

In the
Supreme Court of Ohio

TRACY RUTHER, Individually and
Administrator of the Estate of
Timothy Ruther, *et al.*,

Plaintiffs-Appellees,

v.

GEORGE KAISER, D.O., *et al.*,

Defendants-Appellants.

Case No. 2011-0899

On Appeal from the
Warren County
Court of Appeals,
Twelfth Appellate District

Court of Appeals Case
No. CA2010-07-066

**MERIT BRIEF OF *AMICUS CURIAE* STATE OF OHIO
IN SUPPORT OF APPELLANTS GEORGE KAISER, D.O., et al.**

JOHN B. WELCH* (0055337)

**Counsel of Record*

KAREN L. CLOUSE (0037294)

Arnold Todaro & Welch Co., L.P.A.

580 Lincoln Park Blvd., Suite 222

Dayton, Ohio 45429

937-296-1600

937-296-1644 fax

jwelch@arnoldlaw.net

Counsel for Appellants

George Kaiser, D.O., et al.

JOHN D. HOLSCHUH, JR.* (0019327)

**Counsel of Record*

SARAH TANKERSLEY (0068856)

Santen & Hughes

600 Vine Street, Suite 2700

Cincinnati, Ohio 45202

513-721-4450

513-721-0109 fax

sbt@santen-hughes.com

Counsel for Appellees

Tracy Ruther, et al.

MICHAEL DEWINE (0009181)

Attorney General of Ohio

ALEXANDRA T. SCHIMMER* (0075732)

Solicitor General

**Counsel of Record*

MICHAEL J. HENDERSHOT (0081842)

Chief Deputy Solicitor

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

alexandra.schimmer@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*

State of Ohio

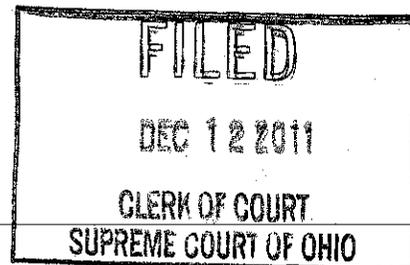


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INTRODUCTION

This case involves an as-applied challenge to Ohio's medical-malpractice statute of repose under Section 16, Article I of the Ohio Constitution. The statute of repose reduces prejudice to doctors by limiting the time within which a patient's medical-malpractice cause of action can accrue. The court below held that the statute of repose, as applied to the plaintiff, violates the Ohio Constitution because it does not provide a legal remedy for a bodily harm. Because the remedy language of Section 16 does not limit the General Assembly's authority to define what injuries the law recognizes, this Court should reverse.

The remedy language of Section 16 speaks only to the courts: Ohio "courts shall be open" to give "remedy" to "every person, for an injury done him in his land, goods, person, or reputation." Section 16, Art. I, Ohio Const. Nothing about this language restricts the legislature's power to define what injuries the law will recognize. And therefore nothing about this language prohibited the General Assembly from enacting R.C. 2305.113(C), the medical-malpractice statute of repose.

Section 16's remedy language provides three protections against *judicial* abuse. First, it guarantees open, impartial access to the courts. Second, it instructs the judiciary to provide a timely remedy for every harm recognized by law as being capable of legal reparation. Finally, the provision mandates that court proceedings be open to the public unless compelling circumstances require otherwise.

Although Section 16's remedy language binds the judiciary, it places no limits on the legislature's authority to define what injuries the law recognizes. It is well established that the law does not provide a cause of action for every harm. If a statute says that the bodily harm a person suffers is not a legal injury, the harm is *damnum absque injuria*: harm for which the law provides no remedy. Just as Section 16 does not interfere with legislative efforts to abolish

common law torts, create statutes of limitations, or impose limitations on liability, it did not prohibit the General Assembly from enacting the medical-malpractice statute of repose.

The history of the Ohio Constitution reinforces the conclusion that the remedy language of Section 16 binds only the courts. The provision derives from the Magna Carta, and since the time of that charter courts and commentators have interpreted the provision as a limitation on judicial—not legislative—power. The remedy language’s preconstitutional history, the history of Ohio’s constitutions, and the General Assembly’s past practice all show that the remedy language of Section 16 concerns only the judiciary.

Stare decisis presents no obstacle to adopting this rule. Any previous suggestion by this Court that the remedy language of Section 16 binds the legislature deserves no deference. Those decisions were wrongly decided at the time; the premises underlying those decisions defy practical workability; and abandoning those previous decisions would not harm any reliance interests.

At bottom, Section 16 does not restrict the Ohio General Assembly’s power to define what injuries the law will recognize. Because the medical-malpractice statute of repose merely defines what constitutes a medical-malpractice injury, it is constitutional.

STATEMENT OF AMICUS INTEREST

At stake in this matter is the constitutionality of an important state statute, the interpretation of a longstanding constitutional provision, and the stability of a central area of tort law. The State of Ohio has a compelling interest in protecting Ohio’s duly enacted statutes against constitutional challenges. Because the remedy language of Section 16 did not prohibit the General Assembly from enacting the medical-malpractice statute of repose, the State supports the Appellants’ request for this Court to reverse the judgment below.

STATEMENT OF CASE AND FACTS

In 2002, the Ohio General Assembly enacted the current medical-malpractice statute of repose. R.C. 2305.113(C). The statute provides that no person has a cause of action for medical malpractice “four years after the occurrence of the act or omission constituting the alleged basis” of a medical-malpractice claim. *Id.*

In 2008, Timothy Ruther was diagnosed with a liver lesion, hepatitis C, and liver cancer. *Ruther v. Kaiser* (12th Dist.), 2011-Ohio-1723 ¶ 4. Around this time, Mr. Ruther discovered that Dr. George Kaiser, one of his previous doctors, had performed three lab tests that revealed elevated liver enzyme levels. Dr. Kaiser had not informed Mr. Ruther of these results. *Id.* ¶¶ 3-4.

The first of Dr. Kaiser’s tests came 13 years before Mr. Ruther discovered the lab results. The second test came 11 years before. And the final test came 10 years before. Mr. Ruther did not allege any act or omission on Dr. Kaiser’s part within the four-year period provided by the medical-malpractice statute of repose. *Id.*

Mr. Ruther nevertheless sued Dr. Kaiser for medical malpractice. (After Mr. Ruther’s death, Ms. Ruther became the named plaintiff both individually and as administrator of Mr. Ruther’s estate. *Id.* ¶ 5.) Dr. Kaiser moved for summary judgment on the ground that R.C. 2305.113(C) barred the action. The trial court denied Dr. Kaiser’s motion, holding that Ohio’s medical-malpractice statute of repose violates Section 16, Article I of the Ohio Constitution as applied to the Ruthers. *Id.* ¶ 6. The Twelfth District Court of Appeals affirmed, and Dr. Kaiser now appeals.

ARGUMENT

Duly enacted statutes enjoy a “strong presumption” of constitutionality. *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948 ¶ 25. In an as-applied challenge, “the party making the challenge bears the burden” of overcoming that strong presumption. *Harrold v. Collier*, 107 Ohio St. 3d 44, 2005-Ohio-5334 ¶ 38. This Court must uphold acts of the General Assembly “in cases of doubt.” *Flagstar Bank, F.S.B. v. Airline Union’s Mortgage Co.*, 128 Ohio St. 3d 529, 2011-Ohio-1961 ¶ 29. In short, “[i]t is difficult to prove that a statute is unconstitutional.” *Arbino*, 2007-Ohio-6948 ¶ 25.

State of Ohio’s Proposition of Law No. I:

The remedy language of Section 16, Article I of the Ohio Constitution does not restrict the General Assembly’s power to define what injuries the law will recognize.

A. The remedy language of Section 16 binds only the judiciary, not the legislature.

1. Section 16’s remedy language binds the judiciary in three ways.

The remedy language of Section 16 binds only the judiciary, and it does so in three ways. First, the provision assures open access to the courts: Courts may not sell justice or otherwise administer justice based on improper influences. Second, the provision instructs the judiciary to provide a timely remedy for every harm recognized by law as being capable of legal reparation. If the General Assembly has created a remedy for a legally recognized injury, then courts must supply the remedy. Third, court proceedings must be open to the public unless compelling circumstances require courts to close them.

The first protection stems from Section 16’s historic purpose. As this brief will explain, Section 16 ultimately derives from Article 40 of the Magna Carta, which abolished a system of justice that required litigants to purchase writs from the royal courts of England. A litigant who paid more would receive a more favorable proceeding. Over time, this 13th-century guarantee

came to be understood as a general protection against executive meddling in the judiciary. This understanding was particularly acute among colonists in the years leading up to the American Revolution. See, e.g., Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions* (1995), 74 Or. L. Rev. 1279, 1300 (explaining that, as the American Revolution approached, colonists “came to fear that the Crown threatened to undermine the independence of the courts”). The remedy language of Section 16 protects litigants against these threats to an impartial and independent judiciary.

The second protection guarantees that the judiciary will supply legally recognized remedies for legally recognized injuries. Courts may not deny remedies that the legislature has created. *Leiberg v. Vitangeli* illustrates this protection. (5th Dist. 1942), 70 Ohio App. 479. In *Leiberg*, a German widow instituted an action for the wrongful death of her deceased husband. *Id.* at 480. The trial court granted the defendant a continuance until the conclusion of World War II on the ground that Ms. Leiberg was an “alien enemy.” *Id.* Ms. Leiberg appealed, and the court of appeals reversed, holding that the continuance “denie[d] that which the people of the state have said every person may do”—namely, seek remedy in court for legally recognized injuries. *Id.* at 487. *Leiberg* thus illustrates the second protection of Section 16’s remedy language: Because the law provided a cause of action for wrongful death, Section 16 prevented the trial court from denying a remedy to Ms. Leiberg.

Finally, the third protection of the remedy language grants a qualified right of public access to court proceedings. Courts generally must keep their proceedings open to the public. The exception to this general rule arises when compelling circumstances—such as preserving a criminal defendant’s fair-trial rights—require courts to restrict public access. *State ex rel. Plain Dealer Publ’g Co. v. Geauga Cnty. Court of Common Pleas* (2000), 90 Ohio St. 3d 79, 82 (per

curiam). Taken together, these three protections comprise the full safeguards of Section 16's remedy language.

2. Section 16's remedy language does not limit the legislature's power to define what injuries the law will recognize.

To say that the remedy language binds only the judiciary is to say that it does *not* bind the legislature. Section 16's remedy language does not tell the General Assembly what injuries the law must recognize. The legislature may create injuries, and it may abolish them. The legislature may enlarge injuries, and it may abridge them. In short, "it is state law which determines what injuries are recognized." *Groch v. Gen. Motors Corp.*, 117 Ohio St. 3d 192, 2008-Ohio-546 ¶ 150 (quoting *Sedar v. Knowlton Constr. Co.* (1990), 49 Ohio St. 3d 193, 202).

What people in casual conversation might refer to as an "injury" may not be an injury recognized by law. The General Assembly has abolished the common law amatory torts; has enacted statutes of limitations; and has otherwise defined what the law acknowledges to be a legal injury. None of this offends Section 16's remedy language.

This Court's precedents involving the products-liability statute of repose prove the point. No one would deny that Mr. Groch had been injured when the trim press came down on his arm. See *Groch*, 2008-Ohio-546 ¶ 5. This Court nevertheless denied Mr. Groch's claim because the General Assembly, in enacting the products-liability statute of repose, had defined products-liability injuries not to include harms like the one Mr. Groch had suffered. *Id.* ¶ 150.

Here, in one sense, a person who has suffered medical malpractice is injured even if that person has not yet discovered the malpractice. But that person has *not* suffered a legally recognized injury. The law says that medical-malpractice actions arise when discovered, and only if discovered within four years of the malpractice event. See *Oliver v. Kaiser Cmty. Health Found.* (1983), 5 Ohio St. 3d 111, at the syllabus (discovery rule); R.C. 2305.113(C) (statute of

repose). This Court should hold that the remedy language of Section 16 does not restrict the legislature's ability to define a malpractice injury this way, just as the Court held in *Groch* that the remedy language did not restrict the legislature's ability to define a products-liability injury.

This of course does not mean that the legislature wields unlimited power. For starters, the remedy language comprises only half of Section 16. The Court has interpreted the provision as providing at least “two distinct guarantees”: Section 16's remedy protections and Section 16's “due course of law” protections. *Sedar*, 49 Ohio St. 3d at 199; see also *Groch*, 2008-Ohio-546 ¶ 108. Nothing about the State's argument affects the meaning of the Due Course of Law Clause, which this Court has repeatedly held to limit the General Assembly's powers. See, e.g., *Groch*, 2008-Ohio-546 ¶ 108 (“[L]egislative enactments may restrict individual rights only ‘by due course of law.’”). Likewise other constitutional provisions provide checks on legislative overreaching—the Equal Protection Clause, the Free Speech Clause, the Retroactivity Clause, and the Federal Constitution's guarantees, to name but a few. Although Section 16's remedy language does not restrict the General Assembly's power, this Court still possesses tools to prevent legislative overreaching.

B. The history of the remedy language shows that it places no limitation on the General Assembly.

History—in Ohio and elsewhere—confirms that the remedy language of Section 16 does not restrict the General Assembly's power. Because “the best interpretation of the remedy guarantee in one state may differ radically from the best interpretation in another state, even when the wording of the two provisions is identical,” the appropriate inquiry is: “What does the remedy guarantee mean in the constitution of [Ohio]?” Schuman, *The Right to a Remedy* (1992), 65 *Temple L. Rev.* 1197, 1220. The answer requires examining the preconstitutional history of the remedy language, the general context in which Ohioans initially adopted the language, the

subsequent history of the language in later constitutional framing, and the General Assembly's past practices.

1. The preconstitutional history of the remedy language shows that it limits only the judiciary.

The preconstitutional history starts in the 13th century. For nearly 800 years, Section 16's precursors have limited only the judiciary. The remedy language of Section 16 "derives ultimately" from Article 40 of the Magna Carta. Schuman, 65 Temple L. Rev. at 1199. King John of England ran a system of justice based on purchasing writs: In order to proceed in court, litigants needed to buy writs from the royal courts. The more a litigant paid, the more expeditious and favorable the proceedings would be. See *id.*; see also Note, *Garrett v. Sandusky: Justice Pfeifer's Fight for Full & Fair Legal Redress. Does Sovereign Immunity Violate Ohio's "Open Court" Provision?* (1996), 27 U. Tol. L. Rev. 729, 740-41 (also tracing the remedy language to the Magna Carta).

These and other abuses caused feudal barons to rebel against King John, ultimately forcing him to sign the Magna Carta in 1215. A.E. Dick Howard, *The Road From Runnymede: Magna Carta and Constitutionalism in America* (1968), 6-7. Article 40, in language framed as a promise from the King, instructed courts to stop selling writs: "To no one will we sell, to no one will we refuse or delay, right or justice." Magna Carta art. 40. This provision did not limit Parliament's ability to enact substantive law. It instead limited only the courts. See Hoffman, 74 Or. L. Rev. at 1286 ("There is little dispute that Chapter 40 of the Magna Carta was intended to restore the integrity of the courts by curtailing the selling of writs.").

