AN ANALYSIS AND APPRAISAL OF THE OHIO STATE CONSTITUTION 1851-1951

A Report to
THE STEPHEN H. WILDER FOUNDATION
Public Affairs Division
Cincinnati

By
Twelve Specialists In Governmental Problems
Members
The Social Science Section of
The Ohio College Association

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FOREWORD

Under the last will of Edith Carson Wilder, widow of Stephen H. Wilder, late of Cincinnati, there was established in 1941 The Stephen H. Wilder Foundation for research in the field of Public Affairs affecting the Cincinnati metropolitan area, for university research in Basic Science, and for support of Summer Opera in Cincinnati.

The will appointed a board of directors to supervise the several divisions of the Foundation. For the Public Affairs Division the directors were empowered to inquire into and investigate subjects of general interest to the people of Cincinnati or Hamilton County and to publish the result of the studies. The will provided that

> "Said directors shall select and engage, with or without compensation, one or more expert or professionally competent investigators or critics of reputation for integrity, who shall seasonably report to said Directors."

The will further provided that

> "None of the foregoing references to the matters which may be the subjects of investigation and report hereunder shall be interpreted to include the selection or expression of a choice between candidates for election or appointment to any public or party office or position."

Major studies heretofore sponsored by the Foundation have included *"Considerations Relating to Future Water Supply for the Cincinnati Area"* (Fosdick and Hilmer, Consulting Engineers, Cincinnati); *"The Government of Cincinnati 1924-1944"* (Thomas H. and Doris D. Reed, for the Consultant Service of the National Municipal League, New York); and "Report on an Educational Campaign—The Cincinnati Plan for the United Nations" (published in the American Journal of Sociology, Vol. LV, No. 4, Jan. 1950).

The background of the present study is set forth on page 6 in the Preface, to which the reader's attention is invited for avoidance of

repetition. The opinions expressed are those of the authors. The Foundation wishes to acknowledge not only its own appreciation of the patriotic services of the group of Ohio university professors who have given their time and talents to the authorship of this report, but to bespeak for them the gratitude of Ohio's citizenry in general.

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PREFACE

In the general election of November 1952, the voters of the State of Ohio will be asked to cast a ballot on the question "shall there be a convention to revise, alter or amend the constitution?" Their answer should be an informed one, based on adequate information concerning the nature, virtues and shortcomings of the present Ohio state constitution. It is the purpose of this monograph to review the provisions of the present document; point out obsolete provisions; suggest alternatives to present ones, based on the experience of other states; and offer suggestions for needed additions to make our basic law adequate to the demands of a modern age.

A state constitution is only one of the kinds of state law. There are also statutes, made by the state legislature; rules and regulations to supplement statutes, made by administrative departments; and common law, established by judicial decision. Of these, the constitution is the most fundamental, since all the others must conform to it. Furthermore, it is the only one which must be approved by the people before it becomes effective.[1] It is, also, difficult to change, as any fundamental law should be. Statutes, on the other hand, may be changed quite easily, by action of the legislature and approval by the governor.

The state constitution creates the state government, divides authority among legislative, executive and judicial departments, and defines the rights of the people in relation to the government. Unlike the national constitution, it grants no powers. Its provisions are limitations upon the authority of the agencies which it creates. Hence, they must be brief and easily understood. They must also deal only with basic and fundamental matters since they may be changed only with difficulty.

In the discussion which follows, frequent reference is made to the fact that certain constitutional provisions are legislative in character, and, hence, they should be dropped out of the constitution. In each case, these are matters with which the General Assembly would be competent to deal if the constitution were silent. Also, they are matters which are not so fundamental as to seem to require the protection of the process of constitutional amendment, but should rather be entrusted to the easier process of statutory change. In some cases, these provisions have crept into the state constitution because those who proposed them had no clear concept of what a constitution ought to be. In other cases, judicial decisions interpreting constitutional provisions had defined old limitations in a way unacceptable to the people, who were, therefore, forced to use the process of constitutional amendment to redefine and make explicit the meaning which they wished to have applied to the old limitation. Finally, some of the legislation now found in the Ohio constitution is there because the people of the state desired some change which the legislature refused to enact and it seemed easier to amend the

constitution than to try to elect a legislature which would follow public opinion. Now that the General Assembly is clearly informed as to the public opinion by the popular acceptance of these last-mentioned changes, it would seem safe to leave such questions to it, removing them from the constitution in order to make them subject to needed modifications by an easier process.

Frequent reexamination of the restrictions which the people have placed upon their state government through the state constitution seems imperative. The ways in which this can be done are explained in the first chapter which follows. General review of the state constitution would seem to require the attention of a democratically elected and widely representative body. It has been common to entrust such a task to a state constitutional convention, ever since Massachusetts and New Hampshire devised such an institution for the preparation of their constitutions in 1780.

In April 1947, at the annual meeting of the Social Science Section of the Ohio College Association, consideration was given to the fact that a vote on whether to hold an Ohio constitution revision convention would automatically come up in 1952. The economists and political scientists who compose the membership of that group decided to set up a committee to study the question. As specialists in governmental problems, they felt that it was their duty to examine the state constitution and inform the voters of their findings. A preliminary report was issued in mimeographed form in 1948. In 1947, also, The Stephen H. Wilder Foundation, of Cincinnati, had begun independent consideration of two phases of possible constitutional clarification and amplification relating to municipal home rule and general tax and revenue structure, and was assembling pertinent data.

Discovery of the mutual interests of the two groups led eventually to the arrangement which has produced this monograph; namely, the undersigned members of the Social Science Section of the Ohio College Association undertook to prepare this document of widened scope as a Report to the Public Affairs Division of The Stephen H. Wilder Foundation, without personal compensation to the authors but with payment of travel expense, clerical overhead, printing and distribution borne by the Foundation up to a stipulated maximum. Both groups have had the valuable consultative contributions of Mr. Ralph S. Rice, professor of Constitutional Law at the College of Law of the University of Cincinnati, likewise without personal compensation to him.

We consider it desirable at the outset to make it clear that we find much in Ohio's present constitution that is admirable, and that clearly should be retained. If the emphasis in the reports which follow seems to be upon defects and shortcomings, it is not to be taken to indicate that we advocate a complete break with the past. Many of us are public

officers, who have taken a solemn oath to support and defend this constitution. We stand firmly by our obligation in this regard. We would invite attention, however, to the fact that an oath to support a constitution does not prevent proposals for orderly change, according to the process provided in the document. It is this we support.

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DAVID KING
HAROLD T. TOWE
HARVEY WALKER, *Chairman*

REFERENCE

[1]The initiative and referendum, discussed in Chapter III provides an apparent exception.

CHAPTER I

THE PROCESS OF CONSTITUTIONAL CHANGE

BY

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Even though constitutions are fundamental laws, they are subject, like all human institutions, to obsolescence, progress and change. As indicated in the comments which follow, many provisions of the Ohio constitution have become obsolete during the past one hundred years. A modern constitution, framed by a convention in tune with modern times, would eliminate this dead wood and avoid the confusion which now results from its retention in the published document. Experience indicates that in no other way is it likely that such pruning will be accomplished.

Methods of Constitutional Change

Constitutional change occurs in several ways. The most obvious and frequently used method is that of formal amendment. Another common method is that of judicial interpretation. Still another is that of elaboration by legislative action. This is of particular significance where constitutional provisions are not self-executing. Finally, there is the method of custom and usage, where, without textual change, constitutional provisions are allowed to fall into disuse or are given new and different administrative interpretations.

Of all these methods of change, the only one which receives formal recognition in the constitutional document is that of formal amendment. In Ohio, this may be accomplished in three different ways: 1) by proposal of the General Assembly and approval by the voters; 2) by a constitutional convention; and 3) by the use of the initiative.[1]

Formal Amendment

The accepted method of making routine textual changes in the Ohio constitution is the first one mentioned above (Article XVI, Section 1) adopted September 3, 1912. Either branch of the General Assembly may propose amendments. This is done by joint resolution, agreed to by three-fifths of the members elected to each House, but not submitted to the governor for his approval. Proposed amendments must be submitted to the voters for approval or rejection on a non-partisan ballot, at a general or special election, as the Assembly may

prescribe. Such amendments must be published once a week for five consecutive weeks preceding the election in at least one newspaper in each county of the state where a newspaper is published. If a majority of those voting on the question approve of the amendment it becomes a part of the constitution. When more than one amendment is submitted at the same election, the ballot must be so arranged as to permit the electors to vote on each amendment separately.

Under the provisions of this section, there have been fifty-two amendments submitted to the people since 1851. Of these, twenty-four have been adopted and twenty-eight rejected. These provisions for amendment seem quite liberal and offer an adequate opportunity for the proposal and adoption of urgently needed changes in our fundamental law. Only the provisions for publication seem excessive. Perhaps a change in publicity methods to approximate those described below in connection with initiated constitutional amendments would be desirable.

Constitutional Conventions

A constitutional convention may be called in either of two ways. If the General Assembly, by a two-thirds vote in each branch, thinks it necessary at any time to call a convention, it may submit the question to the voters. If a majority approve, the Assembly proceeds at its next session to pass a law calling it. (Article XVI, Section 2, adopted September 3, 1912.) The section further provides that candidates for members of such convention shall be nominated by petition only and voted for upon a separate non-partisan ballot. The convention must consist of as many members as the House of Representatives, chosen as provided by law. They must meet within three months after their election to begin their task.

The principal criticism of the provisions for constitutional conventions arises out of the fact that the House of Representatives is used as the standard for the size of the convention. There would be a strong tendency to use the present unrepresentative and gerrymandered apportionment now used in choosing members of the House as the basis for apportionment of delegates to the convention. This would not be necessary. A different basis should be used in 1952-53, provided the number of House members was not exceeded. It would be desirable for a constitutional convention to suggest an amendment to this section which would provide a more equitable and representative basis for choosing delegates to subsequent conventions.

The second method of calling a convention is provided in Section 3 of Article XVI. This section, adopted in 1912, provides that at the general election held in 1932 and each twentieth year thereafter, the question "shall there be a convention to revise, alter or amend the constitution" shall be submitted automatically by the secretary of state

to the voters of Ohio. If the vote is favorable, the General Assembly at its next session must provide by law for the election of delegates and the assembling of the convention. In 1932 there were 853,619 votes for and 1,056,855 against the calling of a convention. This section concludes by providing that no amendment of the constitution proposed by such a convention shall become effective until approved by a majority of the electors of the state who cast ballots on the question.

It is the imminence of a vote under the conditions outlined in the constitution at the general election to be held in November, 1952 that gives rise to the present study. This monograph has been prepared for the purpose of analyzing the present constitution of Ohio so that the people of the state will be informed as to its provisions and strong and weak points before they are called upon to cast their ballots. The accumulation of obsolete provisions, and the need for modernization and for change in some provisions in order to make our constitution more adequate to the demands of the present day, indicate that a convention is needed and could render a distinct service. Piecemeal change by the General Assembly has proved inadequate to keep the constitution abreast of changing times. Popular initiative has been made so difficult that only the most urgent changes can be accomplished by that method.

Initiative for Constitutional Amendments

The third method of constitutional alteration is by initiative petition followed by popular vote. The petition must be signed in forty-four of the eighty-eight counties of the state. In each of these counties the signatures must be of qualified voters equal in number to at least five per cent of those who cast ballots for governor in that county at the last preceding gubernatorial election. The petitions must be signed by a total of ten per cent of such voters in the state as a whole. Approval by a majority of those voting on the question is sufficient to adopt. The text of each amendment and arguments for and against must be mailed to each voter. Since the adoption of this method of amendment, in 1912, there have been thirty-two proposals by initiative petition, of which nine have been adopted.[2]

Summary

All things considered, Ohio has ample and reasonably equitable provisions for formal constitutional change, except those for the membership of the constitutional convention, discussed above. The accumulation of obsolete provisions, the need for rearrangement and for the consideration of new and modern provisions not now included, are the reasons why a convention should be called. The other methods described above are clearly inadequate to the task which now is required.

There is much in the Ohio constitution of today that is good and should be retained. What is needed now is a reexamination and ap-

praisal of its provisions by a democratically chosen convention in the light of what we as a nation have learned about the process of constitution making during the past one hundred years.

REFERENCES

[1]This instrument of popular control is defined and explained in Chapter III.

[2]One of these never became effective because it was in conflict with another amendment, proposed by the General Assembly, which was adopted at the same election.

CHAPTER II

THE OHIO GENERAL ASSEMBLY

BY

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Two articles of the present Ohio constitution have a direct bearing upon the organization and powers of the legislative branch of the state government. These are Articles II and XI. The first of these deals generally with the legislative power; the second with apportionment of seats in the legislative branch of the government. Logic and convenience would seem to indicate a consolidation of these two articles into one, if and when a general revision of the state constitution is undertaken. Article II also contains the provisions on the initiative and referendum which are described in detail in the following chapter.

Historical Background

The constitution of 1851, under which the State of Ohio still is operating, created a legislative body called a General Assembly, consisting of a senate and a house of representatives. In this body, all legislative power was vested.[1] This assembly succeeded a similar bicameral body which had been created by the constitution of 1802. This original state legislature was in turn the successor of a unicameral territorial legislature which existed under the Northwest Ordinance from 1798 to 1803. The territorial assembly included the governor, Arthur St. Clair; a legislative council of five members appointed by Congress from a panel nominated by the legislature; and a group of representatives, elected for a two year term, one for each five hundred people. This assembly got into a serious wrangle with the governor who vetoed many of its acts, although under the Ordinance he was a member of it. This dispute did not endure for long. Congress, on April 30, 1802, authorized Ohio to hold a convention and frame a constitution as a state. The convention met at Chillicothe on November 1, 1802, and adjourned on November 29th after having agreed to a constitution and set the first election under it as the second Tuesday of January, 1803.

This first constitution was not submitted to a vote of the people, but was put into effect by the convention. The officers elected under it met at Chillicothe on the first Tuesday of March and assumed their offices. The first state legislature consisted of fifteen senators and thirty representatives. Although provision was made for a governor and for a system of courts, the judges were elected by the legislative body and the governor, although directly elected, had little authority. The legisla-

ture elected the secretary of state, the auditor of public accounts and the state treasurer, and appointed the chief military officers. The governor was authorized to appoint an adjutant general, to convene or adjourn the legislature, to send messages to the legislature, to grant reprieves and pardons, and to act as commander-in-chief of the military forces of the state. He had no veto and practically no power of appointment. Authorities on the history of this period attribute this concentration of power in the legislature in part to the political temper of the times, which placed great faith in legislative bodies as the embodiment of the sovereign people, and in part to the unhappy experience with executive arbitrariness which the Ohioans had experienced under Governor Arthur St. Clair. Whatever the reason, the past century and a half has witnessed a gradual change in this power relationship so that both the governor and the courts have gained authority and prestige at the expense of the legislative body. This change has been brought about in part because the legislative body forfeited the confidence which had been placed in it, and, in part, because of the changing character of state government and of the state population.

Between 1803 and 1850, the state enjoyed a rapid growth in population. In order to keep pace with this growth, the legislature found it necessary to pass many special laws. Some of these created municipal corporations, through which the services of local government could be rendered to the citizens. Others were for the organization of private corporations to provide business enterprises for the development of the state's resources. Still others created public works, such as turnpikes and canals and provided for their construction and operation at state expense. Many new counties also were created by special law. By 1850 the volume of such special legislation was so large that it interfered materially with the basic duties of the assembly in dealing with the state government and general laws. The need for some change in this legislative pattern was generally recognized.

In addition, the courts had proven inadequate to meet the needs of the expanding population. There was a demand for local elections of judges. The supreme court had no fixed location. It rode the circuit from county seat to county seat to hear appeals from the local courts. The large increase in the number of counties made this procedure practically impossible. Some alteration in the judicial establishment seemed imperative.

The General Assembly, in November 1849, submitted to the voters the question of whether or not a constitutional convention should be called. The call was approved by a vote of almost three to one. Delegates were elected in April 1850. The convention met at Columbus on May 6, 1850, and after a recess from July to December because of a cholera epidemic, concluded its work on March 10, 1851. The constitution which was prepared by this convention was submitted to a popular vote at a special election on June 17, 1851, and approved by a vote of

125,564 to 109,276. According to its own provisions, it went into effect in September of that year, and, as amended from time to time, it remains the basic law of Ohio today.

The 1851 Constitution

The provisions of the 1851 constitution which affect the legislative branch of the government were designed to curb its powers and equalize them with those of the governor and judiciary. The judges were made elective by the people, as were also the principal executive officers—the secretary of state, treasurer of state, auditor of state, and attorney general, thus ending their election by the assembly. The evils of graft and corruption in the granting of special privileges were dealt with in an article which prohibited the conferring of corporate charters except by general law—whether the corporation was public or private. Improvidence in state expenditures was attacked by a severe limit on state borrowing except upon popular vote, and a strict prohibition against the state or any of its subdivisions lending their credit to any private enterprise, or the state assuming the debts of any of its subdivisions.

Biennial or Annual Sessions

The legislature remained bicameral under the 1851 constitution. However, waning confidence in its role as a protector of popular rights found expression in a provision for a change from annual to biennial sessions. Despite this change, the General Assembly continued to meet annually until 1895, through the device of a recess in the first year of the biennium and a meeting pursuant to recess in the second year. This device remains available to the assembly today and its use is suggested as a desirable way in which to make it possible for the legislative body to consider state problems as they arise. An alternative would be to provide for annual sessions by specific constitutional change. Annual sessions are particularly important for the handling of budgetary and financial matters.

Apportionment Under the 1851 Constitution

The constitution of 1851 also established a series of new rules for the determination of the number of members in each of the two houses of the General Assembly. Article XI provides that an apportionment for members of the General Assembly shall be made every ten years, after 1851, by dividing the population of the state as shown by the federal census by one hundred for the House and by thirty-five for the Senate to establish the ratio of representation in each of the houses for the succeeding ten years. For example, the House ratio for the 1941-1951 decennial period was 69,076, while the Senate ratio was 197,360.

For the House of Representatives, every county having a population equal to one-half a ratio was given one representative; each county

having one and three-fourths ratios was entitled to two representatives; and every county having three full ratios was entitled to three representatives; the largest counties received one representative for each full ratio in their population. If a county did not have at least half a ratio, it was combined with the adjacent county with the smallest population to form a district. If, subsequently, the population of any county in a combined county district became large enough to entitle it to a separate representative, it was detached and given separate representation. If this system were in effect today it would give a much better basis for representation in the House than now exists. But by an amendment to the constitution in 1903, each county, regardless of population, was guaranteed a separate representative in the assembly. This had the effect of abandoning the requirement of half a ratio in order to have a representative, and allowing the constitutional provisions for districts consisting of two counties to fall into disuse. If the 1851 rule had been still in effect, the following counties, whose population was less than half a ratio would not have had separate representation from 1941-1950, but would have been combined with adjacent counties for election of members of the house: Adams, Ashland, Auglaize, Brown, Carroll, Champaign, Clermont, Clinton, Coshocton, Defiance, Delaware, Fayette, Fulton, Gallia, Geauga, Hardin, Harrison, Henry, Highland, Hocking, Holmes, Jackson, Knox, Logan, Madison, Medina, Meigs, Mercer, Monroe, Morgan, Morrow, Noble, Ottawa, Paulding, Perry, Pickaway, Pike, Preble, Putnam, Shelby, Union, Van Wert, Vinton, Warren, Williams and Wyandot—total 46. Reversion to the 1851 rule would go far toward curbing present evils in legislative misrepresentation of small rural counties. Such a course might well be considered by a constitutional convention.

