liability of removal. It must be borne in mind here that a judge may be disbarred or suspended for a willful violation of the Code of Professional Responsibility which establishes generally more inclusive standards of behavior than are in the Canons of Judicial Ethics or the Code of Judicial Conduct and which violation might conceivably not be a violation of the ethical rules which apply only to judges.

The authority of the courts to consider the professional discipline of an attorney who is serving as a judge and to remove that judge from the bench if he is deemed unfit as an attorney has been challenged unsuccessfully on several occasions.[38] Challenges usually assert the exclusivity of constitutional and statutory methods of removal. The Supreme Court, in light of its organization as a court with the power to admit to the bar and the decision that a judge must maintain his privilege to practice law even though the public interest requires a limitation on practice during tenure in office, has ruled that it:

> . . . through its inherent power and duty to maintain the honor and dignity of the legal profession of Ohio at its traditionally high level, may prescribe a specialized standard of conduct for all members of such profession who hold judicial office and has jurisdiction over the discipline of such a member . . .[39]

While the states are split as to whether a judge may be disciplined while in office for his actions as an attorney before taking office, Ohio holds that elevation to the bench does not cut off an attorney's liability to discipline for his previous professional misconduct.[40]

The supervision of judicial fitness and the removal of judges by a combined use of Revised Code Sections 2701.11 and 2701.12 and the Supreme Court Rules has been successful. The fact that several judges have been removed from office in recent years by the use of these approaches is evidence that the statutory and rule methods are not subject to the same criticism for impracticability as are the constitutionally prescribed methods of removal.

Conclusion

Just as the existence of each of the methods of judicial removal in Ohio is justifiable, so each presents several real or potential problems deserving the attention of anyone considering a review and possible revision of these approaches. The

following are posed as a recapitulation of the most obvious questions raised or suggested by this study.

The constitutional methods are an important aspect of the separation of powers principle, regardless of their disuse. In considering possible revision, the following stand out as appropriate questions for consideration:

- whether or not having two separate methods of judicial removal available to the General Assembly serves a valid purpose,

- whether some clarification of the grounds for impeachment should be attempted,

- whether a specification should be made as to what grounds are needed for removal under Article II, Section 17,

- whether a resolution should be made in the conflict between the two constitutional methods as to the majority required in the House of Representatives.

The statutory and rules approaches to judicial removal have been shown to be effective means of ridding the bench of unfit judges, but several potential problems still exist, to wit:

- there is no direct public access, other than through a bar association, to the removal of a judge for misconduct prior to assuming office,

- the statutes and rules allow only a limited approach to prior misconduct,

- given the involvement of the Supreme Court in removal of judges under the statutes and rules, there is no method available, outside the legislative powers of impeachment and address, to remove a Supreme Court justice without intimately involving his brothers on the high bench in the process.

FOOTNOTES

1. Constitution of 1802, Article I Sections 23 and 24

2. 1 State of Ohio, Debates and Proceedings, Constitutional Convention, 1850, pp. 239-141 (May 30, 1850). (hereafter cited as Debates).

3. 2 Debates 807 (March 5, 1851).

4. Constitution of 1851, Article II, Section 23.

5. Crim. R. 2

6. For an excellent discussion of this point and of impeachment in general, see: Raoul Berger, Impeachment: The Constitutional Problems, (Cambridge: Harvard University Press, 1973) Chapter II.

7. Ibid., pp. 146-148, and citations given there.

8. Pickering, 1803; Chase, 1804; Peck, 1826; Humphreys, 1862; Swayne, 1903; Archbald, 1912; Louderback, 1932; and Ritter, 1936.

9. E. g., see comment of Rep. Gerald Ford, 116 Cong. Rec. H. 3113-3114 (daily ed. 15 April 1970).

10. Berger, supra., Chapter IV.

11. 1 Debates 240 (June, 1850)

12. Institute of Judicial Administration, Selection, Tenure and Removal of Judges in the 48 states, Alaska, Hawaii and Puerto Rico (New York: August, 1956) pp. 24-25.

13. Ibid., p. 25

14. 1 Debates 431 (June, 1850).

15. 2 Debates 397 (January 24, 1851).

16. 2 Debates 398 (January 24, 1851).

17. Ibid.

18. State of Ohio, Proceedings and Debates, Constitution Convention, 1912 p. 1310.

19. Ibid.

20. In re Copland, 66 Ohio App. 804, 33 N.E. 2d 857 (1940).

21. McMillen v. Diehl, 128 Ohio St. 212, 190 N.E. 567 (1934).

22. In re Bostwick, 125 Ohio St. 182, 180 N.E. 713 (1931).

23. In re Copland, supra.

24. In re Jacoby, 74 Ohio App. 147, 57 N.E. 2d 932; and Comm. on Legal Ethics v. Scheer, 149 W. Va. 721, 143 S. E. 2d 141 (1965).

25. In re Bostwick, 29 N.P.N.S. 21, O. L. A. 258 (C. P. 1931).

26. Ibid.

27. In re Copland, supra.

28. Ibid.

29. Gov. R. VI, Sec. 1 (a).

30. Gov. R. V, Sec. 4.

31. Gov. R. VI, Sec. 1 (b).

32. Gov. R. VI, Sec. 1 (c).

33. Revised Code Section 2701.12 (A) (3).

34. Gov. R. VI, Sec. 1 (c).

35. See, Revised Code Sections 1901.06, 1907.051, 2301.01, 2501.02, and 2503.01.

36. State ex rel. Saxbe v. Franko, 168 Ohio St. 338, 154 N.E. 2d 751 (1958).

37. Ibid.

38. E.g., In re Copland, supra.; Mahoning County Bar Association v. Franko, 168 Ohio St. 17, 151 N. E. 2d 17 (1958), cert. denied 358 U. S. 932, 79 S. Ct. 312.

39. Mahoning, supra., at 151 N. E. 2d 23

40. In re Copland, supra.