Later interpretations by two of England's leading legal scholars confirm this reading. In the 17th century, Lord Edward Coke explained the effect of Article 40 in words reminiscent of Section 16, Article I of Ohio's Constitution:

[E]very subject of this realm, for injury done to him in *bonis, terris, vel persona* [in person, land, or goods], by any other subject, . . . may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay.

Edward Coke, *Second Part of the Institutes of the Laws of England, Vol. I* (W. Clarke & Sons 1809) (ca. 1628), 55.

Eighteenth-century scholar Sir William Blackstone also interpreted Article 40 to bind only the judiciary. Article 40 protected the “right . . . of applying to the courts of justice for the redress of injuries.” 1 William Blackstone, *Commentaries on the Laws of England* (Univ. of Chi. Press 1979) (1765), 137. “[C]ourts of justice must at all times be open to the subject, and the law be duly administered therein.” *Id.* Both of these prominent English commentators read Article 40 as being directed solely to the courts.

Courts during the lives of Coke and Blackstone did not possess the power to strike down legislative enactments as contrary to the Magna Carta. The idea that Article 40 bound only the judiciary was therefore inherent in Coke’s and Blackstone’s interpretations. Their writings bear out that they believed the Magna Carta served as a check only on the Crown and its courts. In Coke’s view, Parliament’s power was “transcendent and absolute” and “[could] not be confined.” Edward Coke, *Fourth Part of the Institutes of the Laws of England* (W. Clarke & Sons 1809) (ca. 1628), 36. Blackstone likewise “kn[ew] of no power that can control” Parliament, even if it enacts a law that is “unreasonable.” 1 Blackstone, *Commentaries*, 91. These writings confirm that Coke and Blackstone both interpreted Article 40 to concern only the judiciary.

Coke’s and Blackstone’s interpretations of Article 40 made their way into an early federal law applicable to land that would become Ohio and into several early state constitutions. Coke’s work in particular was of “enormous significance to colonial revolutionary thinkers.” Hoffman,

74 Or. L. Rev. at 1287. And colonists shared Coke and Blackstone's concerns about judicial overreaching: "the colonial grievance that the Crown was seeking to corrupt the courts . . . was the unifying thread connecting the drafters of the state constitutions with both Magna Carta Chapter 40 and Coke's reformulation of it." *Id.*

As relevant to Ohio, these concerns first manifested themselves in the Northwest Ordinance. The Ordinance of the Northwest Territory—consistent with Coke's and Blackstone's commentaries—guaranteed the inhabitants of the eponymous lands the right to "judicial *proceedings* according to the course of the common law." Northwest Ordinance (1787), Art. II (reenacted at 1 Stat. 50 (1789)) (emphasis added).

As for state constitutions, the immediate predecessor to Ohio's remedy language was Tennessee's Constitution of 1796. Steven H. Steinglass and Gino J. Scarselli, *The Ohio Constitution* (2004), 106. Tennessee interprets the remedy language of its constitution as a limit only on the power of the judiciary. See *Harrison v. Schrader* (Tenn. 1978), 569 S.W.2d 822, 827 ("This Section of our constitution has been interpreted by this Court as a mandate to the judiciary and not as a limitation upon the legislature."); *Scott v. Nashville Bridge Co.* (Tenn. 1919), 223 S.W. 844, 852 ("The provision of section 17 of article 1 of our State Constitution [containing the remedy language] is a mandate to the judiciary, and was not intended as a limitation of the legislative branch of the government."). Ohio's 1802 borrowing from Tennessee provides further evidence that the remedy language binds only Ohio's judiciary, not its legislature.

2. The context in which Ohio adopted the remedy language shows that it limits only the judiciary.

Direct evidence of the intent of those who drafted the 1802 Constitution is almost nonexistent. See G. Alan Tarr, *The Ohio Constitution of 1802: An Introduction*,¹ at 1 (“No record of the debates of the convention is available, from either official records or newspapers of the era.”). Even so, the framers left two contemporaneous clues that they did not intend the remedy language to limit legislative power: the structure of the 1802 document and an 1805 statute relating to common law actions.

The 1802 Constitution created a powerful legislative branch and a weak executive, a structure inconsistent with the idea that the remedy language sharply restricts legislative power. *Id.* at 2 (Article I “reflects the understanding that state legislative power is plenary.”). Unlike almost all other contemporary state constitutions, Ohio’s 1802 founding document gave the governor no veto power. *Id.* at 3. The power of the General Assembly under the 1802 Constitution was nearly unlimited and included the power to appoint the secretary, the treasurer, the auditor, the Supreme Court justices, and the common pleas judges; the power to create new counties; the power to draw districts for federal elections; the power to grant divorces and incorporate businesses; and even the power to block a constitutional convention absent a supermajority vote of its members. Randolph C. Downes, *Ohio’s Second Constitution* (1953), 26 *Northwest Ohio Q.* 71, 72 (noting that this “excessive power given to the legislature” in 1802 was a motivating force behind the vote for the constitutional convention in 1850). This sweeping

¹ Available at <http://camlaw.rutgers.edu/statecon/publications/ohio.pdf> (last visited December 9, 2011). This publication is part of the interdisciplinary study of state constitutions that is the mission of The Center for State Constitutional Studies at Rutgers-Camden. Professor Tarr is the series editor of a planned 50-volume set covering each state constitution in depth. The Ohio volume, also cited in this brief, was published in 2004.

power is inconsistent with an understanding of current Section 16, Article I as barring the General Assembly's ability to refine or eliminate causes of action.

An early Ohio statute also sheds light on the intentions of the 1802 framers. A statute passed only three years after the Constitution contemplated future legislation that would alter or even abolish common law injuries. In 1805, the Third General Assembly passed a statute providing that "the common law of England" and "all statutes or acts of the British parliament" shall form the substantive law of Ohio "*until repealed by the general assembly of this state.*" 3 Ohio Laws 248 (emphasis added). Just three years after Ohio adopted the remedy language that is now Section 16, the General Assembly recognized its broad authority to define what injuries Ohio law recognizes, even by contradicting the received common law.

3. The subsequent history of the remedy language in later constitutional framing shows that it limits only the judiciary.

Subsequent constitutional history confirms that the drafters of the 1802 remedy language did not view the language as restricting legislative power to refine or eliminate causes of action. Ohio's second constitutional convention spanned 1850 and 1851 in Columbus and Cincinnati. The framers discussed the clause with any substance only twice, both times raising concerns about the *judiciary's* inability to administer justice without delay. Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio 1850-51 (1851), at 337, 365 (Jan. 16 & 21, 1851).

If the framers of the 1851 Constitution intended to revolutionize the meaning of the remedy language, they would have discussed it at great length. The framers in 1851 instead considered the clause only as an afterthought. The committee assigned to study the bill of rights initially omitted the remedy language entirely from its first draft. *Id.* at 337. Nothing about the 1851 debates changed the understanding that the remedy language binds only the judiciary.

The clause received scarcely more attention during the debates over the (never-adopted) 1874 Constitution. During debates about a commission to help the Supreme Court relieve a backlog of cases, a delegate invoked the clause as a promise observed in the breach. But the delegate described a problem of courts that were not open for speedy reparation of injuries, not a problem of legislative overreaching. Official Report of the Proceedings and Debates of the Third Constitutional Convention of Ohio (1873), at 756 (July 16, 1873). Another delegate cited the clause during debates about how to divide the common pleas jurisdictions across the state. *Id.* at 952 (July 22, 1873). Again, the reference had nothing to do with limiting legislative power.

Ohio's most recent constitutional convention likewise contained little discussion about the remedy language in Section 16, Article I. Instead, the focus in 1912 was an amendment to that section adding a second sentence authorizing suits against the state. Proceedings and Debates of the Constitutional Convention of the State of Ohio (1912), at 1432 (Apr. 29, 1912).

In 1970, the General Assembly tasked the Constitutional Revision Commission with an analysis and recommendation about every section of the Constitution. The Commission's work product—ten volumes of commentary and recommendations—has been called one of the most important works about Ohio's constitutions. Steinglass, *The Ohio Constitution*, at 378. The Commission's final report on Section 16, Article I describes it as containing two guarantees—an Open Courts Clause, which promises public trials and access to courts, and a Due Course of Law Clause, which assures procedural fairness in adjudicative settings. Ohio Constitutional Revision Commission, Final Report (1977), 468; see also *E. W. Scripps Co. v. Fulton* (8th Dist. 1955), 100 Ohio App. 157, 174 (after tracing the history of Section 16, Article I, concluding that: "Undoubtedly the section had a twofold purpose: (1) to insure that justice should be administered in open court, and (2) that all persons should be guaranteed the right of due process of law.").

Nowhere does the Commission's analysis of Section 16, Article I suggest that the remedy language restricts legislative power to refine or eliminate causes of action.

4. The General Assembly's history of defining causes of action shows that the remedy language limits only the judiciary.

The General Assembly's history of defining available causes of action is consistent with these eight centuries of history and shows that Section 16's remedy language places no limitations on the legislature. Since the State's formation, the General Assembly has enjoyed broad power to shape what injuries the law will recognize.

The Ohio General Assembly has regularly exercised this power. Consider a context closely related to this case: the products-liability statute of repose, R.C. 2305.10(C)(1). This act and other statutes of repose define the outer bounds of legally recognized injuries. This Court upheld the products-liability statute of repose against a Section 16 challenge on the ground that the "General Assembly ha[d] established through the enactment of R.C. 2305.10(C) the injuries that are recognized and the remedies that are available." *Groch*, 2008-Ohio-546 ¶ 150.

As explained above, the General Assembly routinely defines "the injuries that are recognized and the remedies that are available." Examples include:

- the abolition of the torts of breach of a promise to marry, alienation of affections, and criminal conversation, R.C. 2305.29 (see *Strock v. Pressnell* (1988), 38 Ohio St. 3d 207, 214 (upholding R.C. 2305.29 against a Section 16 challenge));
- statutes of limitations, see, e.g., R.C. 2305.06 (limitations period for actions upon written contracts), 2305.07 (for actions upon unwritten contracts or certain liabilities created by statute), 2305.09 (for certain tort actions), 2305.10(A) (for "a product liability claim and an action for bodily injury or injuring personal property"), 2305.11 (for "libel, slander, malicious prosecution, . . . false imprisonment," and other actions);
- and various limitations on liability, see, e.g., R.C. 2305.23 (the "Good Samaritan" statute), 2305.37 (liability limitation for donors of food or consumer goods to charities), 2305.38 (for uncompensated volunteers of charitable organizations), 2305.40 (for land owners who injure certain trespassers), 2305.401 (for "members of the firearms industry" for injuries allegedly caused by the "operation or discharge of a firearm").

One of two things must be true: Either Section 16's remedy language prohibited the legislature from enacting all of these longstanding and foundational statutes or the remedy language does not limit the legislature's power to define what injuries the law will recognize. The answer is clear. The remedy language concerns only the courts, not the power of the General Assembly.

C. *Stare decisis* presents no obstacle to reversing the Twelfth District's judgment.

To be sure, this conclusion lies in some tension with *Hardy v. Vermeulen* (1987), 32 Ohio St. 3d 45. *Hardy* struck down a previous version of the medical-malpractice statute of repose because it "denie[d] legal remedy to one who has suffered bodily injury." *Id.* at 48. But *stare decisis* presents no obstacle to reversing the judgment below.

This Court has identified three factors that guide when it will overrule a prior precedent: "(1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it." *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, at paragraph one of the syllabus. All three factors show that this Court should overrule *Hardy*.

1. *Hardy* was wrongly decided at the time, and changes in this Court's Section 16 jurisprudence no longer justify continued adherence to the decision.

As shown, *Hardy* was wrongly decided in 1987 because it did not account for the original meaning of Ohio's remedy language. The history simply does not support the *Hardy* rule that the legislature may not deny a "legal remedy to one who has suffered bodily injury." 32 Ohio St. 3d at 48. Section 16, however, is not concerned with *bodily* injury. It is concerned with *legal* injury. Nothing requires the legislature to recognize every bodily injury as a legal injury. As three dissenters then noted, the idea "that every common-law right is indelibly embedded in the

Ohio Constitution and that subjective awareness of a potential claim is required prior to the abolishment of a cause of action is sheer legal fiction.” *Id.* at 55 (Wright, J., concurring in judgment only and dissenting in part).

Hardy also rested on a second mistaken premise: that the medical-malpractice statute of repose “made no effort to alter the substantive law.” *Id.* at 49. The *Hardy* majority never explained how a statute that defines legal injury in terms of time is *not* altering the substantive law of malpractice. Time and legal injury are often inseparable. An undiscovered trespass is not trespass after the adverse-possession deadline. See, e.g., *Evanich v. Bridge*, 119 Ohio St. 3d 260, 2008-Ohio-3820 ¶¶ 4-7. Undiscovered negligence by a decedent is not a tort six months after the decedent’s death. See R.C. 2117.06(C). The time limit in R.C. 2305.113(C) operates the same way: An undiscovered injury caused by malpractice is not a tort four years after the malpractice.

This Court’s more recent interpretations of the remedy language also render *Hardy* untenable. The *Groch* declaration that “it is state law which determines what injuries are recognized and what remedies are available” makes no distinction between the products-liability statute of repose and the medical-malpractice statute of repose. *Groch*, 2008-Ohio-546 ¶ 150. Both provide that what is undeniably *bodily* injury is not *legal* injury. The logic of *Groch*—which departs from earlier precedent—compels a decision upholding current R.C. 2305.113(C).

At bottom, *Hardy* stands for the unsupportable proposition that a part of the Constitution intended to protect only judicial process somehow immunizes certain kinds of injury from legislative adjustment. That holding was wrong in 1987, and it is wrong today. *Hardy* should be discarded.

2. The *Hardy* rule defies practical workability.

Hardy is also not worthy of sustained adherence because it defies practical workability. This *Galatis* consideration includes asking whether the decision is subject to criticism from other

jurisdictions and whether it has engendered confusion. 2003-Ohio-5849 ¶ 50. Courts across the nation have rejected the *Hardy* rule, and *Hardy* has sown widespread confusion in Ohio.

Hardy has placed Ohio in a distinct minority of states that find their medical-malpractice statutes of repose unconstitutional under remedy language. Of the states to have considered remedy-language challenges to their medical-malpractice statutes of repose, 16 have upheld their statutes. Ohio is one of only two states to strike down their medical-malpractice statutes of repose. See Annotation, *Validity of Medical Malpractice Statutes of Repose* (2011), 5 A.L.R.6th 133 §§ 7-8; *Methodist Healthcare Sys. of San Antonio* (Tex. 2010), 307 S.W.3d 283, 289 n.31. This imbalance evokes the weight of out-of-state authority that led the *Galatis* Court to abandon the *Scott-Pontzer* precedent. 2003-Ohio-5849 ¶¶ 19 & 50 n.7. Almost all of the states to have considered the question have held that their medical-malpractice statutes of repose survive remedy-language scrutiny. This Court could hardly ask for a stronger indication that the *Hardy* principle is unworkable.