In a valiant effort to secure a fine degree of justice in the apportionment of House members to the larger counties, Section 3 of Article XI sets up an elaborate scheme by which additional members in one or more sessions of the decennial period are allotted to counties having fractional remainders after division of their population by the ratio. In effect, if the fraction was one-fifth, one extra member was alloted for the fifth or last session of the decennium. If the fraction was two-fifths, extra members were alloted for the third and fourth sessions. If there was a fraction as large as three-fifths, the extra representatives were allowed in the first, second and third sessions. For a fraction of four-fifths, the extra members were elected to the first, second, third and fourth sessions. The operation of this rule, unique with the State of Ohio, results in a legislature of varying size. During the decennial period 1941-1951, the total membership of the House has varied as follows: 95th General Assembly, 136; 96th, 136; 97th, 139; 98th, 135; 99th, 135. Fourteen counties benefitted from this rule. Nevertheless, its practical value is small and it militates against continuity in legislative service. Someone must lose out when representation drops from four to three for one or more sessions. A constitutional convention might well consider the elimination of this rule in the interest of legislative stability.

For the Senate, the constitution of 1851 established thirty-three senatorial districts which are described in Section 7 of Article XI. Each district, except Hamilton County, was entitled to one senator. Hamilton County was allowed three. This made up the total of thirty-five. However, the same rules as to combining and dividing districts were applied to the Senate as were prescribed for counties in the House. As a result, the districts have been combined and divided many times to keep pace with expanding and shifting populations. During the decennial period from 1941 to 1950, there were in reality only twenty senatorial districts. Since these are substantially unequal in population, in the case of the larger districts, additional senators are allotted for full ratios (197,360 in 1940), so there is an equality in the number of persons represented by each senator which is lacking in the House. It should be noted that the same rule as is described above for additional representatives for fractions of a ratio is also applied in the Senate. This resulted in a Senate of thirty-three in 1943 and 1945, thirty-six in 1947, and thirty-three again in 1949 and 1951. This rule has no more virtue for use in the Senate than in the House. It might well be eliminated.

Article XI contains some strange expressions which clearly are due to the strong feelings in the convention and indicate the difficulty which the delegates encountered in arriving at a solution of the problem of representation. For example, Section 6 provides that "the ratio for a senator shall, *forever after,* be ascertained (as described above)." Section 10 proclaims "*no change shall ever be made* in the principles of representation as herein established, or in the senatorial districts, except as above provided." Obviously, such invocations to immortality are doomed to disappointment. Reference already has been made to the ill-starred amendment of 1903 which threw the whole scheme out of gear by guaranteeing one representative to each county, regardless of population. It seems likely that wisdom and justice will require still other changes, even though the delegates of 1850-51 should turn over in their graves. A new convention surely should feel free to re-examine the premises upon which such an important element of our government rests.

The delegates to the 1850-51 convention wisely avoided placing their trust in the members of the legislative body to deal forthrightly with problems affecting apportionment of their own seats. An *ex-officio* commission, consisting of the secretary of state, auditor and governor, is required to proclaim a new apportionment every ten years, according to the principles laid down in the constitution.[3] This is good, except for the fact that this agency is probably not amenable to mandamus if it fails to act. The courts are very reluctant to issue a mandate to the governor. It may be possible by constitutional change to reconstitute

this board so as to omit the governor—the others clearly are subject to such judicial control. If the auditor and secretary of state are made appointive by the legislature and governor respectively, the remedy of mandamus to compel the performance of a mere ministerial duty would be even more appropriate. It is suggested that consideration be given to placing this duty in the secretary of state alone. It is not easy to see why the others are necessary.

One House or Two

There has been a good deal of discussion throughout the country since 1935, when the State of Nebraska abandoned her two house legislature in favor of one, on whether or not other states should make a similar change. During the 1935 and 1937 sessions of the Ohio General Assembly, several joint resolutions proposed different schemes for setting up a one-house legislature in Ohio. There was some talk but no action. Neither of the existing houses could be quite sure which one of them was to be abolished, and so the change was opposed by both of them. Then, too, many said that such a scheme might be all right for the small agricultural population of Nebraska, but it would never work in Ohio. Others said let us wait and see what happens. It will be time enough to consider such a plan when it works miracles along the River Platte.

There has been considerable experience with single chamber legislative bodies in the United States. The earliest colonial legislatures in Virginia and Massachusetts had but one house. Pennsylvania and Georgia entered the Union with state legislatures of but one chamber. Vermont was admitted to the Union with a one-house legislature which she retained until 1835. Nebraska now has used a single chamber for her state legislature for a decade and a half. Congress, under the Articles of Confederation, as well as the Continental congresses which preceded it were unicameral. Few people would argue for two houses in the legislative body of a city or county today. Our school boards have but one chamber. In fact, the only significant bicameral, or two house, legislative bodies in the country are those of the United States and forty-seven of the states.

The national government has two houses because of the Connecticut compromise adopted in the Constitutional Convention of 1787 in order to get both the small and large states to agree to the draft. By this compromise the lower house is elected from the states, according to their population, while the senate is chosen on a basis of state equality—two senators from each state, regardless of population. The forty-seven states have two houses mainly because the national government has two houses. True, eleven of the thirteen original states came into the Union with constitutions which called for two houses, based largely on familiar colonial precedents. But since 1789, the justification for having two

legislative bodies in each state has been, in the main, the fact that Congress is established according to such a pattern.

The government of the United States is federal in form. That is, it consists of a central government, possessing certain specified powers, and a number of state governments each possessing broad powers, each entirely independent of the other within its own sphere of action. The national government is forbidden by the constitution to abolish or alter the states, and the states are equally powerless to abolish the national government. However, this relationship, with its distribution of powers between a central government and a number of local governments, has no counterpart within the states. The government of the state may create or abolish counties, cities, villages, townships and school districts at will. There is, therefore, no sovereign interest within the states which possesses power conferred by the people independent of the states. There is no analogy between local government and state government which would require the establishment of one house of the state legislature in which local governments would be represented equally, as the states are represented in the United States Senate.

In the early states, property and taxpaying qualifications for voting and holding office were higher for the state senates than in the lower houses. The senates were the clubs of the rich landed gentry, while the common people found their representation in the house. As time went on, and the popular demand for more equal rights increased, these early distinctions were removed. Today, in practically all the states, the qualifications for membership in the senate are the same as for the house, except perhaps that senators may be required to be a little older. With the loss of these old distinctions and the coming of wider democracy, the excuse or justification for a second legislative chamber passed away.

Recognizing that the two houses of the state legislature now represent the same constituency, those who favor two houses have been forced to change their ground in order to defend the status quo in this regard. Beginning with the *Federalist Papers* and following a long line of judicial decision and partisan argument, the rationalizations of the supporters of bicameralism have been built up to the status of dogma.* Aside from the argument that the states should follow the national government in this matter, which has already been shown to be based on a false premise, one may summarize the arguments of the modern day bicameralists as follows:

1) A second house is needed as a check on the folly of the first. If there is only one house, it will pass ill-conceived and carelessly drafted laws which would be defeated if a second chamber's concurrence were required.

2) It is more difficult to corrupt two houses than one. If you have only one it will be at the mercy of the lobbyists.

3) A two house assembly makes possible representation of one interest of the people in one house and a different one in the other.

Scientific investigations into the legislative procedure and product in a number of typical states reveal that the first of these arguments simply is not supported by the facts. Most bills which are lost in the legislative process die in the house of their origin. There is a tendency for each house to rely on the other to give careful scrutiny to bills with the result that neither discharges its responsibility adequately. The large number of bills that are vetoed by governors each session because of defects in form and even lack of ordinary regard for the public interest shows clearly the inadequacy of the bicameral system to accomplish the primary objective which is claimed for it. The power of the courts to give judicial review to legislative acts, the gubernatorial veto and more adequate aids to the legislative process through legislative councils, legislative reference bureaus and competent bill drafting agencies offer more hope than the bicameral plan for a democratic and efficient legislative process.

The second rationalization of the supporters of the two house system relates to the pressures brought upon legislators and asserts that two houses are less likely to yield to such pressures than one. As a matter of fact, corruption in legislative bodies is on the decline. Where once there was open bribery, now there is a tendency toward devotion to the public welfare. It seems desirable to start from the premise that men and women are generally honest, as well as occasionally dishonest, in their motivation. Confidence of the people in their institutions can be promoted best by assuming the common honesty of those who occupy positions of public trust. Experience in Nebraska shows that lobbyists have had less rather than more influence in the one-house legislature than they had in the former two house body because their operations must be conducted in the open.[4] The very intricacy of two house procedure is mystifying to the ordinary citizen. It is easy for those who make a business of influencing legislative action to master the necessary techniques and use them to further their own ends. The simplicity of the one-house system requires that legislators assume full responsibility for their acts and conduct their business in the full glare of publicity.

The third and final justification for two houses assumes that there are different interests in the state which should be represented in a legislative body. The trouble is, there are many more than two of them. If one were to set about creating a system of functional representation for the various economic groups in the state, he would soon find himself enmeshed in hopeless complexity. Mussolini tried it in Italy and succeeded only so long as he held control of the one party permitted in the state. Employers and employees in the various economic groupings recognized under the law were given an equal voice in the legislative

branch of the government. People, as such, were not represented at all. Such a plan obviously would not be acceptable in any part of the United States. We are committed to the principle that each man should have an equal voice, as nearly as possible, in the choice of legislative representatives. We believe that legislators should enact laws which are in the general public interest, not in the interest of any minority group. Early in our history we abandoned taxpaying, religious and landholding qualifications for public office. The condition which persists in many states, including Ohio, under which there is a serious over-representation of a minority group—those who happen to live in rural counties—is an anachronism. Far from serving as a justification for bicameralism, such misrepresentation is an undesirable feature of our state government, which needs correction as soon as possible.

Whether a constitutional convention would look toward unicameralism as a partial solution for our problems of representation, no one now can know. Such a body certainly should be familiar with this alternative.

Terms of Office for Legislators

Ohio law makers in both Senate and House of Representatives now serve for a term of two years. This is the common and customary period for the lower houses in the states. Only Alabama, Louisiana, Maryland, and Mississippi, with four years, have a different term. The senates, on the other hand, are mostly elected for a four year term. Sixteen states use a two year term. In many of the remaining states, half of the senators are elected each two years, making the upper houses continuous bodies somewhat on the federal model.

If, as suggested elsewhere, the term of the governor should be extended to four years, thought should also be given to the possibility of making a four year term for senators, to give a little more stability to our legislative machinery. Perhaps a constitutional convention should also consider making the Senate a continuous body, as it now is in many states, with one-half of the members elected biennially. It seems highly doubtful that any change should be made in the term of office of members of the House. At least one house, of any two house body, needs to be kept as close to the people as possible. Frequent elections are one way to accomplish this. If a one-house legislature should be established, it would be necessary to make a choice between these two principles. On the whole, a continuous body would seem appropriate. This would allow frequent expressions of public opinion at election time and still conserve the advantage of continuity of service in a one house body.

Single Member Districts

Both in the Senate and in the House, Ohio uses a curious combination of single-member and multiple member districts. In all but the

most populous counties only one representative is chosen from a county and only one senator from a senatorial district. However, in the 1942-52 decade the first district (Hamilton County) elected three senators. The tenth district (Franklin and Pickaway counties) elected two senators, the twenty-fourth and twenty-sixth districts (Northeastern Ohio) elected two or three senators, and the twenty-fifth district (Cuyahoga County) elected six senators. Extra senators were elected also, for major fractions in a number of other cases, to serve in one or more sessions of the decennial period. If, as recommended above, this fluctuation from session to session is abandoned in favor of a fixed quota, it would be desirable to go still further and provide for the division of each county where more than one senator would be elected into as many equal parts as there are senators to be elected. Each part then would choose only one senator.

A similar procedure would be desirable also for elections to the House of Representatives. In that body, the county now is the unit. Several counties choose more than one member, Cuyahoga County elects as many as eighteen. It seems obvious that the voters cannot familiarize themselves with the qualifications of the more than two hundred candidates who present themselves in the primary in that county. And due to party discipline, the delegation often is all of one party when the total vote cast is fairly closely divided. Single member districts would make each representative stand closer to his constituents, present a divided delegation from a partisan standpoint, and prevent unknown and inexperienced candidates from slipping into office on the coat tails of a popular president or governor.

Legislative Council

The Ohio General Assembly has established by statute a number of agencies to assist it in the performance of its duties. A Legislative Reference Bureau has existed since 1910 to do research, maintain a reference library and draft bills and resolutions for introduction in one house or the other. It now operates under a board consisting of the governor and the clerks of the Senate and House. Another important agency is the Ohio Code Revision Commission which is charged with the study of the code and proposal of changes needed to eliminate obsolete material, avoid conflicts and present a more understandable body of enacted law. This commission is now engaged in the monumental task of rearranging the whole code of laws for the consideration of the Assembly. The newest creation in the area of legislative aids is the Ohio Program Commission, a joint legislative-executive body which sits between sessions of the General Assembly to study the problems of the state which may require legislative treatment. In addition, there was, for a time even a fourth agency called the Legislative Research Commission.

All of the functions which have thus been provided for are essential to sound law making. However, unfortunately none of the agencies is adequately financed. The legislative body needs sources of information which will free it from the necessity of depending entirely on executive agencies in passing new laws. More adequate facilities seem desirable. Perhaps combining all that now exists under one competent head with an adequate appropriation, would do the trick. If the legislature is to meet more frequently, as now seems desirable, it could make more continuous use of these agencies. This problem is mentioned here for two reasons. First, although these institutions rest upon statute, they are an indispensable aid to the constitutionally established legislative body. Second, some states have felt it desirable to insert in their constitutions a section which requires the establishment and continued maintenance of a legislative council. A constitutional convention might wish to give some attention to the matter in Ohio.

Salaries and Perquisites of Office

The salaries for members of the Ohio General Assembly now are fixed by law. Members of both houses receive $2,600 per year for two years or a total of $5,200[6]. If there are no special sessions, the average legislature in Ohio is in session approximately one hundred legislative days. Thus legislators are paid approximately $50.00 per day from which they must pay their expenses of living in Columbus during the session. In addition, those who live outside of Franklin County are allowed mileage at six cents a mile for a round trip from their homes to Columbus once each week during the session. Postage and long distance telephone tolls are paid from legislative appropriations.

Some states have placed their legislative salaries and mileage allowances in their constitutions. This has caused many complications. With the progress of inflation and the current need for rapid readjustment in rates of compensation, a rigid constitutional provision would stand in the way. It is much better to leave the matter to statute, as in Ohio. However, the taxpayers must be alert to see to it that pay and allowances are reasonable. An attempt by the Assembly to collect mileage for weeks during which it was not actually in session was prevented by the courts at the suit of a taxpayer not many years ago. The standard for such pay and allowances would seem to be that they should be adequate to free legislators from the necessity of depending on lobbyists for favors, and still allow them enough to maintain their positions with dignity.

Powers and Procedure of the Assembly

Article II of the present constitution contains a number of detailed provisions concerning the powers and procedure of the General Assembly which, on reconsideration by a constitutional convention, might better be left to be provided for in the statutes or in legislative rules.

Others seem out-of-date or in need of correction. Nevertheless, most of these provisions appear to be quite salutary and deserving of continuance.

Qualifications of Members

Section 3 requires that senators and representatives must have resided in their districts for one year before their election. If by this it is sought to assure familiarity with local problems, this period seems much too short. Two or three years would be preferable. In any event, it will be much more significant if all districts elect but one member each.

In Section 4 certain persons are barred from membership in the General Assembly—officers of the government of the United States and persons holding lucrative office under the authority of the state. The first seems quite necessary, the second is ambiguous, and, if retained, should be clarified. Township officers, justices of the peace, notaries public and militia officers are now specifically excepted. Perhaps this list also should be reconsidered. Another condition for denying membership appears in Section 5 where persons who are convicted of embezzling public funds are barred from holding any state office, and those who hold public money for disbursement may not have a seat in the Assembly until they have accounted for the money and paid any balance into the Treasury. These provisions would be more appropriately dealt with in a statute. The first one is hardly suitable for inclusion in the article dealing with the legislative power.

Each house is made the sole judge of the elections, returns and qualifications of its own members by Section 6. While this is a customary constitutional legislative power, perhaps we are mature enough now to entrust contested elections to the decision of the courts. This section continues with provisions that a majority of the members elected shall be a quorum, but a less number may adjourn from day to day and compel the attendance of the others. Some such rules are essential.

Organization of the General Assembly, etc.

Section 7 states that the mode of organizing the House of Representatives, at the commencement of each regular session, shall be prescribed by law. This has been done. This is desirable when the body to be organized is non-continuous. Such matters could be left to the rules in a continuous senate. In any event, the House would have such a power even if this section were omitted from the constitution.

The provisions of Section 8 date from 1912 in their present form. They guarantee each house the right to choose its own officers (except

that the lieutenant governor presides over the Senate), make its own rules, punish its members for disorderly conduct (presumably on the floor), and expel a member by a two-thirds vote. The section concludes with an assurance that each house may obtain information affecting its members and business, and for that purpose enforce the attendance and testimony of witnesses and the production of books and papers. While such powers are essential, it would seem likely that they would be inherent in the legislative power, and, hence, that it would not be necessary to include all this detail in the constitution.

Several desirable provisions appear in Section 9. They require each house to keep and publish a correct journal of its proceedings, take a yea and nay (record) vote on the request of any two members, and pass laws only by a yea and nay vote of a majority of the members elected (constitutional majority) recorded on the journal. There is nothing superfluous here. The following section (Section 10) also is salutary and important. It guarantees to each member the right to protest against any action of the house of which he is a member, and to have his protest entered on the journal.

The provisions of Section 11 concerning the filling of vacancies in the Assembly, by election for the unexpired term, have not been very successful in keeping vacancies filled. By the second year of a biennium there are usually from five to ten vacancies, sometimes more. Some people feel that this causes no harm. Yet, if a special session is called, some districts are without representation. Besides, the requirement of a vote of a majority of those elected in order to pass a bill remains the same—thus becoming more and more difficult to secure in controversial cases. With annual or continuous sessions, filling vacancies would become more important. Perhaps it should be made possible, by law, for the local board of elections to call an election to fill a vacancy. No change would be necessary in the present constitutional provision.

Privileges of Members

The privilege of members against arrest while going to or returning from sessions, except for treason, felony or breach of the peace, and the guarantee that no member may be questioned elsewhere for any speech or debate, as they appear in Section XII, are in a form almost identical with that used in the Constitution of the United States. It is generally agreed that such protections are necessary to legislative independence of the executive and of the courts. However, certain events which have transpired under the analogous provisions of the federal constitution have caused many persons to question their adequacy in protecting individual citizens against character assassination under the guise of privilege. It should be a solemn duty of a constitutional convention to reconcile these provisions, as far as possible, with the guarantees of individual liberty which appear in the Bill of Rights.

Legislative Procedures, Executive Veto, etc.

No question will be raised by most people about the desirability of the provisions found in Sections 13 and 14. The first requires all sessions to be public unless made secret by a two-thirds vote of those present. The second prevents either house from adjourning for more than two days or to another place without the consent of the other. As to Section 15, which states that bills may originate in either house and be amended or rejected in the other, the most that need be said is that this is such common knowledge and practice that a constitutional section seems unnecessary.

Section 16 is a long one. However, it contains only three separate ideas: 1) bills must be fully and distinctly read three times in each house, unless three-fourths of the house dispense with the rule; 2) no bill may contain more than one subject, which must be clearly expressed in its title, and amending acts must contain the entire act or sections amended; 3) the executive veto. The requirement of three full readings is out of date. All bills now are printed for all members to read. In practice, all three readings today are by number and title. This seems adequate. In fact, two readings are enough. This sentence could be dropped from the constitution and left to legislative rule, as in Congress, without loss. The requirements for titles and amending acts seem quite suited to modern conditions and should be retained. The executive veto is discussed elsewhere. It is suggested that this be expanded by giving the governor power to reduce as well as to veto items in appropriation acts.

Section 17, however, establishes a rule which is completely outmoded. It requires the presiding officers of the two houses to sign enrolled bills and resolutions in the presence of the house "while the same is in session and capable of transacting business." In practice, this is often done in skeleton sessions, particularly at the end of the session. This section could be removed from the constitution, or at least shortened merely to require the presiding officers to sign, leaving the time and place to them.

The formal enacting clause, which must appear in every bill, is required by Section 18. No objection can be seen to this.

Compensation of Members

Section 19 bars members of the General Assembly from civil office under the state during the term for which they were elected or one year thereafter, if the office was created, or the emoluments increased during such term. This, of course, is to prevent the legislators from setting up new offices to provide themselves with good salaries under the executive branch. This often was accompanied by deals with the executive under which favors were done by each for the other. Such a prohibition

is needed. A convention might wish to examine the experience under the present law to see whether or not it was adequate to prevent the evils it was designed to remedy. If not, it should be strengthened. If so, it should be retained.

The provisions of Section 20 are related to those of the preceding section. It directs the General Assembly to fix salaries and terms of office for all officers of state, but expressly denies any increase during an existing term, unless the office is abolished and recreated. This, also, is good. But it needs reexamination. Perhaps the final proviso has offered too large a loophole. A convention should decide. Closely related is Section 29, which forbids the Assembly from voting extra compensation to any officer, public agent or contractor after the service has been rendered except by a two-thirds vote of all the members elected to each branch of the legislative body. Something like this also seems desirable.

Appropriations

Control over the appropriating power appears in Section 22, which states that no money may be drawn from the treasury except pursuant to specific appropriation made by law, and that no appropriation may be for a longer period than two years. Several questions arise here. What is a specific appropriation? If this section would prevent lump sum appropriations it should be modified to permit them. They are badly needed in order to secure administrative flexibility. Are rotary funds appropriations for longer periods than two years? If so, clarification seems required. This section may have been adequate for the financial transactions of an earlier day, but may need alteration in the light of modern requirements. The convention should decide.

Impeachments

Sections 23 and 24 deal with impeachments. They have been little used but may be needed as "shotguns behind the door." They might take on new meaning if the state adopts an appointive judiciary as suggested elsewhere in this study. On the other hand, some substitute may be necessary if a unicameral legislature is contemplated. If retained, they should be carefully scrutinized in the light of present day needs.

Meetings and Adjournments

By Section 25 the General Assembly is required to begin its regular sessions on the first Monday of January, biennially. No adjournment date is specified. Although this provision dates from 1851, the Assembly did not adjourn its regular sessions during the year they were begun until after 1895. There was a recess at the end of the first year's session, and a meeting was called by the officers of the Assembly to convene during the second year. It is recommended that this practice be rein-

stituted. The second part of the regular session, held in the second year of the biennium could be used solely for appropriations, or it could be merely a continuation of the first one. If it seems desirable to limit the business to finance, a convention may wish to suggest an amendment to this section. With such an annual session, there would be much less likelihood that there would be any need for the governor to call a special session.

Miscellaneous Provisions and Limitations

Sections 26, 28 and 32 contain additional limitations on the Assembly. Section 26 prescribes that all laws of a general nature shall have a uniform operation throughout the state, and goes on to prohibit the Assembly from delegating, except in case of school laws, power to any other authority to determine when a law shall take effect. The first clause seems reasonable, if it does not prevent classification. The second clause needs some reexamination in the light of later home rule doctrines. Section 28 prohibits retroactive laws and laws impairing the obligation of contracts, but authorizes the Assembly to delegate to the courts, by general law, power to cure defects in instruments and proceedings. This section seems a little too stringent and it may need further consideration. There is no need for the prohibition of impairment of contracts since this is contained also in Article I, Section 10 of the federal constitution. But retroactive curative laws of a civil character may have a beneficial effect and perhaps should not be flatly prohibited. No exception can be taken, however, to the provisions of Section 32, which deny to the Assembly the granting of divorces or the exercise of judicial power.

Section 27, pertaining to the election of United States Senators by the Assembly was made obsolete by the adoption of the Seventeenth Amendment to the Constitution of the United States and should be repealed. Section 30, prescribing the rules under which new counties may be created, also is obsolete. Perhaps it should be supplanted by a section which prescribes how counties may be combined or abolished. Such a law would be more useful under modern conditions.

Article II concludes with several sections enacted in 1912, which were inserted to overcome adverse court decisions. Such were Section 33 on mechanics' and materialmen's liens, Section 34 on hours and minimum wages, Section 35 on workmen's compensation, Section 36 on conservation, Section 37 on the eight hour day on public works, Section 38 on removal of officials from office (a substitute for impeachment), Section 39 on expert testimony in criminal cases, Section 40 on registration of land titles, and Section 41 abolishing prison contract labor. These sections probably all were and still are necessary. One may question the propriety of including all of them in the legislative article. Nevertheless, it seems harmless to leave them there. They all need careful reexamination to make sure that they are adequate today to deal

with the evils they were designed to remedy. A convention could assess the experience under each of them in the light of the past forty years.

Summary and Conclusions

The provisions of the Ohio constitution relating to the legislative body of the state are among the most important to be considered by any convention. A legislature devoted to the promotion of the public interest, and armed with the weapons it needs to control the operations of the state government in the name of the people, is the goal to be worked for. More continuity, more equitable representation, more frequent sessions, and simpler form are all steps toward this end.

REFERENCES

[1]This grant was limited in 1912 by the adoption of the initiative and referendum, which reserved these legislative powers to the people. See Chapter III below.

[2]Section 11, Article XI.

[3]"It is a misfortune incident to republican government, though in a less degree than to other governments, that those who administer it may forget their obligations to their constituents, and prove unfaithful to their important trust. In this point of view, a senate, as a second branch of the legislative assembly, distinct from, and dividing the power with the first, must be in all cases a salutary check on the government. It doubles the security of the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, when the ambition or corruption of one would otherwise be sufficient . . . The necessity of a senate is not less indicated by the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions." *Federalist Papers*, No. 62.

[4]Richard C. Spencer, "Nebraska Idea 15 Years Old," *National Municipal Review* XXXIX, pp. 83-86, February, 1950.

[5]The Ninety Ninth General Assembly passed a law in 1951, increasing this salary to $3,200 per year or $6,400 for the biennium. The governor permitted the act to become law without his signature.

CHAPTER III

THE INITIATIVE AND REFERENDUM

BY

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One of the most controversial proposals of the Constitutional Convention of 1912 was that which established the initiative and referendum. These new devices were added to Article II of the constitution and now appear as sections 1a to 1g of that Article. Section 1 of Article II, as adopted in 1851, provided that the legislative power of the state should be vested in a general assembly, consisting of a senate and house of representatives. The 1912 Convention added to these provisions the following language:

> "but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly, except as hereinafter provided; and independent of the general assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the general assembly to enact laws, shall be deemed limitations upon the power of the people to enact laws."

By these clauses a portion of the legislative power of the state which before 1912 had been vested exclusively in the General Assembly was reserved to the people. The first of the rights reserved was called the initiative (right of the people directly to enact constitutional provisions and statutes); and the second, the referendum (right of the people directly to suspend and vote upon new statutes). While such provisions are far from universal among the states, eighteen states now permit the enactment of legislation by direct proposal of the electorate; twenty state constitutions make provision for the referendum on laws; but only thirteen states have the initiative for constitutional amendments. All three of these powers have been used frequently in Ohio and they seem well established as a part of our constitutional practice. However, there still are many persons who feel that these devices are unwise. They argue that to the extent that they are used they impair the responsibility of the General Assembly for determining state policy, and to the extent that the legislative body is less

responsible, less highly qualified persons will seek legislative office. Experience tends to show, however, that, in general, these reserved powers have been used by the people mainly to force consideration of measures which the General Assembly refused to adopt, although they were desired by a large number of electors, or to reject laws contrary to the public interest which have been lobbied through the Assembly. In a few cases, the initiative and referendum have been employed by special interests to secure laws favorable to them, although the people often reject such proposals. In most cases, the verdict of the voters on issues which appear on the ballot through the use of the initiative and referendum has been an intelligent one.

An Obsolete Provision

In 1918, interests opposed to the adoption of national prohibition secured the addition of two paragraphs to Article II, Section 1, purporting to reserve to the people the right to approve or disapprove, through a referendum election, of any action of the General Assembly ratifying a proposed amendment to the Constitution of the United States. This provision was held unconstitutional by the Supreme Court of the United States in *Hawke v. Smith,*[1] on the ground that the power to ratify a national constitutional amendment is derived from the Constitution of the United States, not from the constitution of the state, and that no state may add to the requirements laid down in the federal document. Despite this decision, the paragraphs remain in the Ohio constitution, and should be removed. A constitutional convention doubtless would do this.

Constitutional Amendment by Initiative

The initiative for constitutional amendments appears in Section 1a of Article II. It requires signatures to petitions equal in number to ten per cent of those casting ballots for the office of governor at the last preceding gubernatorial election. At least half of these must come from half of the counties of the state in the manner described below. Since interest in such gubernatorial contests varies, the number of signers required likewise varies. Two states, Massachusetts and North Dakota, establish a fixed number of signers to avoid such fluctuation. In Ohio, initiative-proposed constitutional amendments are submitted directly to the people for a vote at the next general election. This sometimes results in poorly drafted measures being submitted for vote and occasionally such defective amendments are adopted. This danger is minimized in Massachusetts and Nevada where proposed amendments are submitted first to the legislature for discussion, consideration and perfection of form. Such a provision would seem desirable for Ohio, provided the people could proceed regardless of the action of the legislature.

Initiative for Statutes

The detailed provisions for the initiative appear in Section 1b of Article II. In Ohio, the initiative is of the indirect type under which the original petition, bearing signatures of three per cent of the electors, is transmitted to the General Assembly at its next session. If the proposal is adopted by the Assembly, either as submitted or in an acceptable amended form, no further action is required. If the petitioners are not satisfied with the action taken, or if the Assembly refuses to act, supplemental petitions bearing an additional three per cent of signatures require the submission of the original proposal to a popular vote. If a majority of those voting on the question approve, the initiated law takes precedence over any version passed by the Assembly. The governor is expressly denied a veto over measures approved by the electors, although Ohio has not gone to the extreme of Arizona which denies to the legislature the right to amend or repeal such a law. In Ohio the Assembly is not restrained from amendment or repeal of such laws except by a realization that it may be going against a clearly expressed popular sentiment. Repeal by the legislative body of obsolete statutes adopted by popular vote would not present the same political difficulty.

Referendum on Statutes

Corresponding detailed provisions for the referendum appear in Article II, Section 1c. Here the popular petition requires signatures of six per cent of the electors and must be filed with the secretary of state within ninety days after the governor or Assembly has deposited with him the measure to which objection is taken. When a referendum petition is filed within this time, the operation of the law referred to in it is suspended until a vote has been taken. If the vote is unfavorable to the law, it is nullified and never becomes effective. If favorable, it goes into effect upon canvass of the vote. Certain types of laws are completely exempted from the referendum by Section 1d. These include: 1) laws providing for tax levies; 2) appropriations for the current expenses of state government (however, this does not exempt appropriations for additions and betterments, so-called capital outlays); and, 3) emergency laws. These last laws are defined as those declared by the Assembly to be necessary for the immediate preservation of public peace, health or safety. This declaration and the reasons therefor must be made in a separate section of the law, and it must be favored by two-thirds of all the members elected on a separate roll call vote. These restrictions seem adequate to prevent abuse of the emergency power in a state in which party divisions are fairly close.

Procedure Under Initiative and Referendum

Fears of the 1912 era are reflected in the provisions of Section 1e. These prohibit the use of the initiative or referendum to pass a law

authorizing the classification of property for taxation or establishing a single tax. The first of these prohibitions already has been avoided by the amendment of Article XII, Section 2, of the constitution to permit such classification. The second seems so improbable today that the elimination of the whole section might now be accomplished. Section 1f, which reserves initiative and referendum powers to the people of municipalities, probably should be moved to the article dealing with local government and be extended to counties.

The most detailed and complex portion of the initiative and referendum amendment is Section 1g of Article II which provides for the machinery of petition, ballots and elections on such measures. As the section was designed to be self-executing, it was felt necessary to write many details into the constitution which ordinarily would be left to legislation. The delegates to the convention quite properly felt that if these reserved powers were to be made effective, it would be unwise to rely upon the General Assembly to provide for the details of their operation. True, the section provides that "laws may be passed to facilitate their operation, but in no way limiting or restricting either such provisions or the powers herein reserved." Even this tiny loophole has been used by the Assembly to provide additional restrictions which make the exercise of popular law-making much more difficult, under the guise of facilitation. Perhaps the amendment needs further clarification to make such usurpation impossible. This, likewise, would be an appropriate task for a constitutional convention.

Another provision of Section 1g which would be appropriate for reconsideration by a constitutional convention is that which requires a distribution of signatures among the counties of the state. This reads:

> "Upon all initiative, supplementary and referendum petitions provided for in any of the sections of this article it shall be necessary to file from each of one-half of the counties of the state, petitions bearing the signatures of not less than one-half of the designated percentage of the electors of such county."

Under this provision, initiative and referendum petitions must include signatures from forty-four of the eighty-eight counties. For constitutional amendments there must be signatures from each of the forty-four counties, amounting to five per cent of the electors. For initiated laws, the percentage would be one and one-half per cent on the original petition and another one and one-half per cent on the supplementary petition. For referenda the percentage in each county must be three.

The wide variation in county populations and the concentration of urban residents in a few counties (not over twenty) makes for some difficulty in complying with these constitutional provisions. New laws and amendments desired by the rural residents may be easily proposed. Those needed by urban residents are difficult to propose unless the

measure has a strong appeal to ruralites. Thus, the present constitution protects minorities even more than democracy requires. Perhaps this portion of Section 1g should be reconsidered if a convention is called.

REFERENCE

[1](1920) 253 U.S. 221: 40 S. Ct. 495, 64 L.Ed. 871, 10 A.L.R. 1504.

CHAPTER IV

THE EXECUTIVE DEPARTMENT IN OHIO

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Under the theory of separation of powers, universally accepted in our state constitutions, the executive department includes all agencies and activities which are neither legislative nor judicial in character. Thus it is the receptacle into which most new functions are poured, whether they are created by the constitution or by statute. Most of the law of the State of Ohio relating to executive functions appears in the statute book rather than in the constitution. The present constitution includes one article, Article III, specifically referring to the executive department. It consists of twenty sections, eighteen of which date from 1851, one from 1885 and one from 1912. In addition, Article VI on Education, Article VII on Public Institutions, Article VIII on Public Debt and Public Works, Article IX on the Militia, Article XII on Finance and Taxation, Article XIII on Corporations and Article XV which is entitled Miscellaneous, all deal more or less directly with executive matters. The governor's power of veto, however is set forth in Article II, Section 16.

Historical Background

The unhappy experience of the territorial legislature in its relations with Governor Arthur St. Clair, as well as the widespread political theory of the time, led the convention which framed the first Ohio constitution, in 1802, to provide for a strong legislature and a weak executive. Professor W. H. Seibert describes the governor's office under this constitution in the following terms: " 'The governor' was 'a name almost without meaning.' He was required to see that all laws were faithfully executed, but as a matter of fact, the enforcement of laws, then as now, rested mainly with the local authorities, rather than with the governor. He reported to the legislature on State affairs from time to time, and recommended measures which the Assembly was free to ignore. On extraordinary occasions he could convene or adjourn the legislature. He signed all commissions, but his appointing power was limited to filling the office of adjutant general, and, during the recess of the legislature, such offices as were usually filled by its appointment. He could grant reprieves and pardons, except in cases of impeachment. His most substantial prerogative was his power as commander-in-chief of the army and navy of the state.'"[1]

One of the objectives of the Constitutional Convention of 1850-51 was the establishment of a balance of authority and responsibility between the governor and legislature. Some of the important offices, such as those of attorney general, secretary of state, auditor of state and treasurer of state, which had been filled by appointment of the legislature were added to the executive department and made elective by the people. Other executive agencies were placed under the governor's supervision by statute. In most cases he exercised powers of appointment and removal of superintendents, directors and members of boards and commissioners.[2] In 1903, after 101 years of statehood, the governor was given a veto over legislative acts. This power, modified in 1912, as described below, he retains today.

Executive Department Under the Constitution Today

The present constitution defines the executive department of the state government as consisting of "a governor, a lieutenant governor, secretary of state, auditor of state, treasurer of state and an attorney general." Five of these six officers, all but the auditor of state, serve for a term of two years. The auditor has a four year term.[3]

While the supreme executive power of the state is vested in the governor,[4] the fact that many important executive tasks are confided to officers separately elected and not subject to his control has led to a division of executive responsibility. Since these offices may be held by persons belonging to different political parties, the party of the governor cannot well be held responsible for the actions of its political opponents. The voters are put to the necessity of investigating the qualifications of candidates for several offices if they are to cast an intelligent ballot. In order to improve party responsibility and to reduce the burden of the voter, it would seem desirable to shorten the Ohio state ballot by making some of these elective executive offices appointive.[5]

Many thoughtful American voters feel that they ought to choose by election such officers as are charged with policy forming functions. On the other hand, they would like to be relieved of the necessity of choosing ministerial administrative employees. They would be content to leave their selection to the responsible executive. In accordance with this idea, it seems clear that the offices of secretary of state and treasurer of state should be filled by appointment by the governor and taken off the ballot. The attorney general's post is largely of the same character, particularly if the constitution is to be changed to require the Supreme Court to give advisory opinions. Thus this office could be made appointive also, as it is in the government of the United States.

The work of the auditor of state, as carried on at the present time, confuses purely executive functions, appropriate to a comptroller, with post audit functions in supervision of public expenditures. In this case

it would seem desirable to redefine the functions, transferring those of an executive character to the department of finance and placing the "watch dog" function in an office whose incumbent would be chosen by the General Assembly. Safeguards should be erected in the constitution to insure the choice of a professionally qualified auditor by the legislature. But, in any event, the office should be removed from the ballot.

If the suggestions of the two preceding paragraphs were followed, there would remain on the ballot only the governor and lieutenant governor. These could remain. It may be noted, however, that eleven states find it possible to operate their governments successfully without the office of lieutenant governor at all.[6] In Ohio, his only functions are to serve as president of the Senate and to take over the functions of the governor in case of the latter's death, impeachment, resignation, removal or other disability.[7] Provision also is made for the choice of a president by the Senate when the lieutenant governor is serving as governor, or when he has been impeached or otherwise disqualified. Further, when both the governor and lieutenant governor are disqualified, the gubernatorial succession falls first upon the president of the Senate, then upon the speaker of the House.[8] In view of these provisions, the office of lieutenant governor seems quite superfluous.

Term of Office of Governor

Entirely aside from the problem of shortening the ballot, there is serious question whether, under modern conditions, the term of office of the governor should not be increased to four years. More than half of the states now elect their governors for such a term. The present two year term is too short for the formulation and execution of any comprehensive program; unless the governor is reelected, his opportunity for constructive service is severely limited. A four year term would solve this problem. It also would make it possible to separate gubernatorial from presidential elections completely by using the intervening biennium for the state election. Such separation is considered desirable in order that state elections may be decided upon state issues, without the confusion of a national campaign.