Hardy has also led to confusion about what statutes it condemns. *Hardy* presupposes that Section 16 protects some injuries beyond those recognized by statute and by this Court's interpretation of the common law. But what makes up this amorphous class of injuries? *Hardy* provides no guidance to courts about what injuries Section 16 protects.

The unpredictability of this area of law illustrates the problem. The pendulum has swung, from upholding statutes of repose against remedy-language challenges, to striking them down, and back again. See *Sedar*, 49 Ohio St. 3d 193 (upholding the architect-engineer statute of repose); *Brennaman v. R.M.I. Co.* (1994), 70 Ohio St. 3d 460 (striking down same statute); *Groch*, 2008-Ohio-546 (upholding product-liability repose statute that operated like the statute struck in *Brennaman*); see also *McClure v. Alexander* (2d Dist.), No. 2007 CA 98,

2008-Ohio-1313 (in light of *Groch*, upholding most recent version of architect-engineer statute of repose). *Hardy*'s rule that the legislature may not deny a "legal remedy to one who has suffered bodily injury" has motivated the change each time. 32 Ohio St. 3d at 48. A precedent that creates such uncertainty and volatility in the law is not practically workable.

Hardy has also sown confusion about the status of any statute that preterms a cause of action before discovery of injury. A federal court reading the tea leaves left by *Sedar*, *Hardy*, and *Groch* predicted that this Court would strike down the statute of repose for securities infractions, which cuts off undiscovered injury five years from violation. See *Metz v. Unizan Bank* (N.D. Ohio May 5, 2008), No. 5:05 CV 1510, 2008 U.S. Dist. LEXIS 37270, at *20 ("Based on the above, it appears most likely that the Ohio courts would find that the five year statute of repose contained in the Ohio securities statute [R.C. 1707.43(B)] violates the right-to-remedy clause of the Ohio Constitution. That provision is, therefore, unenforceable."). Yet, in 2011, this Court upheld a statute that operates to the same effect—barring appraiser negligence suits even if the injury is undiscovered until after the four-year limit expires. See *Flagstar Bank*, 2011-Ohio-1961 ¶ 28; see also *Investors REIT One v. Jacobs* (1989), 46 Ohio St. 3d 176 (reaching the same result as to accountant malpractice and rejecting the dissent's argument invoking the remedy language).

Hardy's insistence that the General Assembly may not redefine legal injury by placing a time limit after which an injury is no longer a *legal* injury is unworkable and unpredictable. The rule proposed here, on the other hand, provides clear guidance. *Hardy* should be set aside.

3. Reliance interests present no obstacle to reversing the judgment below.

Little needs to be said about reliance. The holding in *Hardy* striking down a previous medical-malpractice statute of repose has not induced any reliance whatsoever. The class of

people harmed by medical malpractice can be bifurcated into two subsets: those who have discovered the malpractice and those who have not. Neither subset relies on *Hardy*'s holding.

Consider first those who have discovered the malpractice. They have no reason to rely on *Hardy* because the statute of repose is irrelevant once a person has discovered the malpractice. Upon discovering the malpractice, she either has a cause of action for malpractice—if she discovers the malpractice within the statutory period—or she will never have a cause of action for malpractice—if she discovers the malpractice after the statutory period's expiration. In either case, she does not rely on *Hardy*.

Those who have not yet discovered the malpractice likewise have no reason to rely on *Hardy*'s holding. By definition, they do not know that they have suffered malpractice, and therefore have no reason to think about the medical-malpractice statute of repose, much less rely on *Hardy*. Because no one will ever rely on *Hardy*'s holding, the third *Galatis* factor presents no obstacle to reversing the judgment below.

CONCLUSION

For these reasons, the Court should reverse the judgment below.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Attorney General of Ohio



ALEXANDRA T. SCHIMMER* (0075732)
Solicitor General

**Counsel of Record*

MICHAEL J. HENDERSHOT (0081842)

Chief Deputy Solicitor

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

alexandra.schimmer@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*

State of Ohio

CERTIFICATE OF SERVICE

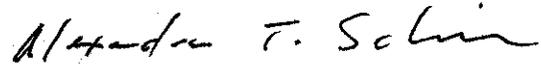
I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* State of Ohio in Support of Appellants George Kaiser, D.O., et al., was served by U.S. mail this 12th day of December, 2011, upon the following counsel:

John B. Welch
Karen L. Clouse
Arnold Todaro & Welch Co., L.P.A.
580 Lincoln Park Blvd., Suite 222
Dayton, Ohio 45429

Counsel for Appellants
George Kaiser, D.O., et al.

John D. Holschuh, Jr.
Sarah Tankersley
Santen & Hughes
600 Vine Street, Suite 2700
Cincinnati, Ohio 45202

Counsel for Appellees
Tracy Ruther, et al.



Alexandra T. Schimmer
Solicitor General

Appendix A

ORDINANCE OF THE NORTHWEST TERRITORY (1787)

On July 13, 1787, Congress passed the ordinance creating the Northwest Territory the first commonwealth in the world whose organic law recognized every man as free and equal.

Realizing that a complete knowledge of the Ordinance of 1787 would be very beneficial to all readers, we herewith reproduce this famous document:

AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE RIVER OHIO

SECTION 1. BE IT ORDAINED BY THE UNITED STATES IN CONGRESS ASSEMBLED, That the said territory, for the purpose of temporary government, be one district, subject, however, to be divided into two districts, as future circumstances may, in the opinion of Congress, make it expedient.

SEC. 2. BE IT ORDAINED BY THE AUTHORITY AFORESAID, That the estates both of resident and non-resident proprietors in the said territory, dying intestate, shall descend to, and be distributed among, their children and the descendants of a deceased child in equal parts, the descendants of a deceased child or grandchild to take the share of their deceased parent in equal parts among them; and where there shall be no children or descendants, then in equal parts to the next of kin in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parent's share; and there shall, in no case, be a distinction between kindred of the whole and half blood; saving in all cases to the widow of the intestate, her third part of the real estate for life, and one-third part of the personal estate; and this law relative to descents and dower, shall remain in full force until altered by the legislature of the district. And until the governor and judges shall adopt laws as hereinafter mentioned, estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her in whom the estate may be, (being of full age), and attested by three witnesses; and real estates may be conveyed by lease and release, or bargain and sale, signed, sealed, and delivered by the person, being of full age, in whom the estate may be, and attested by two witnesses, provided such wills be duly proved, and such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts, and registers, shall be appointed for that purpose; and personal property may be transferred by delivery, saving, however to the French and Canadian inhabitants, and other settlers of the Kaskaskies, Saint Vincents, and the neighboring villages, who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them, relative to the descent and conveyance of property.

SEC. 3. BE IT ORDAINED BY THE AUTHORITY AFORESAID, That there shall be appointed, from time to time, by Congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by

Congress; he shall reside in the district, and have a freehold estate therein, in one thousand acres of land, while in the exercise of his office.

SEC. 4. There shall be appointed from time to time, by Congress, a secretary, whose commission shall continue in force for four years, unless sooner revoked; he shall reside in the district, and have a freehold estate therein, in five hundred acres of land, while in the exercise of his office. It shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his executive department, and transmit authentic copies of such acts and proceedings every six months to the Secretary of Congress. There shall also be appointed a court, to consist of three judges, any two of whom to form a court, who shall have a common-law jurisdiction, and reside in the district, and have each therein a freehold estate, in five hundred acres of land, while in the exercise of their offices; and their commissions shall continue in force during good behavior.

SEC. 5. The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district, and report them to Congress from time to time, which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by Congress; but afterwards the legislature shall have authority to alter them as they shall think fit.

SEC. 6. The governor, for the time being, shall be commander-in-chief of the militia, appoint and commission all officers in the same below the rank of general officers; all general officers shall be appointed and commissioned by Congress.

SEC. 7. Previous to the organization of the general assembly the governor shall appoint such magistrates, and other civil officers, in each county or township, as he shall find necessary for the preservation of the peace and good order in the same. After the general assembly shall be organized the powers and duties of magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers, not herein otherwise directed, shall, during the continuance of this temporary government, be appointed by the governor.

SEC. 8. For the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof; and he shall proceed, from time to time, as circumstances may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

SEC. 9. So soon as there shall be five thousand free male inhabitants, of full age, in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect representatives from their counties or town-

ships, to represent them in the general assembly: PROVIDED, That for every five hundred free male inhabitants there shall be one representative, and so on, progressively, with the number of free male inhabitants, shall the right of representation increase, until the number of representatives shall amount to twenty-five; after which the number and proportion of representatives shall be regulated by the legislature: PROVIDED, That no person be eligible or qualified to act as a representative, unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years; and, in either case, shall likewise hold in his own right, in fee-simple, two hundred acres of land within the same: PROVIDED ALSO, That a freehold in fifty acres of land in the district, having been a citizen of one of the States, and being resident in the district, or the like freehold and two years' residence in the district, shall be necessary to qualify a man as an elector of a representative.

SEC. 10. The representatives thus elected shall serve for the term of two years; and in case of the death of a representative, or removal from office, the governor shall issue a writ to the county or township, for which he was a member, to elect another in his stead, to serve for the residue of the term.

SEC. 11. The general assembly, or legislature, shall consist of the governor, legislative council, and a house of representatives. The legislative council shall consist of five members to continue in office five years, unless sooner removed by Congress; any three of whom to be a quorum; and the members of the council shall be nominated and appointed in the following manner, to wit: As soon as representatives shall be elected the governor shall appoint a time and place for them to meet together, and when met they shall nominate ten persons, resident in the district, and each possessed of a freehold in five hundred acres of land, and return their names to Congress, five of whom Congress shall appoint and commission to serve as aforesaid; and whenever a vacancy shall happen in the council, by death or removal from office, the house of representatives shall nominate two persons, qualified as aforesaid, for each vacancy, and return their names to Congress, one of whom Congress shall appoint and commission for the residue of the term; and every five years, four months at least before the expiration of the time of service of the members of the council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to Congress, five of whom Congress shall appoint and commission to serve as members of the council five years, unless sooner removed. And the governor, legislative council, and house of representatives shall have authority to make laws in all cases for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills, having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill, or legislative act whatever, shall be of any force without his assent. The governor shall have power to convene, prorogue, and dissolve the general assembly when, in his opinion, it shall be expedient.

SEC. 12. The governor, judges, legislative council, secretary, and such other officers as Congress shall appoint in the district, shall take an oath or affirmation of fidelity, and of office; the

governor before the President of Congress, and all other officers before the governor. As soon as a legislature shall be formed in the district, the council and house assembled, in one room, shall have authority, by joint ballot, to elect a delegate to Congress, who shall have a seat in Congress, with a right of debating, but not of voting, during this temporary government.

SEC. 13. And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory; to provide, also, for the establishment of States, and permanent government therein, and for their admission to a share in the Federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest.

SEC. 14. It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact, between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent, to wit:

ARTICLE I

No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory.

ARTICLE II

The inhabitants of the said territory shall always be entitled to the benefits of the writs of habeas corpus, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, bona fide, and without fraud previously formed.

ARTICLE III

Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

ARTICLE IV

The said territory, and the States which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in Congress assembled, conformable thereto. The inhabitants and settlers in the said territory shall be subject to pay a part of the Federal debts, contracted, or to be contracted, and a proportional part of the expenses of government to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other States; and the taxes for paying their proportion shall be laid and levied by the authority and direction of the legislatures of the districts, or districts, or new States, as in the original States, within the time agreed upon by the United States in Congress assembled. The legislatures of those districts, or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers. No tax shall be imposed on lands the property of the United States; and in no case shall non-resident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.

ARTICLE V

There shall be formed in the said territory not less than three nor more than five States; and the boundaries of the States, as soon as Virginia shall alter her act of cession and consent to the same, shall become fixed and established as follows, to wit: The western State, in the said territory, shall be bounded by the Mississippi, the Ohio, and the Wabash rivers; a direct line drawn from the Wabash and Post Vincents, due north, to the territorial line between the United States and Canada; and by the said territorial line to the Lake of the Woods and Mississippi. The mid-

dle State shall be bounded by the said direct line, the Wabash from Post Vincents to the Ohio, by the Ohio, by a direct line drawn due north from the mouth of the Great Miami to the said territorial line and by the said territorial line. The eastern State shall be bounded by the last-mentioned direct line, the Ohio, the Pennsylvania, and the said territorial line: PROVIDED, HOWEVER, And it is further understood and declared, that the boundaries of these three States shall be subject so far to be altered, that, if Congress shall hereafter find it expedient, they shall have authority to form one or two States in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan. And whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent constitution and State government; PROVIDED, The constitution and government, so to be formed, shall be republican, and in conformity to the principles contained in these articles, and, so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the State than sixty thousand.

ARTICLE VI

There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted: PROVIDED ALWAYS, That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid.

BE IT ORDAINED BY THE AUTHORITY AFORESAID, That the resolutions of the 23d of April, 1784, relative to the subject of this ordinance, be, and the same are hereby, repealed, and declared null and void.

Done by the United States, in Congress assembled, the 13th day of July, in the year of our Lord 1787, and of their sovereignty and independence the twelfth.

Appendix B

THE OHIO CONSTITUTION OF 1802: AN INTRODUCTION

G. Alan Tarr
Director, Center for State Constitutional Studies
Rutgers University-Camden

Ohio has had only two constitutions during the course of its history, fewer than most of the other American states. Its initial constitution was drafted in 1802 as a step on the path to statehood, went into effect when Ohio was admitted to the Union in 1803, and remained in operation for almost half a century, until Ohio drafted its current constitution in 1852. This introduction traces the creation of the Ohio Constitution of 1802 and analyzes its provisions.

The Creation of the Ohio Constitution

In April, 1802, Congress enacted legislation authorizing the residents of the Ohio Territory "to form for themselves a constitution and state government" as a step toward being "admitted into the Union upon the same footing with the original states, in all respects whatever."¹ The vote on the Act followed party lines, with the Republicans (Jeffersonians) favoring rapid creation of states from the Northwest Territory and the Federalists steadfastly rejecting such a course. The Ohio Enabling Act provided for the election on October 12, 1802, of delegates for a constitutional convention. The thirty-five delegates who were elected convened in Chillicothe on November 1, 1802. They selected Edward Tiffin, a native of Virginia who had served as speaker of the Territorial house of representatives, to serve as president of the convention.

No record of the debates of the convention is available, from either official records or newspapers of the era. The convention journal merely reports the votes of the delegates on various motions. Nevertheless, some observations can be made about the convention proceedings. First, the delegates completed their work quickly, voting on the final version of the constitution on November 29, only twenty-five working days after they convened. Second, the delegates' votes reveal sharp divisions on some questions. For example, the initial vote on a proposal to extend the suffrage to African-Americans was a tie (17-17), with the convention president, Edward Tiffin, casting the decisive vote against enfranchisement. Third, despite these differences, the delegates ultimately achieved a consensus. No delegate left the convention because his concerns were not being met, and none refused to endorse the constitution that the convention drafted.

The Ohio Constitution went into effect without popular ratification when Ohio was admitted to the Union on February 19, 1803. The failure to seek popular ratification reflected the practice of the time. Although Massachusetts had pioneered in seeking popular ratification in 1780, the idea was slow to catch on. Indeed, of the eight states that drafted constitutions from 1801-1830, only one submitted its proposed constitution to the

people. Not until 1821, when New York did so, did any state outside of New England submit a proposed constitution to the direct vote of the people. The idea of popular ratification was broached at the Ohio convention, but the delegates rejected it by a 7-27 vote.

Provisions of the Ohio Constitution

Structure and Powers of Government

The first three articles of the Ohio Constitution establish the legislative, executive, and judicial branches of the state government. Like Articles I-III of the Federal Constitution, these provisions create offices and prescribe the qualifications, terms, and modes of selection for their occupants. Unlike some state constitutions, the Ohio Constitution of 1802 does not expressly mandate a separation of powers among the three branches. However, it seeks to ensure such a separation by detailed bans on dual office-holding. These bans also guard against an undue mixing of Federal and State authority. For example, under Article I, section 26, "no judge of any court of law or equity, secretary of state, attorney-general, register, clerk of any court of record, sheriff or collector, member of either house of Congress, or person holding any lucrative office under the United States or this State" can serve in the general assembly. Similar provisions restrict who may serve as governor or as a judge (Article II, section 13, and Article III, section 8).

The legislative article of the Ohio Constitution (Article I) differs both from Article I of the Federal Constitution and from the legislative articles in later state constitutions. In contrast with the Federal Constitution, the Ohio Constitution contains no enumeration of legislative powers. This is not an oversight; rather, it reflects the understanding that state legislative power is plenary. Later state constitutions, concerned about the scope of state legislative authority, would seek to contain it through substantive limitations and through procedural requirements designed to ensure a more open and orderly deliberative process. Only two such limitations are found in Article I of the Ohio Constitution: section 19 forbids the legislature from raising the salaries of state officials, and section 17 requires that bills be read on three separate days in each house. Even these restrictions are more nominal than real. The ban on raising salaries extends only until 1808, and the three-readings requirement can be dispensed with by an extraordinary majority "in cases of urgency."

Thus, the Ohio Constitution relies primarily on popular rule and frequent elections to prevent abuses of legislative power.

The Ohio Constitution could have relied on a system of checks and balances to check legislature overreaching, but it did not. Instead, Article II creates a weak governorship. The governor is popularly elected for a two-year term and thus has an independent political base. However, unlike legislators, the governor is not indefinitely reeligible, being restricted to serving no more than six years of every eight. Although the Ohio Constitution draws upon the list of executive powers found in Article II of the

Federal Constitution in delineating gubernatorial powers and responsibilities, it fails to grant the governor two crucial powers enjoyed by the President. First, the governor has no veto power, and thus he cannot prevent the enactment of laws that violate rights or are contrary to the common good. Second, the governor does not appoint administrative officers, and thus his control over administration is compromised. Although the governor can request "information, in writing, from the officers of the executive department" (Article II, section 7), these officers know that their selection--and presumably therefore their continuation in office as well--depends on the legislature. The Constitution expressly vests the selection of the major executive officers--the secretary of state and the State treasurer and auditor--in the hands of the legislature (Article II, section 16, and Article VI, section 2). In addition, it provides that the legislature shall determine the mode of selection of all other officers not mentioned in the Constitution (Article VI, section 5).

Article III of the Ohio Constitution establishes a system of state courts, including a supreme court, a court of common pleas for each county, and justices of the peace. Like the executive officers previously discussed, the members of the supreme court and courts of common pleas are appointed by joint ballot of both houses of the state legislature, and they serve for set terms of office. (Electors in each township select justices of the peace.) To avoid creating a court system that might become outdated as a result of societal changes and population increases, the Constitution authorizes the legislature to add judges to the supreme court or courts of common pleas and to create additional courts as needed.

This description of the three branches of state government makes clear that the Ohio Constitution departs significantly from the Federal Constitution. For one thing, the Ohio Constitution is a more democratic document. Whereas the Federal Constitution established indirect election of the chief executive and members of the upper house, the Ohio Constitution relies exclusively on direct popular election; and the terms of office for Ohio's governor, senators, and representatives are all shorter than for the corresponding offices of the Federal Government. For another thing, Ohio's governorship is considerably weaker than the Federal presidency--or, indeed, the governorship in other states that entered the Union during the first decades of the nineteenth century. For example, all of the other states admitted from 1801-1830 gave the governor the veto power. In part, Ohio's decision to establish such a weak executive may be viewed as a reaction to its experience with the high-handed practices of Arthur St. Clair, who served as Governor during the era of territorial government and who sought to maintain his position by opposing statehood.² In part, too, the distrust of executive power was an article of faith with Jeffersonians, who dominated the early politics of the state. Whatever the cause, the Ohio Constitution resembles other state constitutions much more than it resembles the Federal Constitution.

Suffrage Under the Ohio Constitution

Ohio's Constitution of 1802 extends the right to vote to "white male inhabitants above the age of twenty-one years" who meet residency requirements and who either are taxpayers or "are compelled to labor on the roads of their respective townships or counties" (Article II, sections 1 and 5). Perhaps the most striking aspect of the Constitution's suffrage requirements is its restriction of the franchise to whites. Whatever the practice within the various states, only one eighteenth-century state constitution--the South Carolina Constitution of 1790--imposed an express racial qualification for voting. Thus, Ohio was only the second state--and the first non-slave state--to give constitutional sanction to racial discrimination in voting qualifications. Ohio's decision to impose a racial qualification for voting is particularly noteworthy when considered in the light of the suffrage requirements outlined in the congressional Act of 1802 that authorized the calling of a constitutional convention in Ohio.

That Act, while imposing taxpayer, gender, and residency requirements for those voting to select convention delegates, never mentioned race. One is thus led to the conclusion that the Ohio Constitution may have disenfranchised some voters who had previously been eligible to vote in Ohio. The Ohio Constitution's banishment of African-Americans from the ranks of the politically relevant citizenry was not limited to voting. The Constitution also provided that the apportionment of representatives in the General Assembly was to be based on the number of "white male inhabitants above twenty-one years of age" within the state's various counties (Article I, section 2).

Likewise noteworthy is the Ohio Constitution's restriction of suffrage to taxpayers. Although some historians have emphasized the role of western constitutions in promoting suffrage reform, Ohio's taxpaying requirement for voting paralleled provisions in earlier state constitutions.³ The framers of those constitutions generally agreed that participation in governing should be restricted to those with a sufficient stake in the community, however much they disagreed about what constituted a sufficient stake. Not until the 1820s did the movement for white manhood suffrage attain much momentum. In Ohio, reform was slower. The restriction of suffrage to taxpayers remained part of the Ohio Constitution until the constitutional revision of 1852.

Local Government

State constitutions drafted in the late nineteenth century or in the twentieth century typically include detailed provisions relating to the creation, structure, and powers of local governments.⁴ This detail reflects a legal doctrine, known as "Dillon's rule," that was established in the mid-nineteenth century. This doctrine conceives of the American states as unitary political systems, such that local governments derive their existence and their powers from the state government. From this it follows that local governments can exercise only those powers that were expressly granted to them by the state or were indispensable

to accomplish the declared purposes of the municipal corporation. Moreover, the presumption has been that in cases of doubt regarding whether a power belongs to the state or to a local government, those doubts are to be resolved in favor of state authority. As a result, considerable constitutional detail was necessary to create units of local government and determine the structure and power of such units.⁵

In contrast, Ohio's 1802 Constitution--like the state constitutions that preceded it--seems to treat local governments as component units of a quasi-federal state government. The Constitution does not include an article dealing with the creation or empowerment of local governments; rather, it assumes the legitimacy of existing units of local government, referring to them several times in the course of dealing with other constitutional concerns. Thus, in discussing apportionment of the Senate, it authorizes the use of counties as representational units (Article I, section 6). In discussing the residency requirements for holding county office, it accepts the boundaries of counties established before the Constitution was drafted (Article I, section 27)--indeed, it places limitations on the formation of new counties (Article VII, section 3). The Constitution's treatment of townships is similar. It directs that justices of the peace be elected in townships, thereby recognizing their existence prior to the Constitution (Article III, section 11), as it does in setting a one-year term of office for township officials (Article VI, section 3).

Yet if the Constitution accepts the existence and powers of local units of government, it is not altogether silent regarding local government. Article VI prescribes the mode of selection and term of office for local officials. Township officials are to be elected annually; the sheriff and coroner, the only listed county officials, are elected for two-year terms but can serve no more than four years in six (Article VI, sections 1 and 3). Also, in contrast with some eighteenth-century constitutions, the Ohio Constitution ties representation in both houses of the state legislature to population, not reserving one house for the representation of local units of government or requiring equal representation for those units. And even though the Constitution permits the use of counties as electoral districts, it does not require their use, permitting the legislature the alternative of drawing up electoral districts.

The Protection of Rights

In contrast with most eighteenth-century state constitutions, the Ohio Constitution of 1802 places its Declaration of Rights near the conclusion of the document (Article VIII), just preceding the "Schedule" included for orderly transfer of authority from the territorial government to the state government. Except for its placement, however, the Ohio Declaration of Rights resembles its counterparts in previous state constitutions, and particularly the Virginia Declaration of Rights, on which it appears to be based. Thus, unlike the Bill of Rights of the Federal Constitution, the Ohio Declaration of Rights includes broad states of republican

political principles, as well as more directly enforceable provisions. Section 1 elaborates natural rights theory--"all men are born equally free and independent, and have certain natural, inherent, and unalienable rights." It also emphasizes popular sovereignty, noting that "every free republican government [is] founded on [the people's] sole authority" and that the people "have at all times a complete power to alter, reform, or abolish their government, whenever they deem it necessary." Section 3 proclaims freedom of worship as "a natural and indefeasible right," while acknowledging (in emulation of the Northwest Ordinance) that "religion, morality, and knowledge [are] essentially necessary to the good government and happiness of mankind." Section 14 mandates proportionality in punishment and discourages "a multitude of sanguinary laws [as] both impolitic and unjust." Finally, section 18 commands "a frequent recurrence to the fundamental principles of civil government [as] absolutely necessary to preserve the blessings of liberty."

Many of the guarantees in the Ohio Declaration of Rights have analogues in the Federal Bill of Rights. These include, for example, protections for freedom of the press (section 6), for rights of defendants at trial (sections 10 and 11), for jury trial (section 8), for the right to bail (sections 12 and 13), and for the right to bear arms (section 20). Even so, the framing of these rights is often distinctive, and these differences may have implications for constitutional interpretation. Thus, in the aftermath of the Alien and Sedition Acts, the guarantee of press freedom is particularly concerned to discourage unjust prosecutions for seditious libel, specifying truth as a defense and enshrining the jury as the determiner of questions of both law and fact. The bail provisions guarantee a right to bail in most cases, in addition to mandating that bail not be excessive. And the purposes of the right to bear arms are expressly extended to encompass security of person as well as defense of the state.

Several Ohio guarantees parallel provisions in previous state declarations of rights, though they have no counterpart in the Federal Constitution. These include the access-to-justice guarantee (section 7), the bar on imprisonment for debt (section 15), and the bar on transportation out of state as a punishment for crime (section 17). Other provisions are more distinctive. These include the ban on poll taxes (section 23), the guarantee of equal access to state-supported schools without regard to wealth (section 25), and the right of associations to receive corporate charters from the legislature (section 27).

In sum, the Ohio Declaration of Rights is a combination of the familiar and the distinctive, reflecting both a borrowing from earlier constitutions and an elaboration of new protections in response to novel problems and changes in circumstances. Its provisions are not primarily addressed to the judiciary, nor do they rely on judicial enforcement. Rather, they seem designed to serve an educative function, instructing the citizenry so that "the general, great, and essential principles of liberty and free government may be recognized, and forever unalterably established."

Popular government thus is understood not as a threat to rights but as their greatest security.

Constitutional Change

The Declaration of Rights of the Ohio Constitution recognizes that the people possess an unalienable right to "alter, reform, or abolish their government, whenever they may think it necessary" (Article VIII, section 1). In a sense, this declaration seems to domesticate the right to revolution recognized by John Locke. By acknowledging the people's right to change the constitution peaceably, it reduces the necessity of recurrence to violent revolution to secure good government. This is particularly important because, as the Declaration of Rights also notes, "a frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty" (Article VIII, section 18). Yet in another sense, the Declaration of Rights goes considerably beyond Locke. For Locke, serious violations of rights or a plan to tyrannize were necessary to justify the dissolution of a government; whereas the Declaration of Rights accepts changing popular views of what would produce good government as a sufficient justification for constitutional revision.

The Declaration of Rights confirms that the people do not require amendment or revision provisions to change the constitution; such provisions do not grant a power, but merely specify a procedure by which it can be exercised. Under the Constitution of 1802, this procedure is the same regardless of whether one is amending or replacing the constitution. Two-thirds of the legislature must recommend constitutional change to the voters, who vote on whether or not to call a convention. If a majority favors the call, at the next election voters choose delegates to the convention, who meet within three months after that election. The convention then determines what changes in the Constitution are appropriate--there is no provision for popular ratification of the convention's work.

The Ohio Constitution thus renders constitutional change exceedingly difficult. Even minor constitutional amendments depend upon the calling of a constitutional convention. And to place the question of whether to have a convention on the ballot requires the concurrence of extraordinary majorities in both houses of the legislature. This enables the legislature to block needed reforms.

If legislative abuse of power is the problem to be solved, the legislature can prevent a constitutional solution simply by refusing to broach the idea of a constitutional convention. In such circumstances, the Constitution prescribes no alternative course for initiating constitutional reforms.

Conclusion

Despite its status as the first American state constitution created in the nineteenth century, the Ohio Constitution of 1802 does not break significant new ground, preferring to borrow heavily from existing state constitutions. This is not surprising. The delegates who met in Chillicothe in 1802 were overwhelmingly Republicans (Jeffersonians), and they had readily available in those constitutions plans of government consistent with their

political orientation. In addition, the delegates were interested in achieving statehood, and the necessity of congressional approval of their constitution encouraged a reliance on tried-and-true constitutional models. Yet if their handiwork lacked originality, it did not lack durability, lasting nearly half a century. The Ohio Constitution of 1802, in sum, typifies late eighteenth and early nineteenth century American state constitutionalism.

NOTES

1. The Territorial Act of 1802 is reprinted in William F. Swindler, ed., *Sources and Documents of United States Constitutions* (Dobbs Ferry, N.Y.: Oceana Publications, 1979), 7:544-546.

2. Randolph C. Downes, *Frontier Ohio, 1788-1803* (Columbus, Ohio: Ohio State Archaeological and Historical Society, 1935), chapters 5-6; and Eugene H. Roseboom and Francis P. Weisenburger, *A History of Ohio* (New York: Prentice-Hall, 1934), chapter 5.