Powers and Duties of the Governor

The powers and duties of the governor, as set forth in the constitution, are those customarily granted to such officers. They include: 1) power to require information in writing from the officers in the executive department (in view of the definition of this term in this article of the constitution, it is assumed that this includes only the other elected executive officers); 2) the duty to see that the laws are faithfully executed;[9] 3) authority to deliver messages on the condition of the state to the General Assembly and to recommend such (legislative) measures as he shall deem expedient;[10] 4) authority as commander-in-chief of the

military and naval forces of the state, except when they are in federal service;[11] 5) power to grant reprieves, commutations (of sentence) and pardons for all crimes and offenses, except treason and in cases of impeachment;[12] 6) duty of signing all grants and commissions;[13] 7) power to call the General Assembly into special session by proclamation, limiting the subjects which it may consider during such session; and 8) power to adjourn the General Assembly in case of disagreement between the two Houses in respect to the time of adjournment.[14]

Of the foregoing powers and duties only the fifth and seventh give rise to serious question. Many states now are providing for limitations upon the governor's pardoning power. His duties are so onerous that he cannot give the problem the attention it deserves. So he delegates his authority to one of his secretaries, who holds hearings and makes recommendations which the governor usually follows. In some states the power has been taken from the governor and placed in the hands of a pardon and parole commission, appointed by the governor, for long overlapping terms of office. Commissioners are thought of as being in a position comparable to that of the judges of the highest state court. A convention might wish to consider such a shift in Ohio.

Many states are now authorizing their legislative bodies to call their own special sessions or requiring the governor to call them when requested to do so by the legislative leaders. More frequent legislative sessions would make his power to call special sessions less liable to abuse. However, in no case should the governor have power to deny the representatives of the people the right to discuss any subject of legislation during the special session by omitting it from his call. There is even some question as to whether he should retain the exclusive right to call special sessions. The power to adjourn the legislature is seldom used. It would become obsolete if a unicameral legislative body were established.

Gubernatorial Veto Over Legislation

Every state but North Carolina now confers upon the governor the power of veto over legislative acts. If wisely and moderately used, this can be a salutary control. Unfortunately, it is often used for political purposes when governor and legislature are of different political parties or factions. This has happened in Ohio. In this state, too, there has been great reluctance to put such a powerful instrument into the hands of one man, even though he be the governor. It will be remembered that for 101 years Ohio had no executive veto.

The veto in Ohio today permits the governor to disapprove legislation within ten days after it is received by him. If the General Assembly is still in session, he must return it, with his objections, to the house in which it originated. If three-fifths of the members elected to each house agree, the measure can be passed and become law, the objections of the governor thereto notwithstanding. If the Assembly has adjourned before the expiration of the ten day period, the governor must file the bill and his objections with the secretary of state. There is no pocket veto. However, there is no provision for repassage by a subsequent regular or special session in such a case.[15]

There may be some objection to the size of the majority required for repassage. Why should the governor be enabled to invalidate a measure agreed to by the representatives of the people, unless a larger majority can be mustered for repassage? Some persons feel that the psychological effect of a veto is sufficient to challenge public attention and that a simple majority should be enough for repassage.

The final clause of the veto provision of the constitution authorizes an item veto for use in appropriation acts. However, experience has shown that this provision is not adequate to equip the governor with enough authority to deal with over-appropriations. Some states authorize the governor to reduce as well as to eliminate items. Good administration would seem to suggest such an addition to the Ohio constitution.

Compensation and Reporting of Executive Officers

The officers of the executive department mentioned in the constitution are guaranteed compensation for their services, as established by law. The amount of such compensation may not be increased or decreased during the period for which they have been elected.[16] Such restrictions seem salutary. However, consideration might be given to the adoption of a single section on this subject to protect all state officers, rather than having separate sections in the articles on the executive, the legislature and the judiciary.

All officers of the executive department and of the public state institutions are required to report to the governor at least five days preceding each regular session of the General Assembly. The governor is supposed to transmit such reports with his message to the Assembly.[17] The duty imposed by this section might better be left to a statute, especially if the present elective state offices mentioned above are made appointive. This provision is not now being followed. There would be more point to it if the reports were monthly and gave the governor information which he might use for administrative control.

Administration of Public Education

The sixth Article of the Ohio constitution purports to establish fundamental rules on the subject of education. It consists of four sections, two dating from 1851 and two from 1912. Section 1 decrees that "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 in-

violate, and undiminished; and the income arising therefrom shall be faithfully applied to the specific objects of the original grants or appropriations." Salutary though this provision appears to be, it has been flagrantly violated during our state's history. Fabulously valuable lands were granted to the state under the Northwest Ordinance and by subsequent federal grants for the support of elementary and higher education. Where are these lands today? They have been sold. Where is the principal sum which the money received in their sale represents? It has been spent by order of the Ohio General Assembly. This gross violation of public trust occurred during the canal building period. The legislature in appropriating these trust funds bound itself and its successors in perpetuity to pay to the original beneficiaries, the schools of Ohio, interest at the rate of six per cent on the money they took. This is known as the state's irreducible debt. It seems doubtful, to say the least, that this section of the constitution has been effective.

Section 2 of Article VI directs the General Assembly to make provision for a thorough and efficient system of common schools. It concludes with a prohibition against any religious sect having any exclusive right to or control of any part of the school funds of the state. This duplicates in part the concluding clause of Section 7, Article I (The Bill of Rights) which reads: "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." These two provisions might well be consolidated, if they are deemed essential at all. Under modern conditions no legislature would abolish the public school system!

The third section of Article VI requires that provision be made by law for the organization, administration and control of the public school system of the state supported by public funds. A concluding proviso gives city school districts a small measure of home rule. This section adds nothing to the power of the legislature. Unless the home rule grant is significant, and this does not appear on the face of it, the whole section is superfluous.

The final section of Article VI is especially objectionable. It creates the office of superintendent of public instruction and gives the incumbent a four year term. The former elective office of state commissioner of common schools was abolished by this amendment. However, today, the state government has a number of executive departments of which the department of education is only one. If the governor is to have the authority to see that the laws are faithfully executed, he must have the power to appoint and to remove his department heads. If the term of the governor were increased to four years a part of the objection to this section would disappear. But, even then, there seems

no reason to give the head of one department a constitutional status without conferring the same status on all of them.

Summing up, the four sections of Article VI of the constitution are either unnecessary or undesirable. The whole problem with which they deal can safely be left to legislative discretion. There are those who feel that the head of the state educational system should be appointed by a state board of education, free from gubernatorial control. Such a board, if desired, might be created by constitutional provision. However, it would establish a different form of organization for a single function of state government from that provided for other functions. It would impair gubernatorial responsibility for the administration of state affairs and if the state board were made elective, it would overload the state ballot. All in all, a constitutional convention, in considering the problem of education might well conclude that Article VI should be eliminated from the constitution entirely, unless it should be considered desirable by the convention to confer constitutional status upon the state universities as has been done in Michigan and Minnesota.

Administration of Public Institutions

The same is true of Article VII on public institutions. Section 1 requires that institutions for the benefit of the insane, blind and deaf and dumb shall always be fostered by the state. These and many others now form a part of the state's permanent welfare program. The second section refers to directors of the penitentiary and trustees of institutions which before 1851 were elected by the legislature. Such offices no longer exist. The institutions are governed by quite adequate statutes. The third section relates to the filling of vacancies in such offices and is similarly obsolete. The whole article should be eliminated from the constitution. The legislature would have ample power without it to deal with welfare institutions.

Administration of Public Works

The final section (Section 12) of Article VIII of the constitution establishes the office of superintendent of public works and gives the incumbent a constitutional term of one year. For the reasons mentioned above in connection with the office of superintendent of public instruction, this section should be repealed. The department of public works should be headed by a director appointed by the incumbent governor.

The State Militia

Article IX of the present constitution is woefully obsolete. It deals with the subject of the militia. In the first section, the militia is defined as consisting of *white* male citizens. Under the National Defense Act this is an illegal limitation. A convention should find a definition which is in conformity with federal law. The second section provides that the officers of the militia shall be elected by the persons subject to military

duty in their respective districts. This system of choosing officers went out of fashion after the Civil War. Certainly it is not in accord with modern practice or the National Defense Act. By the third section the governor must appoint the adjutant general, quartermaster general and such other staff officers as may be provided for by law. Line officers must appoint their staffs, and captains, their non-commissioned officers and musicians. Such details as these have no place in a modern constitution.

The last two sections of Article IX have some permanent value. Section 4 requires the governor to commission all officers and gives him power to call forth the militia to execute the laws of the state, to suppress insurrection and repel invasion. Section 5 requires the General Assembly to provide by law for the protection and safekeeping of public arms. The first of these belongs among the powers of the governor in Article III; the latter, among the powers of the legislature in Article II, if, indeed, it is necessary at all, as the General Assembly would have this power without specific mention of it in the constitution.

Miscellaneous Provisions Relating to the Executive

The provisions of Articles VIII and XII will be discussed elsewhere, as will also the provisions of Article XIII. There remains for consideration here the sections of Article XV, Miscellaneous, which affect the executive department. This article contains ten sections, one of which, the ninth, dealing with prohibition, has been repealed. The first establishes Columbus as "the seat of government until otherwise directed by law." It seems unnecessary but harmless. The legislature would have ample power to establish the seat of government even if this section were repealed. The second deals with public printing. It requires that printing jobs be let on contract to the lowest responsible bidder. There seems no reason why printing should be singled out for such treatment. Why should such a rule not apply to all state purchases? A constitutional convention would want to consider whether this section should be expanded or eliminated. The legislative body would have ample power to secure the same result without this provision.

Section 3 seems strangely out of place. It requires a detailed statement of receipts and expenditures of public money to be published from time to time. This seems reasonable, but the provision belongs in the article on state finance. The fourth section is similarly misplaced. It denies election or appointment to public office to persons who are not electors. While there may be some point to denying such persons elective office, it would seem undesirable to establish residence restrictions against employment of competent persons from outside the state, who might, after employment, be required to become residents of the state, and eventually electors. The final proviso of this section which authorizes appointment of women as members of boards of institutions involving the interests or care of women or children, is now obsolete as women are eligible to all public offices. It should be removed.

The fifth section of this article prohibits duelists from holding public office. While such a restriction once was needed, it has been many decades since a duel has been fought in Ohio. The criminal statutes against dueling would seem to offer adequate protection to the public interest today. The section could safely be eliminated by a constitutional convention. More applicable to present day needs is section 6 which prohibits lotteries and the sale of lottery tickets in Ohio. While this also is dealt with in criminal statutes, there always are those who would like to see such statutes repealed. This section might well be retained, in view of recent court decisions.[3]

Section 7 of Article XV provides: "Every person chosen or appointed to any office under this state, before entering upon the discharge of its duties, shall take an oath or affirmation to support the constitution of the United States, and of this state, and also an oath of office." Provisions such as this one have taken on added interest in recent years with special non-communist oaths being added by legislation or administrative rule. A convention would have an obligation to consider the adequacy of this provision, as well as the desirability of any change in its phraseology.

The eighth section of Article XV is clearly legislative in character. It authorizes the establishment of a bureau of statistics in the office of the secretary of state. The General Assembly would have ample power to create such an agency if this provision were repealed—as it should be.

The tenth and final section of Article XV is an important one. It lays down the basic requirements for civil service in the state and its subdivisions. While its phraseology has been criticized as inadequate and any constitutional convention would want to consider constructive changes, the basic principle is clearly desirable and should be retained. This is one area in which legislative action, though authorized, cannot be depended upon to deal adequately with the problem, in the absence of constitutional provisions. Although legislation ordinarily does not belong in a constitution, there are some matters in which it is necessary for the people to speak, clearly and unmistakably, setting the pattern of progress independently of the legislative body. This is such a topic.

REFERENCES

[1]W. H. Siebert, *The Government of Ohio*, The Macmillan Co., New York, 1908, p. 24.
[2]Siebert, *op. cit.*, p. 83. In 1908 there was a dairy and food commissioner elected by the voters for a two year term and a commissioner of common schools elected for a three year term.
[3]Article III, Section 2.
[4]Article III, Section 5.

[6]The constitution now provides (Article III, Section 18) for the governor to fill vacancies in these four offices, by appointment, until the next regular election.
[6]These states are: Arizona, Florida, Maine, Maryland, New Hampshire, New Jersey, Oregon, Tennessee, Utah, West Virginia and Wyoming.
[7]Article III, Sections 15, 16.
[8]Article III, Sections 16, 17.
[9]Article III, Section 6.
[10]Article III, Section 7.
[11]Article III, Section 10.
[12]Article III, Section 11. The governor may suspend execution of a sentence for treason and report the case to the General Assembly which has power to pardon, commute the sentence, direct its execution or grant a further reprieve.
[13]Article III, Section 13.
[14]Article III, Sections 8, 9.
[15]Article II, Section 16.
[16]Article III, Section 19. Corresponding section for legislators: Article II. Section 31: for judges, Article IV, Section 14.
[17]Article III, Section 20.
[18]*Kraus v. Cleveland* (1950) 58 Abs. 353, 360.

CHAPTER V

THE COURTS AND THE JUDICIARY IN OHIO

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The provisions of the state constitution of Ohio dealing with the judicial branch of the government have been the source of controversy since the early days of the state.[1] The framework established by the constitution of 1802 for the state courts had become obsolete and archaic before 1851. In fact, it was largely because of deficiencies in the judicial system that the Constitutional Convention of 1851 was called.[2] This body rectified many of the worst features of the 1802 document, but popular dissatisfaction with the judicial article continued. This article, which is now Article IV of the constitution, probably has given rise to more amendments through legislative proposals and popular referenda than any other part of our basic law. Yet, despite these numerous changes, there are few persons who are completely satisfied with the present system. Substantial defects are seen in the scope of the provisions of the article, in the court structure which they establish, and in the caliber of judges who have been chosen.

Article IV of the Ohio state constitution deals in great detail with the organization and jurisdiction of the state courts.[3] This produces a rigidity which causes difficulty in adjusting the court system to changing social, economic and political needs. If the Constitutional Convention of 1851 had followed the example of the federal constitutional convention of 1787 the judicial article of the state constitution would have contained three sections, the first providing generally for a "Supreme Court and such inferior courts as the General Assembly may from time to time ordain and establish." The second would have defined the jurisdiction of the state courts in general terms. The third would have defined treason against the state. More is not necessary. The excessive detail now contained in the judicial article of the constitution is mainly legislative matter which good practice would leave to the General Assembly to decide. A simpler statement of the organization and functions of the state courts would place the responsibility for the continued adaptation of the state judicial system where it belongs—upon the elected representatives of the people.

The Court System of Ohio

The court system established by the Ohio Constitution of 1851, as amended to date, includes a Supreme Court, ten Courts of Appeals and a multitude of local courts. There is little to criticise in the two ap-

pellate levels, except that it seems unwise and unnecessary to describe appellate court districts in the constitution as now is done.[4] This makes the readjustment of district boundaries to equalize the burden of cases too difficult. It should be left to the General Assembly. This difficulty now is taken care of, in part, by statutes authorizing the Chief Justice of the Supreme Court to assign judges of Courts of Appeals from one district to another for temporary service.[5]

The main difficulty with the structure of the courts as established by the constitution is the complexity, overlapping, duplication and lack of expert service which exists at the local level. There is a court of common pleas in each of the eighty-eight counties of the state, consisting of one or more judges. In each county there is a probate court, except that this may be combined with the court of common pleas, upon vote of the people of the county, as has been done in three counties of the state. In the larger counties there is a court of domestic relations which is a branch of the court of common pleas. This court deals with problems affecting family life, such as divorce and alimony, as well as adoptions, juvenile delinquency and dependency. In those counties which do not have courts of domestic relations, juvenile cases are dealt with by the probate court.

Within each county there are a number of other judicial officers. For each township there are two justices of the peace. In villages and small cities, the mayor has the powers and functions of a justice of the peace. In both cases these officers are not required by the constitution or laws to be trained in the law. In both cases, also, these officers are paid for their judicial duties in criminal cases from the costs collected in cases in which the accused is convicted. This situation was the source of criticism by the Supreme Court of the United States in the case of *Tumey v. Ohio.*[6]

In all the larger cities of Ohio municipal courts have been created by special acts of the General Assembly. While many of these courts have but one judge, the ones in the largest cities have several. The jurisdiction of these courts varies widely in both civil and criminal matters. Generally speaking, they have concurrent jurisdiction with the common pleas court of the county in civil cases involving small damages but cannot try felony cases. They may dispose of misdemeanor charges, but in felonies the municipal judge may only hold a preliminary hearing and bind the accused over to the grand jury. The trial, in case an indictment is returned, is held in the common pleas court. Village mayors and justices of the peace have similar functions in preliminary hearings.

Need for Improving the Court System

Such a complex system of minor courts serves no one well. Even the attorneys often are confused as to which court will serve their clients' interests best. Sometimes there are as many as four different

courts which have jurisdiction over the subject matter of a civil action. In addition, state highway patrolmen have their choice of several different courts in which to bring their prosecutions for violation of state law. This system of courts arose out of a desire to make justice easily available to every citizen. In the days of the horse and buggy this ideal required a judicial officer at every crossroad. The same result can be attained today with many fewer courts and many fewer officials. Furthermore, the frontier conditions which made it desirable, because of a shortage of qualified lawyers, to commission laymen as magistrates no longer exist.[7]

A constitutional convention, if called in 1953, should give careful consideration to the problem of unifying and simplifying the court system at the local level and of staffing it with competent, legally trained personnel. This might be accomplished by the adoption of the abbreviated and simplified Article IV mentioned above. In this case the problem would be simply transferred to the General Assembly. Or Article IV could be rewritten so as to provide for a single judicial court in each county with special branches for probate and juvenile or domestic relations matters. Local magistrates could be provided for, either full time or part time, on a salary rather than a fee basis, as additional judges of the county court. They could be assigned by the presiding judge of that court to serve as city police judges or to replace mayors and justices whose services in a judicial capacity would not longer be required.

Method of Selecting Judges

The concern of many citizens over the quality of the judicial officers who are obtained by our present system of selection in Ohio is another important aspect of the problem. For the Supreme Court, Court of Appeals, Common Pleas and Probate courts, the judges now are nominated in partisan direct primaries by a plurality vote and voted upon at an election on a non-partisan judicial ballot, a majority (to all intents and purposes) being necessary to a choice. All of these officers now are required to be lawyers. Judges of the municipal courts are chosen in various ways, usually by a non-partisan ballot. They also must be attorneys. Justices of the peace are elected on partisan ballots; and village and city mayors, some on non-partisan and some on partisan ballots, but primarily for functions other than judicial. Neither of these classes of officers need be attorneys, although some now are so qualified.

Many states have conducted extensive research into the problem of more efficient, yet adequately controlled, judicial administration in recent years.[8] After much deliberation, California adopted a constitutional amendment in 1934 which has many advantages over that now in use in Ohio. Although the California plan was made to apply automatically only to the appellate courts, still county courts could adopt, and many have adopted, the plan by local option. Under the amendment, members of the courts notify the secretary of state at the end of

each six year term to place their names on the ballot for reelection. Each justice then runs on a separate ballot for confirmation of his services by the people. In short, he runs against his record as a judge and not against other candidates for reelection. If he is defeated, or if he does not choose to run, vacancies are filled by appointment by the governor upon approval of a board comprising the chief justice of the Supreme Court, the presiding judges of the courts of appeal, and the attorney general until the next general election, at which time the judge must commit himself to election so that the people may confirm the appointment for a term of six years or create a vacancy.