3. The most heralded exposition of the democratizing influence of the westward expansion of the United States frontier states is Frederick Jackson Turner, *The Frontier in American History* (New York: Prentice-Hall, 1947). More recent surveys of the development of suffrage requirements during the late eighteenth and early nineteenth centuries include Chilton Williamson, *American Suffrage: From Property to Democracy, 1760-1860* (Princeton: Princeton University Press, 1960); James A. Henretta, "The Rise and Decline of 'Democratic Republicanism': Political Rights in New York and the Several States, 1800-1915," in Paul Finkleman and Stephen E. Gottlieb, eds., *Toward a Usable Past: Liberty Under State Constitutions* (Athens: University of Georgia Press, 1991); and Daniel T. Rodgers, *Contested Truths: Keywords in American Politics Since Independence* (New York: Basic Books, 1987), chapter 3.

4. See G. Alan Tarr, *Understanding State Constitutions* (Princeton: Princeton University Press, 1998), chapters 4-5.

5. *Clinton v. Cedar Rapids and Missouri River Railroad*, 24 Iowa 455, 476 (1868); see also generally John Forest Dillon, *A Treatise on the Law of Municipal Corporations*, 5th ed., 5 vols. (Boston: Little Brown, 1911).

Appendix C

Director's Page

In 1953, Judge Lehr Fess, President of our Society, upon authorization by the Society's Board of Trustees, made application for the maximum amount permissible to counties of our size. In March 1953, the Board of County Commissioners granted the Society the sum of \$15,000. This will make possible the publication of our Ohio Sesquicentennial memorial in the form of our public school textbook entitled *An Introduction to the History of American Democracy*. Our plans for this work were described in the winter (1952-53) issue of the QUARTERLY.

With pardonable pride we can justly claim that our Society's program is the best and most permanent way of building a sound basis for fitting of local history into our general history. We also feel that our method of celebrating the Sesquicentennial is the most truly monumental and vitally permanent of any adopted anywhere else in the State of Ohio. Our pride and our thanks go out to our County Commissioners who have understood our program and given it their blessing.

Our former president, the late Richard D. Logan, once said, "Let us keep our knowledge in repair." We are not only doing that, but we are building a correct foundation for a sound understanding of American History in our locality. We believe that in so doing we are living up to the high purpose of the Magna Charta of Local History—the Ohio law of September 23, 1947.

RANDOLPH C. DOWNES

Ohio's Second Constitution

BY RANDOLPH C. DOWNES

1. *How Ohio's First Constitution Became Out Of Date*

The difficulty with Ohio's first constitution as adopted in 1802 was that it was practically unamendable.¹ Amendments had to originate in another constitutional convention. Such a convention could be called only upon the request by a two-thirds majority in each house of the legislature that the question be submitted to the people. In 1819 such a request was made by the legislature, but the people voted against a convention. For almost 50 years the Constitution of 1802 went unchanged.

Fifty years is a long time to go without making some changes in any constitution. This was especially true for the first 50 years of the 19th century in Ohio. In 1802 the population was 45,028; in 1850 it was 1,980,329. In 1803 the main method of transportation was by foot or horseback; in 1850 railroads, steamboats, and canals were vying for supremacy in the field of commerce. In 1803 there were no large cities in the state: in 1850 Cincinnati, Queen City of the West, with a population of 115,435 was a great meat packing center. Cleveland, with a population of 48,099, was experiencing its commercial and industrial beginnings. Toledo, convinced of its destiny as the "future great city of the world," was vigorously trying to throw off the shackles of the Black Swamp and other retarding influences.

It was clearly necessary to adjust the rural Constitution of 1802 into gear with new urban, industrial and commercial conditions. By 1850 there were several rural features which stuck out like sore thumbs in the old constitution. One was the provision that the legislature could create counties with an area as small as 400 square miles. This was based on travel conditions slower than the horse and buggy; it went to the hike-and-horseback days. Another rural feature was that the state Supreme Court had to hold annual sessions in each county. By 1850 there were 87 counties. This was imposing an unbearable job on the justices. Transportation facilities in 1850 were such that it was justifiable to expect the people to come to the Supreme Court for justice rather than to require the Supreme Court to come to the people. In 1847 Clement L. Vallan-

digham of Dayton drew an amusing picture of the conversion of the judiciary into "a flying express", having a criminal hung in Cleveland one day, and the next day sentencing a group in Cincinnati to the penitentiary.

Another flaw which had become apparent by 1850 was the excessive power given to the legislature. In 1802 this had been part of the reaction to the excessive powers of territorial governor, Arthur St. Clair. The new constitution had deprived the state governor of the power to veto laws. It gave the state legislature power to appoint the secretary of state, the state treasurer, the state auditor, the members of the state Supreme Court as well as all the judges of the Court of Common Pleas in each county. In addition to the right to create new counties, it had the responsibility of drawing up representative districts for electing members of the legislature and Congress. It had power over such petty matters as granting divorces and incorporating businesses, churches, and lodges. It could block the movement to cut its powers by constitutional amendment by refusing a two-third majority to a call for a constitutional convention.

2. *Log-Rolling and Gerrymandering*

The result was that by 1850 the Ohio state legislature had become a notorious nest of log-rolling. New counties became political footballs and were promoted by ambitious politicians of one party or the other. There were plenty of political plums to offer, especially the judgments of the county courts of common pleas.

Perhaps the most undignified aspect of this log-rolling was the periodical indulgence of the legislature in the practice of gerrymandering. This was a juggling of the districts of representation by the party in power. The techniques varied. One was to spread thin the areas supporting the opposition party by attaching pieces of them to larger areas supporting the party in power. Or you could waste a very strong opposition area by putting it all in one district. At any rate, every effort was made to cut up the strongholds of the party in power into as many representative districts as was safe.

Gerrymandering is an example of a good idea gone wrong. Its basis lay

in a desire to avoid the rotten borough system which was debauching English politics. Districts which the tides of population had passed by and in which only a handful of people were left, were entitled to a member of Parliament. Other districts which had hundreds of thousands of people were entirely unrepresented. Even the eastern American colonies and states had fallen into the practice of misrepresentation. There had always been a tendency for the tide-water aristocracy to have more than its share of representation. That was because redistricting legislation lagged as the population moved West. Hence, when a western state like Ohio was formed, it was natural that there should be a provision for frequent redistricting in order to preserve a proper balance.

But the idea degenerated into a racket in Ohio. For example, there was the wretched redistricting bill of 1836. Jacksonian democracy of the common-man variety had reached its climax in the state and was beginning to level off. Ohio had gone solidly for Jackson in the presidential elections of 1828 and 1832. In 1831 Ohioans elected Jacksonian Democrat Robert Lucas to be their governor; in 1833 they re-elected him. In 1836 the Democrats planned to get Jackson's hand-picked friend, Martin Van Buren, to succeed to the Presidency. Cries of "dictator," and "King Andrew" arose. Undaunted, the Democratic legislature gerrymandered the Congressional districts to suit its fancy. The result was that the Democrats got 11 Congressmen against 8 for the opposition Whigs, while the Whigs carried the state at large for William Henry Harrison for President and for Joseph Vance for Governor. The Democrats had also gerrymandered the state legislature into a majority for them. When the legislature met, there followed one of those undignified legislative squabbles which caused much disgust. The first order of business was to elect a United States Senator. In order to do business the legislature had to have two-thirds of its members present. The disgruntled Whigs therefore stayed away to prevent the Democratic majority from electing its candidate, William Allen. After a Whig embargo of a month and a half, public opinion forced them to give in. This made possible the election of Allen.

For several years both parties fired back and forth at each other with gerrymanders and counter gerrymanders. Finally in 1848 matters came to such a climax as to turn two successive legislative sessions into an exhibition of sordid log-rolling. A Whig gerrymander in 1848 had divided Hamilton County into two districts: one to elect one state senator

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and three representatives, and the other to elect one senator and two representatives. Prior to that time the county was all in one district, and usually sent two Democratic senators and five Democratic representatives to the legislature.

In the election of 1848 the Whigs were able to elect one senator and two representatives. The Democrats claimed that it was illegal to split a county's representation. They therefore claimed that all seven of their candidates were elected.

The fight was carried to the legislature and again focussed on the election of a United States Senator. The balance of power was held by several Free Soilers who represented the anti-slavery sentiment of the time. Their leader was Salmon P. Chase of Cincinnati, later to be President Lincoln's Secretary of the Treasury and Chief Justice of the United States Supreme Court. In order to foil the Whigs the Democrats made a deal with the Free Soilers and elected Chase Senator. It was an almost unheard of thing for a splinter party to be so successful. The Whigs, of course, were furious. Therefore, a year later, when the legislature met for its session of 1849-50, feelings were so bitter that week after week passed without the senate being able even to agree on a Speaker. Finally after 301 ballots a Whig was elected. But so great was the public clamor of protest that the Whig Speaker resigned. More electioneering followed with the result that a Democratic Speaker was elected.

The spectacle of a legislature spending more time in electioneering than in passing laws led to an overwhelming popular demand for a constitutional convention. The Democrats, taking advantage of the situation, came out in favor of asking for popular approval of one. In March, 1849, enough Whigs gave in to secure the two-thirds vote necessary for submitting the question of a convention to the people. They gauged public opinion correctly. In the 1849 fall election the public endorsed the calling of a convention by a vote of 145,698 to 51,161. In the ensuing election of delegates a Democratic majority was chosen.

3. The Constitution of 1851

The ensuing constitutional convention, held at Columbus and Cincinnati, wrote an entirely new constitution.² It contained reforms which

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went to the heart of the log-rolling, gerrymandering evil. It transferred many important powers from the legislature to the people as a whole. In the first place it made the amendment process more flexible. Three methods were devised. One was that every 20 years there should be a vote by the people of the state as to whether or not a constitutional convention could be held. The second method was that specific amendments could be added at any time if both houses of the legislature approved by a three-fifths majority and if the people approved in a state-wide referendum. The third method was the old one of a two-thirds call upon the people for a special convention, followed by a vote of the people as to whether a special convention was necessary. These three methods are part of the Ohio Constitution at the present time.

Other provisions of the new constitution weakened the legislative opportunity for log-rolling. It was provided that there should be no changes in county lines without the approval of the old counties affected. This cut down county-making politics. No new counties have been created since the Constitution of 1851 went into effect. Legislative election of officials was abolished. Judges of the county courts were to be elected by the people of the counties involved. The secretary of state, auditor, treasurer and attorney general were to be elected by the people at large. The state Supreme Court was no longer to make annual visits to each county. Instead a district court system was created to meet more local needs for appeals from county courts. The legislative power to incorporate business, churches and lodges was abolished. The issuing of charters was made an administrative process under the direction of the secretary of state. Divorces were to be matters for judicial consideration.

Gerrymandering of the state legislature was given a mortal blow. Redistricting of the legislature was to take place every ten years after the national census had been taken. A strict formula controlled the process. In the house of representatives a so-called "representation ratio" was determined by dividing the state population by 100. Each county was to have as many representatives as it had ratios in its population. If it had less than one ratio but more than half a ratio it had the right to a representative. If it had less than half a ratio it was attached to an adjoining county for representation purposes. If it had more than one ratio in its population it got increased representatives proportionately. For state senatorial purposes the state was divided into 33 districts or groups of counties. A senate ratio was obtained by dividing the state population

to build them. In some years toll receipts were not even paying the costs of maintenance. Money was diverted from school and road funds. The state debt not only went unreduced but it went higher. Interest rates were high and millions of dollars were wasted in paying them. The credit of the state was not good. Therefore, bonds frequently sold at a discount, or, in other words at less than face value.

The Constitution of 1851 had several provisions to cope with this situation. In the first place the land classification basis of taxation was abolished and taxes were made to include all property values including banks and other businesses. Whether or not this included banks under old charters of incorporation was not stated. (Later the United States Supreme Court decided in favor of the banks).³ The banks were further restricted by the provision that individual stockholders were to be held to a liability to the extent of at least double their investment; the legislature might provide for unlimited individual liability. This meant that a bank investor might lose all his property in case of the failure of his bank. Finally the future state debt was to be limited to \$750,000. The state could go above that limit only "to repel invasion, suppress insurrection, defend the State in war or to redeem the present outstanding indebtedness." This meant that the state would not be allowed to engage in such risky enterprises as canal building or railroad building. In order that there should be no question about it, a clause was inserted stating, "The state shall never contract any debt for purposes of internal improvements."

The divorce between government and private enterprise was made more complete by clauses forbidding the state or any subdivision from investing in any corporation. This was the result of many counties, townships and cities having burned their fingers by floating bond issues to raise money for buying railroad stock. In the 1840's railroad companies had high-pressured many localities into buying stock. Such localities had vied with each other in order to get railroads to come through their neighborhoods. But most of these railroads went bankrupt. Hence many towns and counties had to pay all bond issues with taxes instead of expected railroad receipts.

The state of Ohio thus faced the rest of the 19th century with a hands-off, laissez-faire attitude toward private enterprise. This was to lead to abuses by which the public became aroused at the alleged "public-be-

by 35. Each district had a right to one senator and more in proportion to the number of district ratios. Each county which had a population equal to one senate ratio had a right to a senator provided the population of the rest of the district equalled one ratio. This formula method of determining representation exists today with the exception that each county has a right to one representative in the lower house of the legislature regardless of size. The ratio process is not applied to districts for United States Congressional representation.

Other sections of the new constitution sought to cope with the rise of banks and business. A feeling was growing during the 1830's and 1840's that the Ohio banks were not paying their share of taxes. It had been the original practice when the legislature incorporated a bank to include the tax rate in the charter of incorporation. The rate was usually about 4% of the bank's profits. As banks became more and more prosperous it became desirable, especially by Democrats, to increase their rate. But the banks claimed that to increase the rates was a violation of the United States Constitution's provision that no state could pass a law impairing the obligation of contract. The state, said the banks, had contracted with them to levy a certain rate of taxation. To raise it was a breach of contract. This logic was upheld by the United States Supreme Court in the so-called Dartmouth College decision of 1819, as written by Justice John Marshall.

The dispute had a very serious effect on Ohio's financial problems. The prevailing property taxes were imposed on land in proportion to its fertility. This disregarded the improvements made thereon. Land was classified according to three types of fertility and taxed accordingly. It was aimed at speculators who held land out of use. By being forced to pay taxes on their land they would be forced to sell it to farmers. Obviously a reform was necessary so as to include the value of farmers' barns, houses and cultivated acres. But the farmers were not willing to consent to this if the banks were not made to increase their taxes. Why asked the farmers, should we pay more than our share of the state tax burden?

The result of this "you-can't-tax-me" situation was disastrous to the state debt. The state-built canals were not doing as well as expected because they were spread too thin over the state. The tolls were not paying off the bonds by which the state originally borrowed the money

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damned" attitude of big business. Cities, especially, were eventually to develop an attitude of suspicion towards electric power companies, street-car companies and similar "monopolies." A desire to control them in the public interest led to the so-called city home-rule movement. Country districts, somewhat overtly represented in the state legislature, feared to let the cities engage in alleged radical or socialistic innovations. There was gradually created a new constitutional problem which came to a head in the Constitutional Convention of 1912. This will be described in the next QUARTERLY in the third of our Sessquicentennial series on Ohio constitutional history.

FOOTNOTES

1. See Randolph C. Downes, "Ohio's First Constitution," *Northwest Ohio QUARTERLY* (Winter, 1952-53), pp. 12-21.
2. The terms of the Constitution of 1851 are in Isaac Franklin Patterson (ed.), *The Constitutions of Ohio* (Cleveland, 1912), pp. 117-158. Unlike the Constitution of 1802, the 1851 document was submitted to the people and ratified by a vote of 123,564 to 109,276.
3. See Randolph C. Downes, "Judicial Review under the Ohio Constitution of 1802," *Northwest Ohio QUARTERLY* (October, 1946), pp. 164-166.

Memories of Great Churchmen of the Past Fifty Years— A Toledo Newspaper Man's Reaction to Different Brands of Theology

By GEORGE W. PEARSON

1. Early Memories

I have felt it a great privilege that in the past 50 years I have met and reported some of the great churchmen of America and known intimately many of the outstanding clergymen of Toledo. Coming to Toledo in February, 1893, I served for six or seven years as church editor of the old Toledo *News* and the *Blade*. After coming to the East Side in 1900, I covered East Side churches for 40 years until my semi-retirement on account of ill health.

Before touching briefly on my contact with various men and influences affecting my own life, I might mention that these included such great souls as Dwight L. Moody, Washington Gladden, Dr. Josiah Strong, Prof. Graham Taylor, Jane Addams, Russell Conwell, Walter Rauschenbusch, Bishop Charles Williams of the Episcopal church, Bishops Fowler, Vincent, Bashford and other bishops of Methodism, B. Fay Mills, Billy Sunday, Sam Jones, evangelist, Charles Sheldon, Stanley Jones, our own Marion Lawrence, various missionaries from all over the world who were here for the great Laymen's Missionary movement, and even Dharmapala, representative of the Hindus at the World Parliament of Religion at Chicago World's Fair in 1893. Attending services of Catholics, Protestants and Jews, I found some wonderful folks in all of them and a few "not so hot" in my own. Religion and character are personal and I find good in all the creeds, for as Moses Mendelssohn, a great Jewish writer of the 18th century, said: "I certainly believe that he who leads mankind on to virtue in this world cannot be damned in the next." And the Hebrew prophet Micah gave a formula which, if adopted, would assure world peace and could be adopted by all religions: "What doth the Lord require of thee but to do justly, love kindness and walk humbly with thy God."

Appendix D

Commence-
ment. This act shall commence and be in force, from
and after the passing thereof.

MICHAEL BALDWIN,
Speaker of the house of representatives.

JAMES PRITCHARD,
Speaker of the senate.

February 22, 1805.

CHAPTER LV.

*An act, declaring what laws shall be in force in this
state.*

The common
law, British
acts prior to
fourth,
James, first,

and state
laws.

Sec. 1. *Be it enacted by the general assembly of
the state of Ohio,* That the common law of Eng-
land, all statutes or acts of the British parliament,
made in aid of the common law, prior to the fourth
year of the reign of king James the first, and which
are of a general nature not local to that kingdom,
and also the several laws in force in this state,
shall be the rule of decision and shall be consid-
ered as of full force, until repealed by the general
assembly of this state.

Repealing
clause.

Sec. 2. *Be it further enacted,* That a law, en-
titled, "A law, declaring what laws shall be in
force," adopted from the Virginia code and pub-
lished at Cincinnati, the fourteenth day of July,
one thousand seven hundred and ninety-five, be
and the same is hereby repealed.

Commence-
ment. This act shall take effect and be in force, from
and after the first day of June next.

MICHAEL BALDWIN,
Speaker of the house of representatives.

DANIEL SYMMES,
Speaker of the senate.

February 14, 1805.

CHAPTER LVI.

An act, establishing a pilot over Letart Falls, in the county of Galia.

Sec. 1. *Be it enacted by the general assembly of the state of Ohio,* That the court of common pleas for the county of Galia, are hereby empowered and authorized, to appoint a discreet person as a pilot over Letart Falls, in Ohio river, in the county of Galia, to continue in office during good behavior, who before he enters upon the duties as a pilot, shall give a bond, with good and sufficient security to the clerk of the court of Galia county, in the penalty of two thousand dollars, for the faithful performance of his duties as pilot, who shall, before he enters upon the discharge of his duties, take an oath for the faithful performance of his trust.

Court of common pleas, Galia county, to appoint a pilot.

who is to give bond and security

Sec. 2. *And be it further enacted,* That the said pilot, when appointed and qualified, shall take charge of all vessels, boats and other crafts, upon application being made to him for that purpose, and safely convey every such vessel, boat or craft, over the said falls; and any vessel, boat or craft, or their loading, sustaining any damage, through the

Pilot's duty

liable for neglect or misconduct.

Appendix E

gentleman would be willing to vote for a proposition which he intended to offer to the following effect:

"The right of association, for the prosecution of all enterprises, for the advancement of the public good, and for the promotion of morality, shall ever be held inviolate."

The question was now taken upon Mr. REEMELIN'S amendment, and, upon a division, it was rejected—affirmative 22; negative not counted.

Sec. 18. No power of suspending laws shall ever be exercised, unless by the Legislature."

Mr. LARSH proposed to amend by substituting "General Assembly" for "Legislature."

Which was agreed to.

"Sec. 19. This enumeration of powers shall not be construed to impair or deny others retained by the people, and all powers not herein delegated, remain with the people."

Mr. GROESBECK moved to amend this section by striking out from the first line the word "powers," and inserting in lieu thereof the word "rights."

Which was agreed to.

Mr. RANNEY said he perceived that the Committee had left out of this report a number of articles in the old bill of rights. He had copied one of them, and would move its adoption as an additional section, as follows:

"Sec. —. That all courts shall be open, and every person, for any injury done him, in his lands, goods, person, or reputation, shall have remedy by the due course of law, and right and justice administered without denial or delay."

Mr. HITCHCOCK of Geauga, had no objection, to the amendment, if it could be carried out. Justice should certainly be administered without denial or delay, but delay could not possibly be avoided in the Courts, unless they could have a gag-law there, as well as in this body. [A laugh.]

The section was agreed to.

COLONIZATION BY THE STATE.

Mr. BLICKENSDECKER proposed to insert the following, as an additional section of the report:

"Sec. —. Appropriations of money may be made out of the state Treasury for the transportation of colored persons who may reside in this state, and desire to emigrate to the western coast of Africa, and to assist them in settling at that place, whenever the General Assembly shall deem it expedient and beneficial to the citizens of this state."

Mr. BLICKENSDECKER said there was nothing intended by this proposition but to do away with the constitutional objection, which was always raised, whenever this thing of an appropriation for Colonization purposes was proposed in the General Assembly. The probability was, that such a thing would never be undertaken, without first stopping the influx of black population into the State. It was merely designed to remove the constitutional objection, whenever such a thing might be deemed advisable by the General Assembly and the people. The adoption of this declaration might also be productive of good effects in the way of example for the other States.

Mr. LOUDON suggested that it would be well to guard against the liability of incurring the expense of carrying off to Africa all the surplus black population which might be thrown upon us by our neighboring States or the South. The blacks had no claims upon the people of Ohio—especially that portion of them which had come into the State since the adoption of the old Constitution. Ohio was a State for white men. The negroes were intruders amongst us, and it was unreasonable for any man to claim that it rested upon us as a public duty, to transport these people at the expense of the treasury.

Mr. HAWKINS proposed to amend the amendment of Mr. BLICKENSDECKER, by adding at the end thereof the following:

"Provided, That the General Assembly may pass a law, as far as may be deemed practicable, to prevent the immigration of blacks and mulattoes into this State."

Mr. GREEN of Ross, suggested to the gentleman from Morgan to make the provision imperative—striking out "may," and inserting "shall."

Mr. HAWKINS accepted the modification.

Mr. SMITH of Warren, said he would not object to the section, if it left the matter to the discretion of the Legislature. It was a power which belonged to the Legislature at all events.

Mr. GREEN of Ross admitted that the Legislature had the power; and they had attempted to exercise it—how effectually, every citizen in Southern Ohio knew full well. The law upon the subject was a perfect dead letter. Therefore it was that he said, if they were to have any provision of this kind in the constitution, let it be imperative,—for, unless this were done, it would be very uncertain whether the Legislature would attempt to exercise this power or not.

He proceeded at some length to set forth the necessity of Legislative action upon this subject, and, amongst other things, he said, Virginia permitted no manumitted slave to remain within her borders; and Ohio had already become an asylum for the free negroes of Virginia and Kentucky; and, if it were determined to open the door wide for the admission of the blacks, and for their elevation to the position of equality in political and civil rights with the citizens of Ohio—thereby making the state a focus and centre-point of attraction for this class of people—if this was to be done, it should be done without his vote.

The presence of the blacks was a nuisance, especially in the Southern portion of the State; and the people of this portion of the State would submit to no tax more cheerfully than that by which they might get rid of this nuisance. There was no division of sentiment amongst us in regard to this matter. Gentlemen from the northern part of the State, could not, by reason of their prejudices, understand why this was so. But if they were to come down and live amongst us, they would get some information upon the subject. They would learn this fact; that we were opposed to elevating the blacks to the same rank with ourselves; but, that, while we consider them an inferior class of beings, we treat them with the same kindness and faithfulness which we extend to all others, in the same condition of life; we feed them well; we pay them well; and we do not overtask them.

Mr. HITCHCOCK, of Geauga, said he had supposed, when this article was taken up, that it was the design to declare certain great principles with which our ideas of government should accord. He did not suppose that we were about to consider and adopt here, an appendage to the report of the committee on the legislative department. It did seem to him that this proposition was altogether out of place. It was undertaking to declare what the General Assembly should do, in a part of the Constitution which had no connection with the subject.

Mr. TAYLOR was with the gentleman from Ross, in his preference for the imperative form of this resolution. He also preferred "shall" to "may." He liked to see a bold front, as he despised to see a mean thing done sneakingly. If they were going to expatriate the negroes, he hoped gentlemen would face the music; and the word "shall" being interposed, it would afford a better test of the spirit of gentlemen upon a call of yeas and nays.

people in the part of the State which I have the honor to represent, I may state, upon that knowledge, that it is in the highest degree, adverse to the system here proposed, and that these opinions will exert a strong influence upon the votes they are to give, when this constitution is presented to them for their adoption. The reason is, that it is perfectly apparent to them, as it is to me, that it will introduce great delays in the administration of justice, add largely to the cost of litigation, and remove the courts far from the sight and reach of the people.

I call therefore, upon gentlemen of the Convention, and urge them, by every consideration which should be operative upon men who desire to render their labors acceptable, to come forward at once, and aid in engrafting upon this bill such features as will render it an aid to, instead of a weight upon the adoption of the code of organic law we are engaged in constructing.

I have, Mr. President, no personal feeling involved in this question. I am in favor of the best system that can be constructed, and for that I will give my vote.

It is provided in the bill of rights which forms a part of the present constitution, that all courts shall be open, and every person, for an injury done him in his lands, goods, person or reputation, shall have remedy by the due course of law, and right and justice administered, without denial or delay. In the draft of the bill upon the preamble and bill of rights, for the constitution we are engaged in constructing, the committee omitted this provision. It may be, that taking into consideration the provisions of the judiciary report, they felt as if they could not give the assurance that justice shall be administered without denial or delay. That provision however has been reinstated, and I hope to see its promise redeemed to the letter.

But sir: what does this system, in effect provide? The state is to be divided into nine judicial districts, of which the county of Hamilton will be one. Besides this there will be eight districts, into which the balance of the state is to be distributed. This will make about eleven counties in each district. This amendment, if adopted, will bring a session of the Supreme court into one of these eleven counties every year. Is this unreasonable? Or are we to be bound to a system that has no feature but the centralization of all the judicial power of the state? But, we are told by gentlemen, that this is a mere matter of detail, and that the safest and best way is to leave it all to the Legislature. If the thing is right, it can be and should be done here, for this reason,—that this Constitution has got to go before the people, and they will insist upon reading on its face, that they are not to be saddled with a system that shall centralize all the judicial power of the state at the seat of government. They want a guaranty that such shall not be the result. Many will vote against the system, with this provision for delay and consolidation in it. If you will erect this court, give it something to do, and let it do its business as near and as conveniently to the people as practicable. Let us then begin here. The amendment will take nothing from the symmetry of the bill.

Mr. STANBERRY. It will increase the delays in the administration of justice—that is all.

Mr. RANNEY. I do not think so. The same business will be done. Can it not be done as quickly in the districts as at the seat of government? The question is, shall the Supreme Court perform the same duties in the districts, or at the seat of government?

Under the present system, the Supreme Court goes into each county, and decides from sixty to a hundred cases in bank; and will gentlemen say that with an enlargement of the force of the Court, they will be so

overloaded with business that they cannot hold a session in eight different places in our territory? He looked upon this Supreme Court, as something like the fifth wheel of a wagon. There was, it would seem, little for them to do. If they hold their sessions only at the seat of government, there would be next to nothing to do. Now he wanted to furnish them with some duties to perform, for of all the evils that could afflict the public, the worst would be a Court holding its sessions at the seat of government, with nothing to do.

He looked upon it, as of great importance for any court to go out among the people, to learn their character, manners, habits, and modes of thought. It would give them a species of information, that they could obtain in no other way. Besides, the effect upon the people will be in the highest degree salutary. For no court can acquire that power, dignity, influence, and authority, in the eyes of the people, which it ought to have, unless it goes among the people, performs its duties in their sight, and places in their view the practical workings of the system of judicial power which acts upon and protects their interests.

If you require this court to sit at the seat of government, the effect will be, it will not command the respect and the confidence of the people, as if its duties were performed in their midst. The question is, will you have a supreme court sitting at Columbus, and the business to be brought to it, or shall it go from district to district, administering justice to the people, for the people, and in sight of the people?

I have ever said when I have been inquired of, that this convention would not fix upon any system that would not bring home justice to the people. I have used my endeavors to counteract the tendency, to bring disrepute upon its labors. But, sir, dry up the fountains of justice—create a system that shall ensure delay and uncertainty—take it away from the people, and locate it at the seat of government, and you have damned—irretrievably damned this constitution.

Mr. KIRKWOOD said, it appeared that the gentleman from Trumbull, [Mr. RANNEY,] had a deep seated opposition to the entire system of the committee. He attacks the report disingenuously, and lays to this system, all the defects, delays of justice, continuances, appeals, &c., incident to the present system. These are subjects proper to be discussed, under the head of reform, in the practice of the courts; but have no relevancy to the present subject. The question is, shall the supreme court sit at Columbus, or shall it sit in each of the nine districts of the State. Now, the gentleman has himself introduced a system of his own; and it would seem, that he is ready to break down that of the committee, in the hope, then, to introduce his own.

There may be a question of his consistency, which may be seen in the light of his own report. In that, he is content to have his supreme court, in three places in the State. Here he is not content, that it shall sit in even nine places. He seems not to have read his own project recently, and to have forgotten its provisions. And he appears equally ignorant of the provisions of the report of the committee, or he would have known that to sit in bank at Columbus, is but a small portion of the duties required by the judges of the supreme court. The provision of the report is, that the supreme court—that is, the court in bank—shall sit at least once a year at Columbus, and at such other times and places, as the Legislature may direct.