The obvious advantages of the plan are: 1) judges are nominated by intelligent responsible agents; 2) democratic checks are maintained through periodic popular ratification or recall; 3) judges are relieved of having to expend the time and money necessary to secure competitive reelections every six years; 4) the judge runs against his own record and not against some popularly backed political leader who may not have the qualifications for office.[9]

The New Jersey constitution, recently adopted, provides a slightly different, but substantially similar, procedure. In that state all the judges of the courts are: 1) appointed by the governor with the consent of the senate; 2) they must have been practicing attorneys for at least ten years; 3) appointment is practically impossible without recommendation from the Bar; 4) confirmation of the appointment cannot be made by the senate without seven days notice of the appointment having been given to provide an opportunity for protests to the appointment; 5) the qualifications of each appointee are reevaluated at the end of seven years of service, but if reappointed, he holds his office thereafter during good behavior. New Jersey provides for retirement at seventy years, and swift and easy removal of incompetent persons from office.[10]

The Missouri constitution is another new instrument attracting the attention of Bar associations and research agencies all over the country. It is more verbose than that of New Jersey. Much detail is contained in Article V of that constitution which would be more appropriate for legislative action than constitutional pronouncement. Its method for appointment of judges and confirmation of the appointment by popular election is not substantially different from the California plan already mentioned. However the new Missouri constitution may have reformed the judicial system in that state, it would seem to fall short of the model constitution provisions or those found in the New Jersey constitution. It repeats some of the objections current to the constitution of Ohio, such as listing the inferior courts making them constitutional rather than statutory in origin and organization.[11]

According to the current issue of the *Book of the States*, twenty-two of the states have provided for the appointment of judges for one or more of their courts, over the years and a number of states currently

are considering the need for complete constitutional revision to bring about further change in their judicial system.[12] California took steps in this direction in 1947; New Hampshire has tried desperately three times in the past thirteen years to revise its constitution; North Carolina and Oklahoma have been working to this end. Florida, Illinois, South Carolina, Texas and Wisconsin all have active citizen's groups, like Ohio, conducting studies to attain the same results for their constitutions.[13]

Judicial Provision in the Model State Constitution

The Committee on State Government of the National Municipal League has been engaged in research and study of state administration for over twenty years. In 1921 the League published its first *Model State Constitution*, and, since that time, it has been revising its recommendations from time to time to accomplish efficiency in the organization of a model judiciary. In 1948 the fifth revision brought the model up to date.[14] In this edition it is stated that a constitution to be adequate today in the area of judicial administration must contain the following provisions:

> *First*, the judiciary should comprise one unified system called a general court;
>
> *Second*, the general court of justice should have original jurisdiction throughout the state of all claims, including claims against the state;
>
> *Third*, the jurisdiction of each department and subdivision of the general courts should be determined by statute or general rules of a judicial council and should not be spelled out in the constitution itself;
>
> *Fourth*, the office of chief justice should be separated from that of the other judges of the supreme, appellate, and trial departments of the unified court and made elective for a term of eight years;
>
> *Fifth*, the chief justice ought to appoint all other judges from eligible lists containing three names for each vacancy, submitted to him by the judicial council (hereinafter described), and should appoint all clerks and other attaches of the court;
>
> *Sixth*, appointed judges should go to the people for affirmation or recall at the end of a term of four years, and each judge should run against his own record and not against other contenders for the office;
>
> *Seventh*, vacancies in the office of chief justice should be filled by the judicial council with the requirement that the judge run in the next general election following his appointment to the office;
>
> *Eighth*, retirement, pensions and removal from office for cause were thought to be proper items for the model constitution, but details with reference to each were left to the legislature. The

constitution does contain a specific provision for removal of judges by resolution of two-thirds of all the elected members of both houses of the legislature, after notice and hearing, as a substitute for impeachment. The judicial council is authorized to remove judges and ministerial agents of the court by a procedure set up in the constitution;

Ninth, the constitution leaves the compensation of judicial officers to the legislature, as now in Ohio, but specifically provides that neither increases nor diminution of salaries so fixed may take place during any term of office.

Another and *tenth* provision of the model constitution provides with considerable particularity and definiteness for a judicial council with considerably broader powers than judicial councils now have.[16] Among other things, it would have the power to make or alter rules relating to pleading, practice, or procedure in the courts, and would be able to make rules respecting the administration of the court itself, such as the duties of the administrative director and his subordinates, determine such things as the location of offices and places for sittings of the various departments and subdivisions of the general court, and establish or alter judicial districts for the more efficient assignment of judges and cases for hearing. Of course, the legislature never loses power to alter or repeal these rules or to substitute rules of its own making. It was felt, however, that rarely, if ever, would the legislature find occasion to use its power if the judicial council, much closer to the scene of judicial administration than itself, made adequate provision for the situations as they arose. The constitution would safeguard the client and the practitioner alike by requiring that all rules and regulations of the judicial council be published with the statutes of the legislature so all may be able to find them and be governed accordingly. The judicial council organization is also specified in the *Model State Constitution,* dividing membership among the judges of the courts, lawyers, the chairmen of the judicial committees of both houses of the legislature, and three laymen, to be designated by the chief justice, the state Bar, the governor, or to take office *ex officio.*[16] Quite an adequate discussion of the theory behind the provisions of the current model constitutional provisions on the judiciary may be found in the article by Rodney L. Mott which accompanies the *Model State Constitution.*[17]

Obsolete Sections Relating to the Judiciary in Ohio

There are two provisions of the present Ohio constitution relating to the judiciary which are obsolete, and, hence, in any revision through a constitutional convention, consideration should be given to their elimination. The first of these is Section 22 of Article IV, adopted in 1875, which provides for a commission of five members to assist the Supreme Court in clearing its docket. This commission accomplished its purpose and was allowed to disappear at the end of 1878. No use has been made of this article since that time. In view of the fact that the

Chief Justice of the Supreme Court now has power to assign judges of the Court of Appeals to perform such duties, it would seem that this article is superfluous. The other provision constitutes Article XIV of the present constitution under the title of "Jurisprudence." This article consists of three sections, all related to a single subject. It was adopted in 1851 and required the General Assembly at its first session after the adoption of the 1851 constitution to provide for the appointment of three commissioners to "revise, reform, simplify and abridge the practice, pleadings, forms, and proceedings of the courts of record" and "as far as practicable . . . provide for the abolition of the distinct forms of action at law . . . without reference to any distinction between law and equity." This commission was appointed, made its report promptly and resulted in the adoption of the present Ohio Code of Civil Procedure in 1853. No use has been made of this article since that time. It, too, should be removed from a modern constitution.

Summary of the Suggestions for Modernization of the Judicial Article

Of all the articles of the constitution of 1851, as amended, probably the fourth, on the Judiciary, is most in need of revision. Of seventeen present sections of the article, eight date from 1851, one from 1875, five from 1912, and three from subsequent years.[18] The Ohio State Bar Association through its Committee on Judicial Administration and Legal Reform has, from time to time since the organization of the Bar Association in 1880, made recommendations for the improvement of the judicial system.[19] This committee and many members of the Bar still feel that this job is incomplete.

The aspects of Article IV which should be given careful consideration by any constitutional convention include:

1) A simplification of the court system to provide for a Supreme Court, Court of Appeals and a single county court in each county. Some feel that the constitution should provide only for a Supreme Court after the federal model, leaving the establishment of other courts to the legislature.
2) A unified court system at the county level with general jurisdiction in the county court to merge the present jurisdiction of courts of common pleas, probate, domestic relations, municipal, mayor's and justice courts into one county court with county-wide jurisdiction. If the legislature could be relied upon to enact such a reform, the constitutional provision should simply authorize the revision; however, because of pressures it would seem desirable that it be included at least in outline, in the constitution.
3) Minor civil cases and misdemeanors, as well as preliminary examinations in felony cases might be disposed of by commissioners of the county courts who would be qualified attorneys appointed by the presiding judge of the county

court, who would have their offices in the villages and other centers of population in all parts of the county. As a part of this reform, the legislature might well provide for a simplified procedure in presenting cases before such commissioners to provide minimum costs and to make it unnecessary to have the services of a lawyer in cases involving small sums of money or other minor rights.

4) The judicial council which is now provided for by legislation could be strengthened perhaps by referring to it in the constitution. This council might be given power to make rules of procedure, as well as to serve as an administrative research agency for the courts.

5) The power and authority of the Chief Justice of the Supreme Court might well be increased to make him the administrative head of the court system with powers similar to those now possessed by the Chief Justice of the United States Supreme Court.

6) In view of the reluctance of the General Assembly to provide an adequate retirement system for judges, there is some justification for including in the constitution a mandate on this subject.

7) The Supreme Court might be required to give opinions to the governor and legislature on the constitutionality of pending legislation as is now done in several states.

8) In view of the national criticism of the provision of the Ohio constitution which prevents a majority of the Supreme Court from holding an act of the legislature unconstitutional except by concurrence of all but one of the judges when the act has been held constitutional by the Court of Appeals, a convention might wish to change this provision to conform with the general practice in other states. In most states a majority of the members of the Supreme Court may declare any legislative act unconstitutional, regardless of the holding of the Court of Appeals on the question.

9) The judicial apportionment for the Court of Appeals could be taken out of the constitution and establishment of such districts left to the judicial council in order to promote efficient judicial administration.

10) A convention should consider the desirability of adopting a system of selection of judges similar to that now practiced in California, Missouri and New Jersey. Some people feel that the governor might appoint the Chief Justice and that the constitution might provide that the Chief Justice appoint all other judges of the courts on a merit basis.

11) Section 22 of Article IV, creating a Supreme Court Commission, and all of Article XIV, which created a code revision commission, should be removed from the constitution as obsolete.

REFERENCES

[1]See the articles published by Vallandigham in *The New Constitution,* pp. 195-202. Professor F. R. Aumann of Ohio State University covers this period in his article on "The Development of the Judicial System in Ohio." *Ohio Archaeological and Historical Quarterly,* XLI (1932), pp. 211, 212.

[2]When the Constitution of 1802 was adopted, there were only nine counties in the state with a population throughout the area of less than fifty thousand. By the time Governor Shannon went to the legislature in 1843 to demand a constitutional change of some sort, even an amendment, seventy-nine counties had been created to take care of a population which had grown to two millions. By 1847 a veritable crisis was present with eighty-two counties. During this whole time, the population was overwhelmingly rural. In 1810 the ratio of urban to rural population was 1.1% to 98.9%, while in 1850 it was 12.2% to 87.8%.
See: *Ohio Sixteenth Federal Census.* (Compiled by Edward J. Hummel, Secretary of State) Columbus, Ohio, September 1, 1941, p. 6.

[3]See subsections 2-10 of the Article noted in the text.

[4]Article XI, Sections 12 and 13. At the Federal level, and in some of the states, districts are created and changed by statute, according to need.

[5]See sec. 1469 of *Page's Ohio General Code,* Annotated.

[6]273 U. S. 510 (1926).

[7]Roscoe Pound: *The Spirit of the Common Law,* pp. 119, 120.

[8]See *Constitutional Revision in the States of the Union.* A Report to the Constitutional Convention Committee of the Ohio Program Commission. Columbus, Ohio, 1950.

[9]See, C. Aiken: A New Method of Selecting Judges in California. *Amer. Pol. Sci. Rev.,* XXIX, pp. 472-474.

[10]*What the Constitution Means to You.* A Report to the People of New Jersey by Their Elected Delegates to the Constitutional Convention. New Brunswick, New Jersey, 1947, pp. 5, 6.

[11]See, the pamphlet, *Proposed Constitution of the State of Missouri.* Jefferson City, Missouri, 1945, p. 37.

[12]*The Book of the States,* 1950-51. The Council of State Governments, Chicago, Illinois, VIII, pp. 81-95.

[13]See, *Constitutional Revision in the States of the Union. op. cit., supra.*

[14]*Model State Constitution.* (With Explanatory Articles) prepared by Committee on State Government of the National Municipal League. 5th ed., Rev. 1948. New York City, 1948, p. 10, *et seq.*

[15]*ibid.,* p. 10, Article VI, secs. 600, *et seq.*

[16]*ibid.,* p. 11, secs. 603, 604. See also, sec. 605.

[17]*ibid.,* p. 35, *et seq.*

[18]See the manuscript report of the Committee on Constitutional Revision of the Social Science Section of the Ohio College Association, Columbus, Ohio, 1948, p. 4.

[19]See, the *Report of the First Annual Convention of the Ohio State Bar Association,* and the *Third Annual Convention Report.* See also the report of *The Cincinnati Conference* held October 20, 1934, and reported in The University of Cincinnati *Law Review,* VIII, p. 359, *et seq.* Cf. also Report of the Judicial Administration and Legal Reform Committee on the Ohio Judicial System and the Administration of Justice with a Plan for Complete Reorganization, *Ohio Bar,* April 30, 1951, XXIV, pp. 253-315.

CHAPTER VI

SUFFRAGE AND ELECTIONS IN OHIO

BY

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The present provisions of the Ohio state constitution pertaining to the elective franchise appear in Article V, while those dealing with elections appear in Article XVII, although there are several sections of other articles, such as Section 1 and 3 of Article III, which also deal with elections. Four of the seven sections in Article V date from 1851, one from 1912, one from 1923 and one from 1949. Article XVII was added to the constitution in 1905. However, Section 2 of that article was amended in 1947. The provisions of Article III referred to above were written in one case in 1851, and in the other in 1885. At the outset, it would seem desirable to suggest that if a constitutional convention is held, it should give consideration to the consolidation of all these provisions into a single article dealing with "suffrage and elections."

Among problems relating to suffrage and elections which might arise in a constitutional convention are the following:

Time of Elections

The constitution now provides (Article XVII, Section 1) that general elections shall be held annually on the first Tuesday after the first Monday in November. It might be well to add the proviso that the time of elections may be altered by law. Perhaps such alteration should be made only if favored by a two-thirds vote of the legislature. Another question might relate to the wisdom of prohibiting state-wide special elections. Provision might well be made for the separation of local elections from state and national elections as is now done by statute. State and national elections occur in even years and local elections in the odd numbered years. There are some who feel that an even greater separation is desirable and that the national elections should be held in the even years, state elections in the odd years and municipal elections in the spring of either the odd or even year.

Qualifications for Voting

The constitution now provides (Article V, Section 1) for United States citizenship, an age of 21, residence in the state for one year and in the county, township, or ward, such time as may be provided by law. At least one state, Georgia, has reduced the age limit for voting to eighteen years. A constitutional convention probably would wish to consider this question. The present residence requirements seem acceptable, as do also the provisions in the present constitution that the local residence requirement be fixed by law. There is some opinion, however, that these requirements should appear in the constitution. Thirty-three states provide for a year's residence in the state, eleven for two years, and four for six months. The extent which literacy tests should be required for voting is a question to which some attention might be given.

Gain or Loss of Residence

The present constitution contains no provisions concerning the manner in which residence may be obtained or lost. A clearer definition of what constitutes gain or loss of residence seems to be desired in certain quarters. The new constitution of Missouri, for example, specifies that no person shall gain or lose residence by reason of his presence or absence while in the civil or military service of the state or nation, or in the navigation on the high seas or waters of the state or nation, or while in a poorhouse or asylum at public expense or in a public prison, or while a student at an educational institution. Some such provision might well be inserted, although the question as to the location of the voting residence of college students is one upon which there might be difference of opinion.

Disqualifications from Voting

At present, the Ohio constitution contains no provision concerning disqualifications from voting, except those in Article V, Sections 4 and 6. By these sections the General Assembly is authorized to exclude from voting or holding office any person convicted of bribery, perjury or other infamous crime, and idiots and insane persons are barred. The same is true of persons convicted of a felony. This is now done by statute. Perhaps it would be well to provide that persons who have finished prison terms or have been pardoned should be automatically restored to full citizenship, since restoration by pardon of the Governor is now practically automatic. Many people feel also that any persons guilty of corrupt practices in connection with an election should be prohibited permanently from voting. Perhaps the legislature should be specifically directed to pass laws applicable to this area in addition to the general provision quoted above.

Registration

There is difference of opinion as to whether the constitution should specifically *require* registration for voting. The Ohio constitution does not do so now. On the other hand, it would seem wise to provide specifically that registration may, by law, be required for voting. This would clear up any question as to whether registration is an added qualifica-

tion going beyond the qualifications expressly mentioned in the constitution. The details of registration legislation should be left to the legislative branch of the government and should not be included in the fundamental law.

Methods of Voting

The present brief statement in Section 2 of Article V in the Ohio constitution, "All elections shall be by ballot" has served its purpose well, but it might properly be enlarged to provide that secrecy of voting is to be preserved and that the legislature may by law prescribe the methods of voting and of counting the votes, including, if it sees fit, provision for the use of mechanical devices. The question will probably arise as to whether the newly adopted amendment (Article V, Section 2a) providing for the office type of ballot (Massachusetts ballot) should be included in a new or revised constitution. This is probably one of the details which should be left to the legislature rather than included in constitutional provisions now that the will of the people on the matter is known.

Absent Voting

The constitution now is silent on the question of absentee voting. The whole elaborate system which now exists rests upon statutes. While it would seem undesirable to write the system into the constitution, it may be desirable to give the whole practice a constitutional basis by including in the constitution a section which would simply say that provision may be made by law for the casting and counting of absentee ballots. Certainly the details should be left to the law makers.

Selection of Election Officials

The details of the election machinery can properly be left with the legislature but the constitution might well contain a sort of guarantee that undue partisanship be avoided. How this can be done effectively is a real problem. Some have suggested that the constitution provide that, while the legislature be given the power as to details even to the extent of providing party representation, the election officials should be appointed "according to merit and fitness to be determined, so far as practicable by competitive examination." (Quoted from the *Model State Constitution* published by the National Municipal League, 1948). Another possibility would be to require that election officers, although appointed on a partisan basis, should be required to attend training courses and pass examinations on election laws and procedure.

Miscellaneous

There are a number of pertinent issues in connection with constitutional revision which are related to suffrage and elections which

properly belong in other parts of the constitution. All provisions relative to the *initiative and referendum* should be included in the parts of the constitution dealing with legislative powers. The *method of choosing judges* belongs in the sections dealing with the judiciary, and the questions as to *length of terms* of various elective offices should be settled in sections of the constitution other than those dealing with suffrage and elections. A problem which is closely related to the effectiveness of the ballot is that which arises from the fact that the voter at the election booth is presented with a long ballot, involving the filling of many positions by popular vote which might better be filled by appointment. The *short ballot* movement has a direct relation to the effectiveness of the ballot. There probably should be no mention of the short ballot in the section on suffrage and elections, but the constitution should shorten the list of elective officers and should authorize the legislature, under certain conditions, to move in the direction of a shorter ballot.

A question which will undoubtedly arise will be whether the provision for direct *primary elections* should be continued in a new or revised constitution. The general opinion of authorities in constitutional law would probably be that this is another example of the type of problem concerning electoral devices which should be left to the legislature. Certainly a constitutional convention should become familiar with the practice in such states as New York where nominations for statewide offices are made by party convention, while nominations for local offices are made through a direct primary. Many of the difficulties which are now experienced with the direct primary might be avoided by adopting such a change. Consideration might also be given to the possibility of authorizing party conventions to indorse, officially, candidates for office in primary elections. The experience with the presidential preference ballot which is contained in the same section of the present constitution has not been too happy. A convention might wish to consider the removal of this mandatory requirement.

The present constitution of Ohio contains no provision authorizing the recall of elective officers. Several states have such provision but their experience with them has not been uniformly good. While there seems to be no crying need for instituting the recall in Ohio, a convention should consider it and it may be desirable to direct the legislature in the constitution to provide for some democratic means of ousting and replacing incompetent or corrupt elective officials. The shorter the ballot, however, the less important such a provision would be.

CHAPTER VII

FINANCE AND TAXATION IN OHIO

BY

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The Ohio constitution contains two different articles dealing with financial matters, Article VIII entitled "Public Debt and Public Works" and Article XII entitled "Finance and Taxation." The first of these contains thirteen sections, nine of which date from 1851, one from 1912, one from 1921 and two from 1947. The first section of Article VIII authorizes the state to contract debts to supply casual deficits or failures in revenues, or to meet expenses not otherwise provided for, but limits the aggregate debts at any time to $750,000. This limit was fixed in 1851 when such a sum represented a substantial portion of the state budget. It is unrealistic today and a convention would want to consider whether or not it should be raised or repealed. Under the provisions of section 2, debts to repel invasion, suppress insurrection or defend the state in war may be created outside the limitation of section 1. Because of the limits imposed by section 1, it has been necessary twice (in 1921 and 1947) to amend the constitution to issue bonds to pay a bonus to veterans of World Wars I and II.[1] As the bonds issued under the 1921 amendment have all been paid, section 2a could be omitted in any convention revision of the constitution.

The third section of Article VIII prohibits the creation by the state of any debt not authorized by section 1 or 2. Section 4 prohibits the state from loaning its credit to any individual association or corporation, or becoming a stockholder therein.

The fifth section expressly prohibits the state from assuming the debts of any county, city, town or township, unless such debts were incurred for the defense of the state. Such a limitation as this may be unwise. Municipalities cannot take bankruptcy. The state, by careful administrative control may try to prevent cities from having financial troubles, but when local governments are unable to meet their obligations, the state may have a moral duty to step in and protect persons who have invested in municipal bonds. Such a section as this needs reconsideration in the light of new federal laws.

Section 6 goes on to prohibit the legislature's authorizing cities to lend their credit to or become stockholders in a private enterprise although this is not to be construed to prevent the insuring of municipal property in mutual companies. The section concludes with a sentence added in 1912 which authorizes the legislature to regulate the rates

charged by insurance companies organized in or doing business in the state. It would seem that this should be transferred to the article on Corporations.

Sections 7 to 11 of Article VIII create a state sinking fund, establish an *ex-officio* sinking fund commission consisting of the governor, treasurer, auditor, secretary of state and attorney general. Most states have forbidden the issuance of term bonds, thus making sinking funds obsolete. A convention should consider whether such a fund is needed any longer in Ohio. If serial bonds are issued, the treasurer can easily pay them as due, and a sinking fund commission no longer would be required.

Article XII of the constitution consists of twelve sections, two of which date from 1851, six from 1912, one from 1930, one from 1933, one from 1936 and one from 1948. Nothing seems to invite constitutional amendments like an article dealing with finance and taxation. The older sections of this article are 4 and 5. These require the General Assembly to provide for raising revenue sufficient to defray the expenses of the state, including interest on the state debt; prohibit the levy of taxes except pursuant to law, requiring each such law to state the purpose of the tax and restricting its use to such object. In 1912 poll taxes were prohibited; debts for internal improvement were outlawed; inheritance and income taxes were authorized; the bonded debt of the state and its subdivisions was to be protected as to principal and interest; and franchise and excise taxes, as well as taxes on the production of minerals, were to be permitted. In 1930 half of all income and inheritance taxes was reserved to the county, school district, city, village or township in which it originates, as may be provided by law. A 1933 amendment imposed a ten mill limit on the taxation of real estate and permitted classification of property for purposes of taxation. In 1936 the state was forbidden to charge an excise tax on food for human consumption off the premises where sold. In 1947 an amendment forbade the use of moneys derived from motor vehicle or gasoline taxes for other than highway purposes.

Article XII is a hodge-podge of sacred cows. A constitutional convention certainly is needed, as it was in 1912, to rationalize all these conflicting rules. Furthermore, consideration needs to be given to whether or not the doctrine of state preemption of tax sources as created and developed by the Ohio Supreme Court shall stand or be modified by a constitutional provision authorizing cities to use the same sources of taxes as the state if they wish to do so. Some clarification also may be needed on the subject of exemptions, such as those of property used for religious and educational purposes, which are growing to unexpected proportions. It has now been long enough, also, to evaluate the experience with the ten mill constitutional tax limit on real estate and decide whether or not this section should be kept in its present form.

The provisions on finance in a state constitution, unless couched in the most general language, are in need of occasional revision. Both public demand for governmental services and the means of paying for them change. One marked manifestation of this change is the growth in recent decades of cities and their suburbs. Technological change and urban concentration of population not only have created additional demands for public services but also have changed the base upon which taxes can properly be levied. The ownership of real property, once the sole presumptive evidence of ability to pay taxes, no longer occupies such an important place. Intangibles, including private and federal debt and equities in corporations, now take on a far more important status than in 1802 when the first constitution was written. Further, an individual's salary or wage income may be substantial, with a high presumptive ability to pay taxes, and yet such a person may own little in the way of taxable real or personal property.

Some amendments have been made in the Ohio constitution to allow at least partially for changes in taxpaying ability and for the greater needs of modern living. The changes, however, have been in the nature of patchwork. No thorough-going revision has been undertaken to make the Ohio constitution a more satisfactory basis for legislation on taxation and expenditures to meet the needs of the present time. The changes which have been made can be characterized as a mixture of legislation and constitutional amendment. For example, the basic provision of a sales tax is statutory legislation; the prohibition of excise taxes on food sold for consumption off the premises is in the constitution.

With the exception of the thirteenth Section of Article XVIII, which furnishes the Ohio Supreme Court's basis for the preemption doctrine, there is no explicit provision in the constitution for the separation of revenue sources between the state and local governments. The state relies mainly on excise, inheritance and indirect taxes for its support, while the local governments have their main source of locally controlled revenue in the tax on property. A considerable amount of the state-collected taxes are returned to the local units either on the basis of origin or of presumed need. The separation of revenue sources, and the distribution to local units of state-collected taxes, are based on both constitutional provisions and legislation, with no clear theoretical distinctions.

Financial provisions of the Ohio constitution which at the present time contain ambiguities, are inequitable in their tax incidence, or fail to meet the demands of present day conditions of living are analyzed below.

The Ten Mill Limitation

One of the most debatable features of the constitutional provisions respecting taxation is the limitation of real property tax levies to ten

mills on each dollar valuation of real property within the taxing jurisdiction. If such a limitation were absolute it would be intolerable. Accordingly, Article XII, Section 2, provides that "laws may be passed authorizing additional taxes to be levied outside such limitation" when approved by at least a majority vote within the taxing district. The apparent purpose of the constitutional provision is to restrain extravagance within taxing subdivisions. Whether it has been effective in its purpose is questionable: the levy in all metropolitan and most rural communities invariably exceeds ten mills,[8] and this seems inevitable in view of the rising costs of government. The requirements for participation in the School Foundation Fund make some excess inevitable.

A full dress reconsideration of this provision of the constitution by a convention seems desirable at this time. The ten mill limitation was born in a severe depression. It seems fantastically inadequate and repressive in a time of inflation. Its proponents, in the campaign which led to its adoption, promised that the income lost by the limitation to the municipal governments would be made up by the General Assembly, from other tax sources, according to demonstrated financial need. The blundering and patchwork series of efforts to make good on these promises has not inspired confidence in the capacity of the state lawmakers to solve the problem. A constitutional convention might well make this one of its major items of business and by a well-considered constitutional provision end the incessant bickering and lobbying between the cities and the legislators.

One example of the fluctuating policy of the Assembly in this area is afforded by the series of laws which fix the percentage of vote required in order to approve levies outside the limitation. This has varied from a simple majority to 65%, depending on the problems of the moment and on the nature of the subdivision involved. Preferential treatment has been extended to school districts throughout the history of the limitation. Operating levies for city government have been the most difficult to obtain. While it seems clear that there should be some flexibility in tax rates, it seems equally evident that the constitution might define the conditions for the adoption of special levies more accurately. It would be possible to state clearly that such levies might be adopted in all cases by a simple majority of those voting. A convention might well consider such a change.[9]

Taxation of Minerals

It would be hard to imagine a more ineffective method for taxation of minerals than that required under Article XII, Sections 2 and 10. The former section requires that land shall be taxed by a uniform rule, according to value; the latter authorizes the imposition of taxes upon the production of minerals. Minerals in place are certainly "land" for taxing purposes, although, of course, minerals are personal property when they are severed from the land, hence, under Article

XII, Section 2, they must be taxed in the same manner and to the same extent as all other land. It seems clear that the legislature could not differentiate between land containing minerals and other land.[4]

This leads to obvious difficulties, which can be illustrated by an example. Suppose tract A has a poor grade of coal which has been mined sufficiently so that the value of the tract can be reasonably estimated by the county auditor. Tract B has rich oil deposits which are, however, unknown because there has been no drilling in the area. From a practical viewpoint, the minerals on tract A will be taxed, while those on tract B will not be taxed, simply because their existence is not known. Moreover, even if the existence of oil is known, it is impossible to do more than make a very rough guess as to its value, although the coal in place may be measured approximately by core drilling or estimated on the basis of local geological formation.

Section 10 does nothing to relieve this inequity. It simply authorizes imposition of severance taxes—that is, taxes measured by the amount of mineral actually removed from the land. But since real estate taxes on *all* land must be imposed at a uniform rate, the severance taxes would have to be added to the property taxes. Thus, if severance taxes were enacted without revising the assessments to exclude minerals in place, they would add to the tax burden of owners of such minerals, but would not equalize it.[5]

This embarrassment has not gone unnoticed. The Ohio tax commissioner conducted a study of the tax and revenue system of the state of Ohio and its political subdivisions and made a formal report to the governor in 1947. It was then recommended that a severance tax be *substituted* for the *ad valorem* tax on minerals. Not only was it believed that such a tax would be more equitable, but also that "the substitution of a severance tax for the present ad valorem (real estate and personal property) tax on minerals and mineral rights will provide additional revenues in many counties that are now requesting increased aid from the state.'" However, no action was taken.

Exemptions

Article XII, Section 2, limits in somewhat dubious language the authority of the General Assembly to grant exemptions from real estate taxes to various charitable, religious and educational groups. Under that section, exemptions are authorized only for "burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose." The section has been interpreted by the Ohio Supreme Court to limit sharply the exemptions claimed by various organizations. The problem is one of extreme difficulty and a detailed consideration of the numerous (and occasionally inconsistent) decisions of the Supreme Court is not possible here.

However, two problems should be considered:

(a) Exemptions For Public Housing

Many Ohio cities are plagued today with slum areas and a pressing need for adequate housing. The problem was recognized by the Ohio General Assembly in 1933, when it passed the state housing law.[7] Under that act and Federal statutes, Federal funds were made available for slum clearance in Ohio. The Ohio Supreme Court once held that all housing developments were subject to Ohio real estate taxes. This decision was summarily reversed by the United States Supreme Court in *City of Cleveland v. United States*,[8] which held that these taxes could not be assessed, under the Federal constitution, against real estate owned by the United States.

But current administration of Federal housing assistance contemplates in some cases that the developments will be owned by parties other than the Federal government. In order that Federal assistance may be obtained in such enterprises, however, it is necessary under Federal regulations that the property be exempt from local real estate taxes. No exemption for this purpose is authorized by Article XII, Section 2. The Ninety-Eighth General Assembly sought to encourage slum clearance with Federal aid by amending Ohio General Code Sec. 1078-36 to provide that property acquired or owned by the housing authority established under the 1933 law "shall be public property used exclusively for a public purpose within the meaning of Article XII, Section 2, of the constitution, and shall be exempt from all taxation . . . " Ohio General Code Sec. 5356 was likewise amended to provide that such property should be exempt from real estate taxation along with other types of property mentioned in that section. However, the decision of the United States Supreme Court in the *City of Cleveland* case required exemption only because of ownership by the Federal government. The immunity of the Federal government from taxation would hardly extend to non-governmental or even state housing authority ownership, notwithstanding that construction was originally financed by Federal funds.[9]

Whether public housing should be granted an exemption from ad valorem taxation is a question upon which debate frequently becomes heated. The General Assembly has resolved the question in favor of exemption. In view of the substantial doubt as to the constitutionality of laws establishing such exemption, it seems appropriate to consider the desirability of fixing the existence or non-existence of the exemption by constitutional provision.[9a]

(b) Charitable Exemptions in General

It is not easy to decide what is included within such terms as "institutions used exclusively for charitable purposes" and "houses used exclusively for public worship" as mentioned in Article XII. Interpretation of such terms on the basis of dry logic is not always possible

or desirable. Some recent decisions of the Ohio Supreme Court on the subject have drawn dubious distinctions which point out the need for making the limitations of Section 2 more specific.

For example, parish houses used as residences by ministers are subject to tax.[10] So is property used by an orphan asylum, notwithstanding that the legislature may specifically declare it to be exempt.[11] Also, property used to train persons for the ministry is taxable.[12] On the other hand, residences occupied by the president, professors and head janitor of a denominational college are exempt.[13] Likewise, it was recently held that, although living quarters for a janitor were furnished within a church structure itself, the entire structure was exempt.[14]

Nor does inconsistency end there. Exemption was denied for real property owned and used by the Battelle Memorial Institute in scientific research, because it received payment in some cases from industrial corporations for research done by the Institute on assignment.[15] On the other hand, real property of hospitals which charge fees to all those able to pay, but are non-profit organizations, was considered exempt by the Ohio Supreme Court in 1917 and still retains exempt status.[16] Chaos was recently increased by *Cleveland Osteopathic Hospital v. Zangerle*,[17] in which the Ohio Supreme Court held, with three judges dissenting, that since that hospital had shown a substantial profit for a short period of time it was not entitled to exemption. It was, however, a non-profit organization and applied the profits toward the retirement of its indebtedness. It had not previously been considered that an attempt of a non-profit organization operating a hospital to retire an indebtedness and insure solvency to resist a possible depression would result in a sacrifice of its exempt status. In none of these cases did the organization sought to be taxed seek a private profit. In every case services were rendered which might properly be considered as of value to the public. Sound tax administration would seem to require that the entire subject of exemptions be carefully reconsidered and that more specific limitation or expansion of the power of the legislature to exempt property should be expressly stated in the constitution.

Apportionment of Inheritance and Income Taxes

Article XII, Section 9, of the constitution requires that not less than fifty per cent of the income and inheritance taxes collected by the state shall be returned to local governments in the manner designated by the General Assembly. This section would seem to afford a minimum source of revenue to local governments. However, since an increasing number of people of wealth maintain their residences in suburban areas outside of the corporate limits of the city, the allocation may be made to a suburban municipality whose needs can be amply provided for through other taxes. Further, it is incongruous to earmark those revenues through the constitution and leave it to the General Assembly to earmark or appropriate under general statutes receipts from all

other taxes. This provision is legislative in character and should be removed from the constitution, thus leaving full discretion in the General Assembly as to the disposition of the proceeds of this tax.

When Can Cities Impose New Taxes?

No one needs to be told that Ohio cities are having serious financial difficulties. The reason is not far to seek. Their revenues arise primarily from the taxes on real estate. Many tax officials and tax payers doubt whether the burden of almost completely supporting local governments, now borne by property owners, should not be shared to a greater extent by persons who do not own property. For these reasons, cities and counties have sought repeatedly in the last few years to find new sources of revenue. If they do not find more revenue, the present practice of running to the state and the Federal government for a handout will become even more general and, indeed, more necessary, than it is today.

New sources of revenues for local government might include income, inheritance, sales and other taxes on consumption, however, in Ohio, many of these are preempted by the state. The principal funds for the operation of the state government are obtained from excise taxes of various kinds, although there is no state income tax in Ohio.

If cities were permitted to levy the same taxes as the state, very serious problems of tax administration might arise.[18] It certainly may properly be argued that the constitution ought to prevent a problem of this kind from arising by establishing a division of tax sources between the state and its cities.

In a series of cases the Ohio Supreme Court has held that cities cannot impose excise taxes where the state has entered the field, even though the General Assembly has not forbidden the city to do so. The cases are numerous and have been the subject of a penetrating study by the former Ohio tax commissioner.[19] A recent case will illustrate the point: In *Haefner v. City of Youngstown*,[20] the city-imposed tax on consumers of natural gas, water, electricity and telephone service was held void because the state had imposed a tax on the *public utility* and had exempted sales of utility services from the state sales tax. At no time did the General Assembly forbid the cities to impose the kind of tax involved in that case. The city ordinance was nullified only on the ground that the state "by implication . . . preempts the field by levying the same or similar excise tax." The former tax commissioner has expressed doubt that the legislature could, even here, specifically authorize that city to impose the tax under present interpretation of the constitution by the Supreme Court.[21]

Any constitutional limitation on the power of the General Assembly and the cities to allocate the total sources of tax revenue as their respective needs dictate is undesirable. Moreover, if the General Assem-

bly desires to exclude cities from using certain types of taxation it seems proper to require that it say so in plain terms. To seek exclusion "by implication" does not promote sound tax administration or public finance.

Clarification of the so-called doctrine of preemption is urgently needed and may be considered intelligently and at length through a constitutional convention.

Miscellaneous Tax Problems

Other problems appear of comparatively less importance than those discussed. Two are significant enough to require mention:

Article II, Section 1e prohibits the use of the initiative and referendum to pass a law authorizing classification of property or a single tax. No sound reason appears for such a limitation. The point has already been discussed in the chapter on Initiative and Referendum.

Article XII, Section 12, prohibits imposition of a sales tax on food to be consumed off the premises. It has been held that "food" includes candy and confectionery.[22] No exemption is available for drugs. No argument is needed to demonstrate the folly, so far as public needs are concerned, of taxing purchases of medicine and exempting purchases of candy.

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[2]2 Ohio CT 7015 (1950)

[3]Since the General Assembly has recently reduced the percentages required, the problem is less pressing than formerly, but without constitutional change, power remains in the legislative body to alter these laws at will. Cf. *Ohio General Code* Sec. 5625-18.

[4]See, e.g., *Reed v. County Board of Revision,* 152 O.S. 207 (1949).

[5]Twenty-eight states have severance taxes, including the major centers of mining activity excepting Pennsylvania. CT State Tax Guide 3402 (1950).

[6]Glander, "A Study of the Tax and Revenue System of the State of Ohio and its Political Subdivisions," 88 (1947).

[7]*Ohio General Code* 1078-1 to 1078-60.

[8]323 U. S. 329 (1945).

[9]See, Rice, "Intergovernmental Tax Immunities" 54 *Yale Law Journal,* 665-686 (1945).

[9a]In the recent case In Re Exemption, 155 O.S. 590 (decided June 21, 1951) five judges of the Ohio Supreme Court declared that the above cited Ohio General Code Sections 1078-36 and 5356 exempting public housing from taxation were unconstitutional. Two judges held those sections constitutional. The legal result of this case, therefore, is that those sections are constitutional, since Section 2, Article IV of the constitution requires the concurrence of all but one judge to nullify a legislative act (except, as was not the case here, in affirming a judgment of the Court of Appeals declaring an act unconstitutional). The practical effect of the decision, however, is to leave the future of tax exempt public housing still in doubt in Ohio, since constitutionality based on two judges as against five is too tenuous and tentative and will tend to affect adversely such practical factors as the issuance of bonds to finance public housing projects.

[10]*Watterson v. Halliday,* 77 O.S. 150 (1907).

[11]*New Orleans' Asylum v. Board of Tax Appeals,* 150 O.S. 219 (1948).

[12]*Bloch v. Board of Tax Appeals,* 144 O.S. 414 (1945).

[13]*Kenyon College v. Schnegly,* 81 O.S. 514 (1909).

[14]*In re Bond Hill-Roselawn Hebrew School,* 151 O.S. 70 (1949).

[15]*Battelle Memorial Institute v. Dunn,* 148 O.S. 53 (1947).

[16]*O'Brien v. Physicians Hospital Association,* 96 O.S. 1 (1917).

[17]153 O.S. 222 (1950).

[18]These problems are not insuperable; for example, the city of New Orleans and the State of Louisiana both have sales taxes and the taxes have been administered without conflict in this and other states having similar tax arrangements.