The proposition involved in the amendment, is, not that the court that now corresponds to the supreme court, shall sit in each of the districts of the State; but that the court in bank, shall sit in each of the districts.

Appendix F

JULY 16, 1873.]

GARDNER, GODFREY, MULLEN, COWEN.

be hurtful in any respect, and it only becomes useful when the necessity exists for it. If you leave this section out of the Constitution, you have no provision whatever, by which, if, in the multiplicity of causes, the supreme court should become, as it now is, overrun with business, you can relieve it. Gentlemen say that there has been no necessity hitherto for a provision of this kind; but gentlemen, in the light of the fact that now the supreme court is four years behind its business, will not argue that a commission like this, had it been provided for by the old Constitution, would not have relieved the docket of the supreme court.

Mr. GODFREY. Will the gentleman allow me? Does he think the necessity would have occurred, the docket would have been behind, had the jurisdiction of the supreme court been what we now propose to make it?

Mr. GARDNER. Gentlemen undertake to speak for the time to come. Do they forget that the State of Ohio is a great State, and a growing State? that varied and multiplied interests are growing up all through it; great commercial and manufacturing interests? Do they suppose the courts of this State are to remain as they are now, and have been for twenty years past? We do not know what is in the future for us. We have made a provision for future contingencies, and that is all there is of it. It can certainly do no harm, and it may do infinite good. Now, the argument of the gentleman from Richland [Mr. BURNS] that the supreme court will manufacture an occasion for the creating this commission, seems to me to be an entirely unwarranted assumption. That is, presuming that an intelligent court, elected by the people to perform the duties of that court for the people, will disregard their official oaths, neglect their business, and manufacture an occasion for this commission. Now, that is presuming more than we are warranted in doing, and if they should do so wrongful an act, the General Assembly, which is to make provision for it, would prevent the wrong. If we leave this article in the Constitution, it can do no harm. As the gentleman suggests, in 1850, at the time the old Constitution was made, it was thought not to be needed, but our experience has shown that now, by the accumulation of business at the commencement of a new judicial system, there is a necessity for the creation of this commission to relieve the supreme court of the accumulation of the docket. That does not necessitate our providing that this commission now shall last ten years. Gentlemen are content to give us a commission that shall only continue for three years. We ask that this commission shall only be provided to supply an actual want, and relieve the docket of the supreme court. I have a case pending in the supreme court now, that has been there for two years, and I am informed by the clerk that it cannot be possibly reached for more than two years more. When such a state of case as that exists, we want a provision by which litigation may come to an end. Therefore, I hope the Committee will not strike out this section.

Mr. MULLEN. In 1851, at the organization of our present judicial system, I learn that there had been an accumulation of cases in the supreme court to the amount of between 400 and

500. It was thought then that the judicial system then devised would be sufficient to gain upon those cases, and be sufficient to dispose of the cases as they came into court. Therefore, no commission was authorized at that time for the disposition of the cases. But in view of the action of the Judicial Committee in this case, and in view of their recommendation; so far, I do not think that any such argument or excuse exists at the present time. Now, as I said, in 1851, there had been an accumulation in the supreme court, of between 400 and 500 cases. No commission was appointed at that time, but the supreme court, under the present judicial system, went into the discharge of their duties, and they have kept up with all the cases that have been brought into the supreme court, both of law and of fact, with the exception of forty cases, and they have held the district court at the same time; and there has been an accumulation during the last 20 or 22 years, of only forty cases. Now, I ask, if there can be any necessity for such a provision in the present Constitution, that a commission may be appointed, if the judges of the supreme court may see proper to ask it? Now, the supreme court, under the present system, adopted yesterday, has been relieved. All questions of fact are retained by the inferior courts, and they are not called upon to act in those cases. Neither are they required to go down to the district court; but their whole time, all their energies, and their full capacity, are asked to be expended upon the cases of law, simply, in the supreme court. Then, I say, where can be the necessity or the excuse, rather, for permitting this section to remain in the present judicial system? I concur in the opinion of the gentleman, that a decision announced by the appointing power would not carry with it much influence, much respect; and I am not in favor of throwing the supreme court into temptation. I do not desire to doubt the capacity or the ability of the supreme court under this new judicial system, of discharging their whole duty. I am satisfied, Mr. Chairman, that under the present judicial system, with the safeguards that have been thrown around the supreme court, they will be fully competent to keep up with all the business that may come into that court, and play half the time. Now, there has been a great deal of talk about relieving the supreme court. I undertake to say, Mr. Chairman, that under our present judicial system, the judges of the court of common pleas have done twice as much work as any single judge of the supreme court in the State of Ohio, and yet their labors have been disparaged. It has been said they have not half worked. I think the lack of labor has been in the supreme court. Then, I say, in view of the amendments that were passed by this Committee, on yesterday, I hope that this section may be stricken from the proposed plan.

Mr. COWEN. The Committee, in disposing of the 4th section of this article, have unanimously decided that a commission, in place of the supreme court, is now necessary. The gentleman from Richland, [Mr. BURNS], makes a prophecy, as I understand it, namely, that although the creation of such a commission is now necessary, it will never again be necessary in the history of Ohio.

BURNS, COWEN, PRATT, WHITE of B.

[WEDNESDAY,

Mr. BURNS. Will the gentleman from Belmont give way a minute?

Mr. COWEN. Yes, sir.

Mr. BURNS. I think he extends my prophecy a little too far. I stated for the next twenty years.

Mr. COWEN. Very well. The gentleman makes a prophecy that it will not be necessary for the next twenty years. Of course, the Committee are not going to convert themselves into a committee of prophets. If the proposition of the gentleman in this section were, that such a commission should be created once in ten years, then I can see the force of the argument and the pertinency of the predictions that are made here by those who oppose the Proposition. But who of this Committee is prepared, in the exercise of his deliberate judgment, to say, that for the next twenty years no such necessity as now exists, and as is admitted by this whole Committee, and every member of this Convention, will occur? It has been observed here, and remarked upon by the gentleman from Marion, [Mr. SCOFIELD], that this does not propose to create another commission in the future. The proposition is simply to make a provision here, abundantly guarded, as I think. If the members of the supreme court are of the opinion, at any time in ten years after the expiration of the commission which we have created, they appeal to the people through their representatives, and then it is for the people, through their representatives in the General Assembly, to determine whether that demand is justified by the state of the docket and the business, and if it is, they are authorized, in that case, to do it. What harm can possibly result, Mr. Chairman, from the adoption of an amendment guarded as this is? And why should objections be made to the adoption of it, simply because it is possible it may not be needed? I do trust we may not fall into the error which it is conceded the framers of the present Constitution fell into, of supposing they had created a supreme court that would be amply able to do the business of the State. It is claimed here, and reference is constantly made to the action of the Committee on yesterday, in adopting an amendment which it is supposed will reduce materially the business of the supreme court. How much it is going to reduce it, it is impossible to determine now; and gentlemen are entirely mistaken when they assume that that court has the disposition of questions of law only. Criminal cases, equity cases, may go up to it under the action of our Legislature as it now stands. Besides that, Mr. Chairman, I do not propose to discuss here, even incidentally, the propriety of the amendment as it now stands; but it was debated in the Committee. We anticipated its probable fate in the Convention, and inasmuch as it is spoken of here, I beg leave to say, that I, for one, shall, when the action of the Convention comes to be taken upon that, at least enter my solemn protest upon the adoption of the amendment to this second section. I ask the indulgence of the Committee while I make this single remark, that I do not concur in the opinions which have been expressed by gentlemen of eminence, when they say that our judicial system is creating a supreme court for the purpose simply of settling general

questions of law which are of public interest. My understanding is, that it is the duty of the Convention, when they undertake to create a court, to create a court where justice may be administered, and the individual and personal rights of the people determined. I do not propose to anticipate the action of the Convention, even, therefore, in giving the vote which I shall cast against the proposition to strike out this fifth section.

Mr. PRATT. I would not willingly yield in respect to any gentleman upon the floor that I owe to all the supreme judges and supreme courts that have ever been in Ohio, now are, or ever will be; but I am not prepared, in anticipation, to give that degree of respect to a brevet supreme court that attaches to that regularly constituted under the Constitution of the State. I hope, therefore, that the motion of the gentleman from Mercer [Mr. GODFREY] will prevail, and that this power that is sought to be lodged in the Legislature and the supreme court, of creating every ten years a supreme court by brevet, will not be there long. While I respect the court as now constituted, and as it will be constituted in the future, I do not believe it is politic or wise on the part of this Convention or of the people, to place before that supreme court in the future the invitation to relieve themselves of the labors cast upon them by this Constitution, by throwing it upon another tribunal. Now, in the progress of the debate yesterday, in this Committee, we were assured by those who were well advised and who had studied well into the statistics, that at least seven-tenths—that was the statement, as coming from the clerk of the supreme court—that seven-tenths of the causes seeking admission to that court now, were upon questions of fact, for the decision of which, by the vote of this Committee, we provided to refer to another tribunal, and that seven-tenths of the business seeking admission into the supreme court of the State, is provided for by another tribunal that we all believe will become an efficient tribunal, a break-water against the piling up of business in the supreme court, already provided for. May we not most properly insist that there will exist no such accumulation of business in the future as has existed in the past, and that this court, consisting of its five judges, will be amply sufficient in the future to keep its docket clear? I shall, therefore, vote for striking out the section.

Mr. WHITE, of Brown. The Committee framing the Report have sought that it be adequate to meet any future exigency that may arise in the progress of the growth and development of the State. Our Bill of Rights declares "that all courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by the due course of law, and justice administered without denial or delay." That declaration in our Bill of Rights, for a number of years last past, has been an absolute nullity. Justice has not been administered without denial or delay, and for injuries done to our people in their persons, their property and their reputation, the courts have not been open for the administration of speedy justice, as they are required to be upon fundamental principles of right and of justice,

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laid down in our Bill of Rights. Who can foretell what the growth and development of the State of Ohio may be for the next twenty years to come? I know no way of judging of the future but by the past, and if we are to take the past as the criterion by which to ascertain our wants in the future, what does the past tell us? In the last fifteen years the cases on the docket of the supreme court have gained about forty. It will now take four years to reach a case that is placed upon the general docket of that court, unless some relief is provided by this Convention. Is that the administration of justice without denial or delay? We have, by the unanimous concurrence of the Convention, as the gentleman from Belmont [Mr. COWEN] said, provided relief for the present exigency that is upon us. Why shall we not provide relief against future exigencies that may come upon us, in order that justice may be administered without denial or delay? As I said before, who can tell what twenty years may develop in this growing State, now, as it were, in her infancy? Our great mineral interests, those great mines of wealth that still lie buried in the bowels of the earth, are almost utterly undeveloped, are in their infancy. Our railroads, our telegraphs, our life insurance and fire insurance companies are constantly multiplying. Our commercial interests are constantly growing and developing, and the exchanges of the different commodities of the country are increasing, and with the increase of exchanges the commodities increase. The sources of litigation are constantly increasing in our midst, and shall we not make this provision, that the supreme judicial tribunal of the State, the court of last resort for the determination of all these great questions of right, shall speedily dispose of the questions which may be submitted to them for their arbitration? What danger is there in incorporating this clause? The gentlemen say it is an invitation to the tribunal to negligence, and want of diligence in the performance of their duties. I venture the assertion that there is no officer, no court, no tribunal in the State, that has worked as faithfully and as diligently, in the discharge of the duties enjoined upon them, as the supreme court of the State; and with diligent application to the business of the court they are unable to keep up. They are inadequate to the task. If they were now even with the docket, and were to start in with the docket, with the state of the business as it now exists, with all their industry, and all their application, they could not more than keep up even, and with the future growth and development of the State, with new causes of litigation in our midst, shall we not provide against any contingency that may happen to come upon us in the future, like the evils that are now upon us? What harm can come of this provision which is thus carefully guarded? Those men who are best acquainted with the business of the court, whose situation and relations to it are such that they know the state of the business in the court, are required, whenever the business becomes so clogged that they are inadequate to the administration of speedy justice, as a right the people of the State are entitled to, to certify the fact under the seal of the court, which has to be spread upon the journals of the court,

that the business has so accumulated as to make it necessary that a commission should be raised for the purpose of disposing of the business accumulated upon the docket. That being certified to the Governor, he makes his appointment of the commission, and that appointment is a nullity until it is ratified by the representatives of the people in the Senate. With this safeguard thrown around it, I can see no danger.

Mr. GURLEY. Will the gentleman allow me a question?

Mr. WHITE, of Brown. Certainly.

Mr. GURLEY. Is he satisfied with this anomalous mode of creating the supreme court of the State of Ohio?

Mr. WHITE, of Brown. The gentleman asks me if I am satisfied with this anomalous mode of establishing the supreme court of the State of Ohio. I answer him, that I am satisfied, and will be satisfied with it, until somebody can present to me a better plan.

Mr. GURLEY. I will ask the gentleman another question. Why he does not provide for the constitution of a supreme court proper in that same way?

Mr. WHITE, of Brown. For this simple reason: This is a tribunal organized to meet a contingency and exigency that may arise, and is merely temporal for merely temporal purposes to meet a temporal exigency; and inasmuch as we cannot contemplate when the exigency may come, or what it may be, when it does come, this, to my mind, is the best provision that I have heard suggested to meet it.

Mr. HOADLY. Will the delegate from Brown, [Mr. WHITE], permit me a question?

Mr. WHITE, of Brown. With pleasure.

Mr. HOADLY. The objection that occurs to my mind to this provision is the short term of office, and as one of the Committee, after considering the matter, I should like to have him express his own opinion as to the probable success in getting a worthy court to serve on so short a term.

Mr. WHITE, of Brown. My view of the probable success would be this: The Governor of the State is a man of sufficient intelligence, and sufficiently acquainted over the State, to know who would be qualified to discharge the duties of that office. I propose, and I have no doubt that he would constitute a tribunal of men whose learning, whose standing and character as lawyers, throughout the State, would give to their decisions as much credit and as much weight as the decisions of the supreme court itself.

Mr. PAGE. Will the gentleman allow me to ask a question?

Mr. WHITE, of Brown. Certainly.

Mr. PAGE. The question involves also a statement. We have two supreme courts sitting at the same time: Suppose that the commission and the supreme court differ in their opinion, in the decision of a given question. Which is to be taken as authority?

Mr. WHITE, of Brown. The gentleman asks me the question: Suppose the commission and the supreme court differ in their opinion on the decision of a given question. Which is to be taken as authority? Now, my understanding of it is, that the commission and the supreme court will be sitting here at the same

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probate court, which shall be a court of record, open at all times, and holden by one judge, elected by the electors of the county, and whose term of office shall be four years.