[19]Glander and Dewey, "Municipal Taxation: A Study of the Preemption Doctrine" 9 O.S.L.J. 72 (1948), also, Fordham and Mallison, "Local Income Taxation," 11 O.S.L.J. 217 (1950).

[20]147 O.S. 58 (1946).

[21]*op. cit.,* pp. 81-92.

[22]*Andrews v. Tax Commissioner,* 135 O.S. 374 (1939).

CHAPTER VIII

HOME RULE AND LOCAL GOVERNMENT IN OHIO

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What is home rule? The term itself has caused difficulty both among political scientists and in the courts. Rodney L. Mott, in an excellent recent study, has defined home rule as "a relationship between the cities and the state in which the cities enjoy the fullest authority to determine the organization, procedures, and powers of their own governments, and a maximum of freedom from control by either the legislature or state administrative officers.'" Some have defined home rule simply as the power to frame and adopt a charter.

Perhaps a brief glimpse into the history of state-local relationships will aid in clarification of the issue. From early times in our history, the courts have adopted an attitude that cities were created by the state and remained as creatures of the state. This complete subordination to the state applied not only to the actual creation of the municipal corporation and to the grant of basic powers, but, also, to each additional power which was found necessary or desirable.

Historical Background

In Ohio, from 1803 to 1852, the legislature treated each municipal incorporation and each change in municipal powers separately or specially for the most part. At times, under the pressure of many changes, efforts were made at establishing a pattern or general law;[2] but, generally, resort was to a specific charter of incorporation. Toward the latter part of this period, as both public and private corporations began to grow, the legislative burden became too great. In the convention of 1850, which framed the constitution under which Ohio still operates, the claim was made that "three-fourths of the laws of Ohio are special and local in nature.'"[3]

In the effort to reduce the volume of special and local laws, the 1851 constitution provided that "the General Assembly shall provide for the organization of cities and incorporated villages, by general laws . . ." and that "the General Assembly shall pass no special act conferring corporate powers.'"[4] Pursuant to these constitutional provisions, the General Assembly in 1852 passed the first comprehensive

general law for the organization of cities and villages and repealed all previous general and special laws. Under the act, incorporated places were classified as cities or villages, depending upon whether they had more or less than 5,000 population; and cities were further subdivided into classes of more or less than 20,000 population.[5]

Classification of cities by population is usually sustained by the courts; and, in fact, such classification of cities was sustained by the courts in Ohio for a period of fifty years between 1852 and 1902. However, during this fifty years, there were developed, by the General Assembly, population classifications so minute that the eleven principal cities of the state were each in a separate class and grade. This intent of the legislature to treat such cities individually was indicated by the fact that toward the latter part of the period the title of the acts and marginal notes in the statutes designated cities by name.

Most of the principal writers of texts on municipal government describe the period of municipal government beginning with 1850 as one of "extensive legislative interference" in the affairs of cities. Ohio was no exception. This same period has been characterized as being "the dark age of municipal politics," a period chiefly known for the Tweed ring in New York and its counterpart in many cities of the country. Though many of the "classified" special acts which were passed in this period may have been in the best interests of good government of municipalities, it cannot be denied that many had less lofty motivation. The Toledo case of *Knisely v. Jones,* cited below, illustrates the latter kind.

Early in 1902, the courts in Ohio began to look askance at classification as practiced in Ohio.[6] Then in the 1902 term of the Supreme Court came a series of cases from Cincinnati, Cleveland and Toledo challenging certain acts of the legislature on the basis that by the use of minute classification the laws were made special rather than general as required by the state constitution.[7] Underlying the culminating Toledo case lay an effort to strip independent Mayor Samuel N. "Golden Rule" Jones of much of his executive power by vesting control of the police department in a board appointed by the governor in all cities of class one, grade three (Toledo was the only city in this class and grade.)[8] In denying a writ of mandamus, the Supreme Court held that "The apparent legislative intent is to substitute isolation for classification." This case, with two others decided the same day affecting other cities of the state, nullified the whole classification system.[9]

As a result of the decisions of the Supreme Court, the Ohio legislature was immediately called into special session by Governor Nash and it performed the Herculean task of adopting a municipal code in a very short time. This code provided one form of government for cities, and one form for villages (under 5,000); the only variation allowed was that of providing an increasingly larger council for the more popu-

lous cities. The uniformity imposed by this code on cities, ranging from almost 400,000 to a mere 5,000 population, has proved too rigid. However, this code, with amendments, and subject to the 1912 constitutional amendments, is still the basic law in Ohio for municipalities which do not choose a home rule or optional charter.

As noted in the preceding paragraph, constitutional amendments adopted in 1912 attempted to provide two forms of relief from municipal code rigidity: 1) optional charters; and 2) home rule. The optional charters, authorized in Article XVIII, Section 2 of the constitution as so amended, permit the legislature to devise a number of general charters of different forms which may be adopted by municipalities. The Ohio legislature has framed three such charters providing for differing forms of city government: the federal plan (mayor-council), the commission plan and the city manager plan. Of course, these optional charters are subject to legislative amendment, and must be so amended if there is to be any alteration in the powers of municipalities operating thereunder.

Constitutional Home Rule in Ohio

The home rule provisions of the constitution adopted in 1912 consist principally of Article XVIII, Section 3 which provides that:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws,"

and Article XVIII, Section 7, which provides that:

> "Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."

Before examining the practice of municipal home rule in Ohio, two unusual aspects of the Ohio home rule provisions must be noted: 1) home rule is granted to all municipal corporations without regard to the size of the community; and, 2) the home rule powers granted by the constitution extend to all municipalities, not merely to those which adopt home rule charters.[10]

In Ohio the courts have had to define the nature and content of home rule because of two ambiguous phrases in the constitutional provisions: 1) "local self-government" and 2) "conflict with general laws." The courts are not happy about the task of interpretation as may be discerned in a 1917 case, *State v. Cooper,* in which the court says:

> "Indisputably these provisions are hazy and ambiguous, and it is unfortunate that the members of the Constitutional Convention did not more fully define the powers of local self-government committed to chartered cities, and thus relieve the courts from exercise of wide discretion and from never-ending appeals for construction of this constitutional clause; and likewise relieve the judicial department of the government from the criticism too often made that it has exercised the power of framing a Constitution—a power that has been lodged in the people."[11]

Fordham and Asher, in their excellent review of home rule powers in Ohio, state that "as the expression of a broad political idea, either the California or the Ohio term carries considerable meaning, but, as a legal concept, 'local self-government' is as lacking in sharpness of meaning, after thirty-five years of interpretation, as it was at the outset. It has been a fundamental difficulty with the home rule concept from the beginning that public affairs are not inherently either local or general in nature."[12]

In respect to "conflict with general laws", this same study points out that the courts have adopted the "head-on-clash" theory of conflict and have viewed general laws as those which apply uniformly throughout the state and which are of general concern to the state as a whole (*Froelich v. Cleveland.*)[13] A review of the cases shows that the court has not been consistent even under the above standards.

Judicial Interpretation of Home Rule in Ohio

Next let us examine the status of home rule in Ohio as it has developed in interpretation by the courts. For the organization and citation of principal cases we have relied heavily upon Fordham and Asher's study in the *Ohio State Law Journal* for the winter of 1948. We suggest that for a more extended knowledge of the specific situations and problems dealt with in the cases herein cited, the reader should examine the full texts and reasoning of the court decisions referred to.

A. Governmental Structure

Original incorporation must be under general law; thereafter local voters may choose (a) to remain under general law, or (b) to elect to come under an optional charter, or (c) to adopt a home rule charter. Peculiarly, a city operating under an optional charter may adopt a home rule charter, but a city operating under home rule charter cannot choose to come under an optional form.[14]

Cities have considerable freedom in fashioning the form of their government and in organizing its legislative and executive branches. However, a city may not create a municipal court,[15] even though it must provide suitable accommodations and facilities if such a court is established by the state.[16]

1. Police and Fire Departments. Police and fire protection, rightly or wrongly, are considered by the Supreme Court to be matters

of state-wide concern, and are therefore subservient to state legislation. Cities are bound by state laws setting up retirement systems,[17] prohibiting educational requirements for police examinations,[18] regulating work schedules and holidays for firemen,[19] and requiring that disciplinary hearings for police be held by the safety director and not by the city manager.[20]

2. Health Departments. The state may create health districts and impose upon municipalities the burden of financing them,[21] and may require installation of sewage disposal facilities.[22] Where the state legislature has indicated an intention to exempt health district positions from civil service by striking out merit provisions from a previous law,[23] the contrary civil service sections of a municipal charter do not operate.

3. Ad Hoc Districts. The creation by the state of flood control (and probably housing) authorities within but not coterminous with cities, have been held a valid exercise of state power[24] but such agencies could not, under Ohio court theory, be established by a city under a home rule charter.

B. Personnel

Generally speaking, the qualification, duties and manner of selection of purely municipal officers is within the area of local self-government.[25]

1. Civil Service. The constitutional requirement of civil service applies to employees of state, county and city;[26] no mention is made of villages, and the courts have held that it does not apply to them.[27]

A home rule charter provision on civil service in compliance with the constitution but not with the statute has been upheld.[28] Conflicting decisions are found with regard to civil service regulations at variance with the state statute regarding police department appointments.[29] Statutes supersede a charter with respect to fire, police, health and municipal court employees; thus, police examinations cannot be closed to persons who cannot meet certain education requirements,[30] health district[31] and court employees [32] cannot be required to take civil service examinations, and the city cannot set up compulsory retirement provisions for firemen and policemen.[33]

A city cannot legally enter into an employer-employee contract providing for a check-off on wages.[34]

2. Qualification of Electors. Cities may prescribe qualifications of electors for municipal elections, as indicated in a 1917 case in which a city granted woman suffrage.[35]

3. Nominations, Elections. Municipalities may determine the appointment or election of municipal officers, method of nomination and

manner of conducting elections for municipal officers.[36] Courts have sustained the substitution of nomination by petition for the direct primary,[37] proportional representation,[38] conferring the judicial powers of a mayor on the president of the council.[39] And, oddly at variance with other police, fire, health and court cases, a 1933 decision held that a municipal judge was a local officer and bound by charter nominating procedures rather than a parallel state law.[40]

4. Salaries. The determination of salaries is believed to be of local concern, with the possible exception of those employees engaged in judicial, health, police, fire and other "state-wide concern" functions.[41]

C. Procedures

Legislative and administrative procedures are generally considered to be matters of local self-government. Courts have sustained: charter requirements for over-riding the local planning commission[42] (except where a state highway was involved);[43] charter requirements for publication of ordinances which differed from those established by the statutes;[44] and more recently (1947) charter procedures involving the sale of land to the federal government without conforming with the statutory requirement of competitive bidding.[45]

D. Substantive Home Rule Powers

1. Protection of Public Morals. In the earlier cases cities were allowed to regulate the sale of liquor by imposing heavier penalties than the statute,[46] to fix closing hours earlier than state permits authorized,[47] and to prohibit sales to those under eighteen years.[48] These cases were under the theory that there was no conflict with state law. But more recent cases have denied the right of a city to limit liquor permits to fewer than allowed by the state,[49] and have found an implied conflict between a city midnight closing law and state liquor permit hours.[50]

Cities have been denied the right to use public funds to erect a municipal theater[51] or to censor films,[52] but have been allowed to prohibit the Sunday showing of motion pictures.[53]

2. Control of Streets and Traffic. Cities have been permitted to set up weight limits for vehicles lower than those established by the state,[54] to prohibit cleats on vehicles,[55] to prohibit the stopping of motor busses[56] or require stopping in designated places,[57] and to provide parking meters.[58] An ordinance was invalidated which required motor busses to travel on practically impassable streets.[59]

Cases are found on both sides regarding the right of cities to impose speed regulations, in part depending upon the varying policy of the state. At present the statutes appear to allow local regulation consistent with state law.[60]

Cities may require insurance or bonding for taxi drivers,[61] may establish safety zones for loading street cars and busses,[62] and may require a safety stop before entrance on a main thoroughfare.[63] On the other hand, they cannot prohibit the use of the streets to a driver under eighteen years.[64]

3. PUBLIC HEALTH AND WELFARE. Cities have been sustained in their efforts to impose meat inspection,[65] to prohibit advertising of eyeglasses,[66] to establish standard weight for a loaf of bread,[67] to punish an attempt to steal,[68] to prohibit sales of horse race tips,[69] to proscribe slot machines,[70] and to limit the number of jewelry auctions.[71] They have not been allowed to regulate the hours of barber shops,[72] nor to appropriate money for the day care of children of working mothers.[73] In respect to this subject matter Fordham and Asher conclude that "perhaps, the correct theory is that municipalities may act until the state pre-empts the field."[74]

4. MISCELLANEOUS. Planning and zoning laws have been upheld as local powers.[75] The power to control the public schools[76] and libraries[77] rests entirely with the state legislature, even to a point where the city is not permitted to charge for a building permit for a school.

There are many other major fields in which the home rule picture might be presented. These include the fields of taxation, the control of public utilities, the appropriation of real estate, and the like. However, the fields here presented are enough to indicate the constitutional confusion and resultant judicial whittling away of municipal home rule powers.

County Home Rule

Counties have been considered quasi-corporations under the law, and subject to state control as agencies of the state. The so-called county home rule amendment of 1933,[78] authorizes counties to incorporate by framing and adopting a charter. This charter may provide for governmental framework, and for the selection of officers for the performance of duties imposed upon counties and county officers. The counties may or may not assume municipal powers, but if municipal powers are assumed the adoption of the county charter requires extraordinary majorities. Optional county charters also may be enacted by the legislature for local adoption, but none has been prepared.

Many consider the idea of home rule in the county nonexistent in Ohio since the Cuyahoga county case in 1936.[79] In this case the use of the word "ordinance," the creation of a civil service commission, the reservation of initiative and referendum powers and the establishment of a countywide jurisdiction for a county police force were held to be assumptions of municipal powers requiring the extraordinary majorities.

Under Article X of the constitution, counties which do not adopt charters and all townships remain completely under the control of the state legislature and have only such officers and powers as the legislature establishes. There is a vast area of unfinished legislative business in these areas of local government, but this is not an appropriate field for consideration in a constitutional convention.

Conclusions

Despite the refreshing tenor of recent municipal home rule decisions sustaining the power to determine procedure for the sale of real estate locally[80] and permitting local income-payroll taxes in the absence of state pre-emption or limitation,[81] there is no doubt but that the home rule power contemplated by the 1912 constitutional amendment framers has been depleted and left hollow in many places. It is not the function of this paper to assess the blame, but merely to present the need for a re-evaluation and redefinition of home rule in Ohio. This is extremely important in view of the fact that two out of three Ohio citizens live in urban communities of 2,500 or more in population.

Since the problem of home rule has several facets, it seems that the only practical way to attack the problem is through a constitutional convention, which can consider the local government problem in relation to the whole problem of the state. For example, home rule requires a liberal attitude on the part of both the legislature and the courts, and an effective, alert public opinion. These requirements involve the problem of legislative composition and selection, the consideration of the competence and independence of the judiciary, and the permission to set up agencies of information and concerted action for the local governments.

It would seem that in the local home rule field a constitutional convention needs to be called to:

1) Consider the whole problem of metropolitan government to enable the socio-economic unit to conform more closely with the political and legal unit. Herein lie the problems of extra-territoriality, annexation, federated government, special districts, townships, schools, and county government in some cases.
2) Improve conditions of intergovernmental relationships.
3) Assemble together in the home rule article of the constitution the related provisions in regard to all types of local governments and the rules on fiscal control by the state.
4) Clarify the meaning of home rule in the light of current trends after almost forty years of experience, considering such possibilities as:
   a) Local federalism as suggested by Mott;
   b) Conferring broad grants of power and some specific powers as in New Jersey and Colorado;

c) Specific grants of power with instructions to the courts to interpret the powers broadly as in Colorado;

d) Local veto power as in Chicago and New York State;

e) Reexamination of the fiscal duties and limitations, both constitutional and statutory;

f) Establishment of a rule of interpretation that the charter provisions take precedence over and supersede statutes affecting local government in cases of conflict;

g) Provision in the constitution of a rule of interpretation that general state laws should not take precedence over or supersede home rule charter provisions unless an intent to do so is clearly expressed in the law, as in Minnesota; and

h) Requirement of a legislative declaration of intention to take over municipal powers and an assumption of the financial burden in such a case.

It is imperative that the questions of local government be given immediate attention. The earliest opportunity for a comprehensive attack presents itself in an approval of the call for a constitutional convention in 1952.

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CHAPTER IX

CORPORATIONS UNDER THE OHIO CONSTITUTION

BY

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The Thirteenth Article of the Ohio constitution of 1851, entitled "Corporations," contains provisions on a variety of topics, reflecting the unfortunate experiences and fears of the time. Five of its seven sections have not been altered since their adoption. Two others date from 1912 and 1936 in their present form.

It has been observed in Chapter VIII that one of the principal reasons for calling the constitutional convention of 1850-51 was to provide a more satisfactory method for the chartering of municipal or public corporations. The legislature, under the constitution of 1802, had created such corporations by individual special laws. Indeed, by 1840 the volume of such special legislation had become so great that it interfered with the ability of the General Assembly to give adequate consideration to the general legislation which was before it. This need led to the proposal of a section in Article XIII of the new constitution which would require that municipal corporations be organized and governed under general laws. However, instead of placing that section in an article dealing with municipal or public corporations, it was placed in the article dealing with general and private corporations. This section should now be transferred to the new Article XVIII which was adopted in 1912.

Another problem which was uppermost in the minds of the delegates to the constitutional convention of 1850-51 was the corresponding tendency of the legislature to charter private corporations by special acts. Such charters often granted extensive special privileges, and, hence, they were very valuable to those who could secure them. Extensive lobbying and even bribery were not unknown. In order to minimize these evil practices the delegates provided that thenceforward the General Assembly should pass no special act conferring corporate powers. (Article XIII, Section 1) Such charters already issued could not be affected, since they constituted contracts between the state and the incorporators under the doctrine of the Dartmouth College Case.[1] An example of the type of embarrassment which was caused may be found in the case of the *Piqua Branch of the State Bank of Ohio v. Knoop* where the charter of the bank was held to constitute a contract for a special and limited type of taxation which could not be changed without impairment of the obligation.[2]

The Dartmouth College Case led to the adoption by Ohio of a constitutional provision which would help to avoid the effect of this decision in cases involving charters granted to private corporations thereafter. In Section 2 of Article XIII this provision is found, "Corporations may be formed under general laws, but all such laws may, from time to time, be altered or repealed." In the same section there was added in 1912 a reservation of power to the state to regulate such corporations, as well as foreign corporations doing business in the state.

Section 3 of Article XIII originally provided for double liability for the stockholders of banking corporations. However, after the enactment of the federal deposit insurance act, the Ohio constitution was amended in 1936 to make stockholders in such corporations liable individually only for stock not fully paid for. Since this is the rule also for non-banking corporations, although these latter ones are not mentioned in the constitution, this section seems superfluous and it could be eliminated by a constitutional convention without danger to the protection offered the general public. Certainly Section 7 of this article, which requires a vote of the people of the state approving any act of the General Assembly authorizing associations with banking powers before such a law may take effect, is completely obsolete. The fears of 1851 need not be perpetrated in a modern constitution.

Section 4 of Article XIII provides simply that the property of corporations shall forever be subject to taxation, the same as the property of individuals. This is so generally accepted today that one wonders why such a provision ever was placed in the constitution. It is suggested that it may have been due to the practice of exempting such property in the special charters granted before 1851, although, as we have seen, no provision of the 1851 constitution could be applied retroactively to private corporations created before that time. If an article on corporations is desirable at all in a constitution, such a section as this certainly can do no harm. Conceivably the sporadic suggestions heard today, for granting tax exemption to corporations for a period of years as inducement to locate in Ohio, could become unduly resurgent, and such an event would offer justification for its continuance.

The fifth Section of Article XIII applies to public utility corporations. It prohibits the appropriation of private property for a right of way without full compensation first having been paid, irrespective of any benefit claimed by the company to have been or to be conferred upon the balance of property not so taken. The amount to be paid is to be fixed in a court of record by a jury of twelve men. One needs to transport himself in thought to 1851 in order to understand the reason for this provision. In that period railway construction was proceeding at a feverish pace in Ohio and it seems probable that the methods used by some of these railway corporations in securing their rights of way left a good deal to be desired in protecting the interests of property owners. This section was designed to prevent appropriation of private property

without regular judicial procedure. Of course, it applies today to all public utilities upon which the state has conferred the right of eminent domain. It reinforces and makes specific the provisions of Section 19 of Article I of the constitution (Bill of Rights) which say that private property shall ever be held inviolate but subservient to the public welfare and prescribes the method by which such property may be taken by the state or its subdivisions for public purposes.

Since Article XIII was for the most part written a century ago, it could, therefore, hardly be expected to provide adequately for the large and complex corporations of today. The recent constitution of Missouri[5] makes better provision for the modern corporation than does the constitution of Ohio. The suggestions which follow are based in the main on that document.

In order that there may be no mistake concerning what is a "corporation," the state constitution should adequately define the term.[6]

A provision common to state constitutions states that the legislature shall pass general laws under which corporations may be formed and shall pass no special act conferring corporate powers.[7] An exception is made allowing special acts in some states for the creation of corporations for "charitable, educational, penal or reformatory purposes."[8] The state legislature has the inherent power to create a corporation for any purpose provided that it does not violate either the state or the federal constitution.[9] Thus the state has the power to provide for corporations through general laws and by special acts, provided that the incorporation is for any lawful purpose or purposes.[10]

The use of the right of eminent domain for private corporations is not specifically mentioned in the Ohio constitution, although provision is made in Article XIII, Section 5, for full compensation for property appropriated by any corporation. With reference to eminent domain, it appears that some constitutions more adequately protect the people than does the constitution of Ohio.[11]

In providing for the issuance of stock, the Ohio constitution permits the classification of corporations and the conferral upon proper boards, commissions and officers of such supervisory power over their organization, business and sale of stocks and securities "as may be prescribed by law."[12] This leaves the protection of the public largely up to the action of the legislative body, whereas some states have included a provision in their constitutions which requires that the issuance of stock shall be only for "money paid, labor done, personal property, or real estate or leases thereof actually acquired by such corporations."[13] The operations of modern corporations are of such complexity that the public must be adequately protected against the improper issuance of stock, and while it is true that this may be accomplished by acts of the legislature, it appears wise to provide for such protection in the constitution.

One of the provisions which is found in many constitutions and which is noticeably missing from the Ohio constitution provides for cumulative voting by stockholders. Because of the complicated nature of corporate security structure, and to protect minority stockholders, it is desirable that state constitutions provide specifically and adequately for cumulative voting by each shareholder for the directors or managers of any corporation.[12]

Most states have originally, or by means of amendment, included a provision reserving the right to change or repeal the laws under which corporate charters are granted.[13] The question of the nature of the limitations upon the power of the state, through amendment, to alter or vary the rights of stockholders previously acquired is considered in the cases of *Jay Ronald Co., Inc. v. Marshall Mortgage Corporation* and *Hottenstein et al v. York Ice Machine Corporation* and apparently it is not yet settled.[14] This problem has been one of growing importance and complexity since the Dartmouth College case which enunciated the principle that a corporate charter is a contract between the state and the corporation. The case of *McNulty v. W. J. Sloane* represents an extension of the reserve powers of the state.[15] The principle laid down in this decision states that an amendment to a corporate charter can eliminate the generally considered vested right of the preferred stockholder to accrued cumulative dividends. The case states that the right to accrued cumulative dividends, which have not been declared, is not a debt. If this precedent is followed, a state may avoid the constitutional restriction enunciated by the Dartmouth College case by reserving the power to repeal or amend the charter both in the state constitution and in the corporate law.[16]

Aside from the previously suggested item of transferring to Article XVIII, Section 6, which relates more properly to municipal corporations, the principal duty of a constitutional convention, in dealing with the problems of corporations, would be to satisfy itself that the provisions of the state constitution which cover this area are adequate to the needs of the present financial and industrial age. The Missouri and other provisions, above referred to, should be of aid in that inquiry. It may be that little conspicuous change is required in Ohio's constitution, since the legislature may act, and has acted, to give Ohio by statute one of the best corporation codes of any state in the Union.

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[6] Constitution of Illinois, Article XI, Section 1; Constitution of Delaware, Article IX, Section 1.

[7] *Atkinson v. Railway*, 15 O.S. 21.
[8] *Ohio General Code* 8623-3.
[9] Constitution of Missouri, Article XI, Sections 3, 4, and 5; Constitution of West Virginia, Article XI, Section 12; Constitution of Utah, Article XII, Section 11.
[10] Constitution of Ohio, Article XIII, Section 2.
[11] Constitution of Delaware, Article IX, Section 3; *cf.* Constitution of Missouri, Article XI, Section 7; Constitution of Pennsylvania, Article XVI, Section 7; Constitution of Texas, Article XII, Section 6.
[12] Constitution of Missouri, Article XI, Section 6; Constitution of Illinois, Article XI, Section 3; Constitution of Pennsylvania, Article XVI, Section 4; Constitution of West Virginia, Article XI, Section 4; Constitution of Nebraska, Article XII, Section 5.
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CHAPTER X

THE BILL OF RIGHTS IN THE OHIO CONSTITUTION

BY

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The Constitution of the United States, as it was presented to the states by the Convention of 1787 contained no Bill of Rights. The lack of such provisions in the document caused much discussion in the ratifying conventions and nearly prevented ratification in several key states. Approval was finally secured on the promise that the first Congress would prepare and submit a Bill of Rights as a set of amendments to the Constitution. This was done, and the first eight amendments now stand as a protection for the people against abuses of their liberties by the national government. The state constitutions already had such bills of rights, thus making the list of individual liberties well known to the citizens. The national list followed rather closely the one which formed a part of the Virginia constitution. This, in turn, had been prepared by Jefferson in 1776, as a compilation of the basic liberties of free men, won as concessions from the kings of England over the preceding seven centuries or more.

The Bill of Rights of the Ohio constitution, which forms Article I of that document, follows in the same tradition. It is still important to have such a statement, although the principles of liberty now have been so thoroughly established that most of them would never be questioned. The state Bill of Rights protects those who live under it from abuses of power by state officers, while the national Bill of Rights, generally speaking, protects them against abuses of power by national officers—hence, both are needed. It is true that in recent years, since 1937, the Supreme Court of the United States has shown a strong tendency to extend the protection of the first amendment to the people of the states as against their own state governments. This has been done by interpreting the due process clause of the fourteenth amendment to include, by reference, all of the protections of the first amendment—freedom of religion, freedom of speech and of the press, freedom of assembly, and the right of petition. Thus the federal courts now will take jurisdiction of cases in which such rights are alleged to be infringed even though they arise under a state law. However, this new federal protection can hardly do more than reinforce the state's protection of these basic freedoms.

The Present Bill of Rights

An analysis of the provisions of Article I of the state constitution of Ohio shows that they are much more wordy and extensive than the guarantees of the federal Bill of Rights. The effectiveness of some of them might even be improved by a simplification of their language. Others, like that contained in Section 1, are quotations from such documents as the Declaration of Independence, which was a political document designed to proclaim to the world the justification for the American Revolution not intended to become law. Section 1 provides:

> "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."

It may be argued that such a paragraph has no proper place in a modern constitution. Two objections may be made against it, the first being based upon the nature of a constitution, and the other being derived from contemporary political philosophy. The constitutional argument is that, since a constitution is fundamental and organic law, provisions that are merely doctrinal statements should not be written into it. The paragraph in question neither grants nor takes away power; nor is it concerned with the framework of government. It is, therefore, without legal effect. The philosophical objection is that the whole paragraph reflects eighteenth century thought and is out of harmony with modern conceptions of the function of government. Today, government exists for the service of the people, and the promotion of their welfare is its chief concern. Liberty is liberty in a social organization, and the private interests of the individual must be subordinate to the greater needs of society. In that view no one can be said to have literally inalienable rights.

It is possible, however, to grant the validity of both of these objections, and, nevertheless, to maintain that Section I should be preserved. This point of view rests upon the belief that it is advisable to have in the constitution an affirmation of the normal freedom of the individual. Democratic institutions work today under conditions which tend to submerge the individual, so that he is in danger of becoming a nameless element in the vast machinery of the modern state. Government needs the reminder that personal freedom remains a vital element in democracy. The word, "men", however, might well be changed to "persons."

The most recent of the state constitutions, that of Missouri (1945) and of New Jersey (1947) contain provisions similar to this section of the Ohio constitution. The *Model State Constitution* of the National Municipal League includes a similar provision in its Bill of Rights. The

word "inherent", however, might well be substituted for the present word, "inalienable", so as to reflect more accurately the modern point of view.

Section 2 provides:

> "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."

Down to the semi-colon, this is doctrine which is enforceable only upon the battle field. However, it contains democratic truth which is as applicable to fascist or communist dictators as ever it was to kings and princes, and should be retained. Insofar as it is directed to the elected representatives of the people, it becomes a useful admonition not to forget that it is the duty of the government to serve all, and not merely some of the people.

Section 1 and part of Section 2 could be combined appropriately with the present Preamble to the constitution to read somewhat as follows:

> All persons are by nature free and independent and have certain inherent rights, among which are the enjoyment of life, liberty, property, and the pursuit of happiness.
>
> Furthermore, all political power is inherent in the people, And government is instituted for their protection and benefit, Therefore, we, the people of the State of Ohio, grateful to Almighty God for our freedom, to secure its blessings and to promote our common welfare, establish this Constitution.

The portion of Section 2 after the semi-colon should stand separately in another section. It not only deals with a different subject, but it constitutes a prohibition laid upon the legislature.

The third section of the Bill of Rights provides:

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

While it may be thought that at this late day such an elementary right can be taken for granted, it is still a fact that those who are on the unpopular side of a question sometimes find it difficult, if not impossible, to obtain a forum for discussion. Section 3 lays upon government not only the obligation not to abridge this right, but also the duty to give protection against abridgement by others. This section follows closely one of the guarantees of the first amendment to the Federal Constitution.

Section 4 of the Bill of Rights also parallels the federal document. It reads:

> "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."

Since we no longer depend upon a militia for our defense, this provision seems obsolete and could be dropped; or, perhaps, it might be reduced to the single statement that the military shall always be subordinate to the civil power.

In the fifth section of Article I is another fundamental guarantee. 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 the jury."

This section was put in its present form by an amendment adopted September 3, 1912. It is basic to many of our current laws and clearly should be retained.

Echoes of the Northwest Ordinance and the thirteenth amendment may be seen in Section 6:

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

While this section is of historical interest only today, no harm can come from retaining it. Adequate protection to the individual is afforded by the thirteenth amendment to the Federal Constitution.

Section 7 is also largely of historical interest:

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

This section could well be reduced to a simple guaranty of freedom of conscience after the manner of the parallel provision in the First Amendment to the Constitution of the United States.

The next three sections (8, 9 and 10) all deal with procedure in criminal cases and they will be considered together.

> 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(s) it.
>
> SECTION 9. All persons shall be bailable by sufficient sureties, except for capital offences (offenses) where the proof is evident, or the presumption great. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.
>
> SECTION 10. Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance cannot 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 made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

Section 10 in its present form is an amendment to the constitution adopted September 3, 1912. There would be some value in reviewing the experience of the state under these three sections to determine whether they are adequate to modern needs. It might be advisable to permit the prosecution of a criminal case by information as well as by indictment by a grand jury, as is done in several states; and to permit trial in minor civil cases by a jury of less than twelve; or to prohibit the use of a jury

where the issue on trial is that of mental competence. Perhaps, also, the final provisions of this section, covering self-incrimination and double jeopardy, should be placed in distinct and separate clauses. They may raise questions of substantive, rather than procedural rights, which are capable of separate adjudication.

Freedom of speech and of the press are protected by 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 libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted."

Here is guaranteed one of those great substantive rights which are essential to democracy. The phraseology used is typical of that in most of the state constitutions. The new constitution of New Jersey follows this section almost word for word. Modern means of communication, such as the telephone, telegraph, wireless, radio and television could be included in the guaranty by the insertion of the phrase, "or otherwise communicate" after the word "publish"; but the right has already been judicially extended to cover all of these except television, and no doubt it also will be included in time. It is to the credit of the state constitutions that they expressly lay upon the citizen the responsibility for abuse of this right, and it is sound practice to give the jury considerable latitude in the trial of such cases.

The two sections which follow have less vitality:

> 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.
>
> 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.

Transportation of convicts as one of the punishments for crime has never been used in this country. Quartering of troops went out with the militia. These sections are obsolete and should be removed from the text of the constitution.

Section 14, however, is of more current interest.

> "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."

This establishes for the state the guaranties of the Fourth Amendment. It would, perhaps, be advisable to add a prohibition against the use in court of evidence secured in violation of this section.

The fifteenth section introduces a subject which once was more important than it is today.

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

The principle behind this provision has permanent value. No one would wish to see such punishment restored. However, the section could be rewritten in the interests of clarity to indicate that it included judgments based upon contract and excluded fines imposed by law.

In Section 16 an effort is made to establish a principle which would seem to be universally accepted.

> "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."

This section in its present form is an amendment adopted September 3, 1912. It embodies two completely unrelated subjects. The first sentence boils down to the statement that every wrong shall have a legal remedy. The second sentence purports to confer upon the General Assembly authority to legislate and authorize suits against the state. This power would be possessed without such a grant. Since justice can be administered no faster than the complexities of trial procedure permit, and since the legislature cannot be compelled to legislate, it is difficult to see what this provision can accomplish.

Another historical relic appears in Section 17.

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

This section seems obsolete and although its retention will do no harm, it might well be removed.

Section 18 offers an example of a very unusual provision for a state constitution.

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

This idea goes back to the time when government was much more simple and much less responsible than it is today, when fear of executive dictatorship was more real. There is a reasonable doubt as to whether it now serves a useful purpose.

A more immediately useful provision appears in 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."

This section does no more than provide for the use of the well known power of eminent domain. It seems verbose and might well be rewritten in modern terms and in the light of judicial interpretation.

Adverse court decisions required the adoption of 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."

This section is an amendment adopted September 3, 1912. It clearly should be retained as it serves as a basis for our wrongful-death statute.

In Section 20 an attempt was made to emulate the Ninth and Tenth Amendments to the Constitution of the United States.

> "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."

This section does no more than to state a truism. Since "all political power is inherent in the people", they obviously retain what they have not parted with, and there is no way of discovering what these rights are. This is so because the word, "people", is used collectively, to denote the body politic; and the power referred to is the constituent power, the power to enact fundamental law. However, this provision may have a psychological value. At any rate, it occurs commonly in state constitutions.

Possible New Sections

It is well known that social and economic rights have been receiving the attention of government for a number of years. The point has been reached where they are beginning to make their appearance in the Bills of Rights of the new constitutions. For example, the right to bargain collectively is guaranteed by the constitutions—to name no others—of Missouri, New Jersey, and New York. New Jersey goes farthest of all and prohibits segregation in the public schools if done "because of religious principles, race, color, ancestry or national origin". The con-

stitution of Ohio is silent on these rights, although the process of amendment has given ample opportunity for the introduction of one or more of them into the Bill of Rights. Perhaps a constitutional convention would desire to consider them.

Summary

The Bill of Rights of the state constitution was adopted in 1802. Now, after almost one hundred and fifty years, it needs modernization and readjustment. If it had been written in the first place as a short and simple list of guaranties, after the manner of the Bill of Rights in the Federal Constitution, the work of adjustment and interpretation could have been carried on by the state Supreme Court. But the contrary is true; it is long and detailed and is comprised of a variety of material. It is much more than a list of prohibitions. It needs restatement, reclassification and amendment.

1. Almost all of the sections would be improved and clarified by the change of a word here and there. Several of them need redrafting. Sections 7, 10 and 19 need to be completely rewritten.

2. Much would be gained if the provisions were correlated and grouped in some kind of order. The right to bear arms (Section 4) now comes between the right of petition and the right to trial by jury; the right to religious liberty (Section 7) is placed between the prohibition of slavery and the right to a writ of habeas corpus; Sections 11, 12 and 13 are, respectively, concerned with freedom of speech, the transportation of criminals outside the state, and the lodging of soldiers in private houses. The Bill of Rights should not leave the impression on the people that it is a hodge-podge of loose ends.

Scattered through the article are the great substantive guaranties which are essential to democracy. These would gain both significance and force if they were correlated. Section 1 (inalienable or inherent rights), Section 2 (political power vested in the people), Section 11 (freedom of speech), Section 7 (freedom of religion), Section 3 (right of petition) and Section 19 (sanctity of private property) form a well-defined unit. The sections guaranteeing a fair and impartial trial form another. Section 5 (trial by jury), Section 10 (procedure of indictment and trial), Section 16 (speedy trial), Section 8 (habeas corpus), Section 9 (bail), and Section 14 (search warrants required). The last three sections implement the first three in this group. The prohibition against compulsory self-incrimination and the guaranty against a second trial for the same offense, which are now lodged obscurely in Section 10, should be given independent standing—either each in its own section or both in a new section.

The obsolete provisions could well be pruned out. Section 6, prohibiting slavery, and Section 12, prohibiting transportation out of the state as a punishment for crime, are certainly museum pieces. Section 17, prohibiting "hereditary emoluments", is another. Section 4, guaranteeing the right of a private citizen to bear arms, long ago lost its point. This is true also of Section 13, which prohibits government from quartering troops in private homes. These two sections could either be redrafted or removed. Section 15, prohibiting imprisonment for debt, is obsolete insofar as it applies to the imposition of a jail sentence for failure to pay private debts. It should be rewritten to cover modern practice. The Bill of Rights should not enshrine a collection of antiques.

3. Finally, there are those social and economic rights which have grown out of the necessities of an industrial civilization and which have been accepted as essential to the public welfare. Examples of this class of rights are: the right to work; the right to a minimum wage; the right to a minimum standard of living; the right to security in time of sickness, unemployment, and old age, and the right to leisure for rest and recreation. The problem of giving constitutional recognition to such rights as these is a difficult one to solve. It would seem, however, that the time has come to guarantee to employees the right to bargain collectively through representatives of their own choosing, and to prohibit segregation in the public schools and universities for any reason except that of mental ability to carry on the prescribed studies.

A revision such as has been suggested would make our Bill of Rights more adequate to a modern age without disturbing in the least the impressive list of liberties so long cherished by Americans. The art of progress includes the conservation of the best of our tradition while moving forward to make our institutions more democratic and more sensitive to contemporary needs.

CONCLUSION

In the Preface we pointed out that our allegiance to the constitution and our recognition that it contains much that is permanent and sound should not prevent our willingness to consider proposals for orderly change, according to the process provided in the constitution itself. We should like to restate by way of conclusion that the emphasis in the preceding Report upon defects and shortcomings, and upon the obsolete, the outmoded and the ambiguous, and upon the adaptations appropriate to practical experience and current needs, does not bespeak a desire for radical or sweeping changes. We feel however that the need for much clarification and modernization should be clear from what has been said in this Report; that the major issues requiring consideration have been analyzed; and we hope that the voters of Ohio will have had from this Report useful and basic information upon which they can cast their ballots in November 1952 for or against the calling of a constitutional convention, in an intelligent manner.

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