The SECRETARY read :

Mr. COOK moves to amend, by striking out sections 8, 9, 10 and 14, and inserting the following:

Each county in the State shall constitute one common pleas district, in each of which, except the counties of Hamilton and Cuyahoga, at least one judge for such district shall be elected by the electors thereof. In the district composed of Hamilton county, at least five, and in the district composed of Cuyahoga county, at least three judges, shall be elected by the electors of said counties respectively. Courts of common pleas shall be held by one or more of these judges in every county, as often as may be provided by law, and more than one court or sitting thereof may be held in any county at the same time.

SEC. — The judges of the courts of common pleas shall hold for the term of five years, and, while in office, shall reside in the district for which they are elected, but may hold such court in any county of the judicial circuit composed in part of said district.

SEC. — The jurisdiction of said common pleas courts, and of the judges thereof, shall be fixed and regulated by law.

SEC. — In all counties of the State, where a probate court shall not be established, as in this article provided, the jurisdiction of the several probate courts now existing therein, with the records, files, books and papers thereof, shall be transferred to the respective courts of common pleas in said counties; and said courts of common pleas shall be open at all times for probate and testamentary business, the appointment of executors, administrators and guardians, and for such other jurisdiction as may be provided for by law.

SEC. — There shall be established in each county of the state having, according to the last Federal census, and in each county as the same shall hereafter acquire, according to the Federal census, a population greater than — thousand, a probate court, which shall be a court of record, open at all times and holden by one judge, elected by the electors of the county, and whose term of office shall be three years.

SEC. — Each probate judge, and clerk of court, other than the supreme court, shall receive a fixed salary out of the proper county treasury, and all their official fees shall be paid into such treasury, and shall constitute a separate fund, applicable, so far as may be necessary, to the payment of the salaries of the judges and clerks of said county. The clerk of the supreme court shall receive a fixed salary out of the State treasury, and shall pay into it all his official fees.

The CHAIRMAN. It will be understood that the various sections proposed to be stricken out will be subject to amendment before the vote is taken upon the substitute.

Mr. RUSSELL, of Meigs. Will the gentleman from Wood [Mr. Cook] allow me to offer an amendment to section 8?

Mr. COOK. I am under obligations, if I give way to any one, to give way to the gentleman from Montgomery, [Mr. CLAY,] for the purpose of allowing him to offer an amendment.

Mr. CLAY offered the following as an amendment to the substitute offered by Mr. Cook:

"SECTION 8. The State shall be divided into fifteen common pleas districts, of which the counties of Hamilton, Cuyahoga, Montgomery, Franklin and Lucas, shall each constitute one, of compact territory, bounded by county lines, and as nearly equal in population as practicable, having due regard to business.

Fifty judges, residing in their respective districts, shall be elected by the electors thereof, as follows:

Five in Hamilton county; three in Cuyahoga county; two in Montgomery county; two in Franklin county; two in Lucas county; and the remaining thirty-six judges in such districts, respectively, as the General Assembly may provide.

Courts of common pleas shall be held by one or more of these judges, in every county of the district, as often as may be provided by law, and more than one sitting thereof may be held at the same time in any district."

Mr. HOADLY. Will the gentleman from Wood [Mr. Cook] allow me to make a sugges-

tion? His third section and the ninth section of the Report of the Committee are really identical, and if he will waive pressing his third section, it may save us a little trouble in the Committee. They only differ in mere phraseology.

Mr. COOK. I have no objection whatever. I have no objection to the gentleman from Meigs [Mr. RUSSELL] sending in his amendment to read.

The CHAIRMAN. If the amendment of the gentleman from Meigs [Mr. RUSSELL] is an amendment to the original proposition, it is first in order.

The SECRETARY read :

Amend section 8 by striking out the word "twelve," in the first line thereof, and insert "45," and add after the word "county," in the fifth line, "Cuyahoga county," and strike out the words "three judges," in the fifth line, and insert "one judge."

The CHAIRMAN. The question is upon the amendment proposed by the gentleman from Meigs [Mr. RUSSELL]. The gentleman from Wood [Mr. Cook] is entitled to the floor.

Mr. COOK. I only have a word to add, Mr. Chairman, and I think I can say it as well now as at any other time. I really feel that I am in a better condition than I may be again.

The amendment which I offer is not the work of my own hands, but it is the product of joint labor. It has been prepared after consultation. We have followed the proposition submitted by the Committee as far as we could, having in view our desire to incorporate the idea that we would have a court in each county.

I will add but a few words to what I have already said, in support of this amendment.

Gentlemen here entertain doubts of the propriety of establishing a court of common pleas in each of the counties of the State. And so far as I have been able to learn, it is clearly because they think there cannot be found lawyers of the requisite talent in the smaller counties to fill the position with sufficient dignity, as they express it. They need have no fears on that account. The smaller counties have need of as much dignity as the larger ones. The danger does not lie here. Nor is it in the want of integrity, nor in the want of moral worth, nor in the lack of virtue; all these are more highly cultivated in the rural districts than in the cities. The country abounds in men of moral worth. The cardinal virtues are more highly prized there than elsewhere.

The only danger, if there be any, is in the want of men of sufficient legal knowledge to fill the office of judge of such a court.

For the past twenty years, some of the smaller counties have furnished the best judges in the State. And many of the ablest lawyers in the cities are men who learned the law in the smaller counties and removed to the cities, not to learn the law, but to make money and to teach the city lawyers how to practice the profession.

Both city and country are supplied with lawyers, as with the other necessities of life, by the demand for them. So, you will always find lawyers in a county, with talents commensurate with the business. And is this the only real difficulty in the way of establishing courts of plenary jurisdiction in the several counties,

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when removed, whether by fact or philosophy, reasonable men shall give their unfounded objections and give to the people a system of courts in which they may realize the promises made in the Bill of Rights, viz:

"All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and justice administered without denial or delay."

I cannot resist the conviction that gentlemen have either overdrawn on their imagination or have been driven to opposition of this system by ungrounded fears. They fear it will not maintain the judicial dignity; that it will deteriorate; that the judges will become lazy or rust in court, for want of something to do.

I have no fears of that sort. If the court is clothed with common pleas and probate jurisdiction, the judge will have business enough for every working day in the year. And the questions which will come before him will be of so varied a nature as to keep him bright on all matters which may arise for his adjudication. But should he have some days of leisure to spend in his library, he would, perhaps, be none the worse for it.

Upon the question of conferring so important jurisdiction upon a county court, we may derive information from an examination of the organization and jurisdiction conferred upon the present probate court. Its organization was not such as to secure the best legal talent of the county. But notwithstanding, the General Assembly has invested it with jurisdiction to hear and determine some of the most important questions that can arise in any court in the State.

They have given it jurisdiction in *habeas corpus*, in which not only all our liberties may be imperiled, but where infancy may be torn from maternal arms and given to the cold mercy of strange hands.

It has jurisdiction to condemn lands for the use of corporations, and may take from any citizen of the State his most valued property. He may have spent a life-time in ornamenting a house, and adorning it with all the luxury of art; flowers may bloom around him, and he may have a shrubbery that Shenstone would have envied. But it lies in the track of a proposed railroad. In vain he endeavors to induce the officers to deviate from their survey and spare to him his home that he may spend his declining years in peace. But they are inexorable. They file their petition in the probate court and the judge issues the order under which the aged man is driven out, houseless and homeless, as Adam from the Garden of Eden. And still gentlemen refuse to clothe a court of greater judicial importance in the county with a jurisdiction in many matters of far less importance. And to release themselves from the absurdity of their position, they say they would prefer to take from this court the jurisdiction above referred to.

But why rob it of this jurisdiction? Who has asked you to do it? Have the people found fault with the court in the exercise of this jurisdiction?—I ask gentlemen not to lay violent hands on this court to release themselves from their absurd position; but, rather, yield to reason and give us a court in each county

where our business may be speedily disposed of.

We have probate court, and we have common pleas court in each county; but each is only a half court. Why seek to force upon us two courts when one will do the business better? It will not be because you think it will be cheaper. It will cost more.

You propose to give us eighty-eight probate judges, and pay them a salary. This will be fixed at not less than \$1,500 each per annum, which, for the eighty-eight, will amount to \$132,000 per annum.

You also propose to give us thirty-eight common pleas judges, whose salary will not be less than \$2,500 each per annum. This will make \$95,000 per annum, which, added to the salaries of the probate judges, will make \$227,000 per annum for what should be done by one court.

Consolidate the court of common pleas with the probate court, and you get rid of thirty judges at a salary of \$2,500 each, or a gross sum of \$75,000 per annum; and if you increase the salary of the county judges to \$1,800, (which will secure men of sufficient ability to do all the business, and do it well,) it will only cost the State \$158,400—a saving to the over-burdened tax-payers of the State, in the salaries of judges, of \$46,600 per annum, besides the great saving in costs to parties, made by reason of the continuance of cases for the want of time to try them.

The CHAIRMAN. The question is upon the motion of the gentleman from Meigs, [Mr. RUSSELL], to amend the eighth section, by striking out in the first line the word "twelve" and inserting the word "forty-five"; by inserting in line five, after the word "county," the words "and Cuyahoga county"; and striking out the words "three judges," and inserting "one judge" in the same line; and inserting after the word "three," in the seventh line, the words "in Cuyahoga county, three judges," so that it will read:

"The State shall be divided into 45 common pleas districts—of which the counties of Hamilton and Cuyahoga, shall each constitute one—of compact territory, bounded by county lines, and as nearly equal in population as practicable, having due regard to business, in each of which, except in the districts composed of Hamilton county and of Cuyahoga county, one judge for such district, residing therein, shall be elected by the electors thereof. For the district composed of Hamilton county five judges, and for the district composed of Cuyahoga county three judges, residing therein, shall be elected by the electors thereof. Courts of common pleas shall be held by one or more of these judges, in every county in the district, as often as may be provided by law, and more than one court or sitting thereof may be held at the same time in any district."

Mr. GRISWOLD. Can this amendment be voted upon separately? There are certain amendments, if the first part is adopted, that I would like to propose.

The CHAIRMAN. The Chair thinks the proposition divisible as to each one.

Mr. GRISWOLD. Then, I demand a division.

Mr. RUSSELL, of Meigs. With the consent of the Committee, I withdraw my amendment.

The CHAIRMAN. The question then before the Committee is upon the amendment to the substitute for section eight, proposed by the gentleman from Montgomery [Mr. CLAY].

Mr. COOK. I wish to say to the gentleman from Meigs, [Mr. RUSSELL,] that if my motion to strike out section eight would not prevail, under strict parliamentary usage he would not

Appendix G

Suits Against the State.

out or against lawful authority, here he must rely on the justice of congress, or of the executive department. The greatest difficulty arises in regard to the contracts of the national government; for, as they cannot be sued without their own consent, and as their agents are not responsible upon any such contracts when lawfully made, the only redress which can be obtained must be by the instrumentality of congress, either in providing (as they may) for suits in the common courts of justice to establish such claims by a general law, or by a special act for the relief of the particular party. In each case, however, the redress depends solely upon the legislative department, and cannot be administered except through favor. The remedy is by an appeal to the justice of the nation in that forum, and not in any court of justice, as a matter of right.

Section 1678. It has been sometimes thought that this is a serious defect in the organization of the judicial department of the national government. It is not, however, an objection to the constitution itself; but it lies, if at all, against congress, for not having provided an adequate remedy for all private grievances of this sort in the courts of the United States. In this respect there is a marked contrast between the actual right and practice of redress in the national government, as well as in most of the state governments, and the right and practice maintained under the British constitution. In England, if any person has, in point of property, a just demand upon the king, he may petition him in his court of chancery (by what is called a petition of right), where the chancellor will administer right, theoretically as a matter of grace, and not upon compulsion, but, in fact, as a matter of constitutional duty. No such judicial proceeding is recognized as existing in any state of this Union as a matter of constitutional right, to enforce any claim or debt against a state. In the few cases in which it exists it is a matter of legislative enactment. Congress has never yet acted upon the subject so as to give judicial redress for any nonfulfillment of contracts by the national government. Cases of the most cruel hardship and intolerable delay have already occurred, in which meritorious creditors have been reduced to grievous suffering, and sometimes to absolute ruin, by the tardiness of a justice which has been yielded only after the humble supplication of many years before the legislature. One can scarcely refrain from uniting in the suggestion that in this regard the constitutions, both of the national and state governments, stand in need of some reform to quicken the legislative action in the administration of justice; and that some mode ought to be provided by which a pecuniary right against a state or against the United States may be ascertained and established by the judicial sentence of some court; and when so ascertained and established, the payment might be enforced from the national treasury by an absolute appropriation. Surely it can afford no pleasant source of reflection to an American citizen, proud of his

rights and privileges, that in a monarchy the judiciary is clothed with ample powers to give redress to the humblest subject in a matter of private contract or property against the crown, and that in a republic there is an utter denial of justice in such cases to any citizen through the instrumentality of any judicial process. He may complain, but he cannot compel a hearing. The republic enjoys a despotic sovereignty to act or refuse as it may please and is placed beyond the reach of law. The monarch bows to the law, and is compelled to yield his prerogative at the footstool of justice.

The question being "Shall the proposal pass?"

The yeas and nays were taken, and resulted — yeas 79, nays 6, as follows:

Those who voted in the affirmative are:

Anderson,	Harter, Stark,	Peters,
Beatty, Morrow,	Hoffman,	Pettit,
Beatty, Wood,	Holtz,	Pierce,
Beyer,	Hoskins,	Read,
Cassidy,	Hursh,	Redington,
Cody,	Johnson, Madison,	Rockel,
Colton,	Johnson, Williams,	Roehm,
Cordes,	Keller,	Shaffer,
Crites,	Kerr,	Shaw,
Crosser,	Kilpatrick,	Smith, Geauga,
Cunningham,	King,	Solether,
Davio,	Knight,	Stalter,
Donahey,	Kramer,	Stewart,
Dunn,	Lambert,	Stilwell,
Dwyer,	Lampson,	Stokes,
Earnhart,	Leete,	Tannehill,
Eby,	Longstreth,	Tetlow,
Elson,	Ludey,	Thomas,
Evans,	Mauck,	Ulmer,
Farrell,	McClelland,	Wagner,
Fess,	Miller, Crawford,	Walker,
FitzSimons,	Miller, Fairfield,	Watson,
Fox,	Moore,	Weybrecht,
Hahn,	Nye,	Winn,
Halenkamp,	Okey,	Wise,
Halfhill,	Peck,	Mr. President.
Harris, Ashtabula,		

Those who who voted in the negative are: Antrim, Brattain, Collett, Doty, Stevens, Woods.

So the proposal passed as follows:

Proposal No. 252 — Mr. Weybrecht. To submit an amendment to article I, section 16, of the constitution. — Providing for redress of claims against the state.

Resolved, by the Constitutional Convention of the state of Ohio, That a proposal to amend the constitution shall be submitted to the electors to read as follows:

Suits may be brought against the state, in such courts, and in such manner, as may be directed by law.

Under the rules the proposal was referred to the committee on Arrangement and Phraseology.

Leave of absence was granted to Mr. Riley and Mr. Marriott.

Mr. KNIGHT: At the request of the proponent of Proposal No. 272, which was informally passed a moment ago, and by the desire of members of the committee, I wish to call up Proposal No. 272.