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The Last Word on the Ohio Constitution

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THE LAST WORD ON THE OHIO CONSTITUTION

STEVEN H. STEINGLASS* & GINO J. SCARSELLI.** THE OHIO STATE CONSTITUTION, 2D ED. (NEW YORK: OXFORD UNIVERSITY PRESS, 2022). XXIX + 661 PP.

REVIEWED BY JONATHAN L. ENTIN†

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* Dean Emeritus and Professor Emeritus, Cleveland State University College of Law. *See also* STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE AND FEDERAL COURTS (2023-2024 ed. 2023). Dean Steinglass argued two important civil rights cases in the U.S. Supreme Court and was on the briefs in a third. *See* Bd. of Regents v. Roth, 408 U.S. 564, 565 (1972) (arguing a leading procedural due process case on behalf of an untenured state university professor whose contract was not renewed after the professor criticized the administration's response to student protests); Felder v. Casey, 487 U.S. 131, 133 (1988) (arguing on behalf of an arrestee in a 42 U.S.C. § 1983 case holding that a state notice-of-claim statute was preempted); Howlett *ex rel.* Howlett v. Rose, 496 U.S. 356, 358 (1990) (appearing on the briefs on behalf of a former high school student who sued school officials under 42 U.S.C. § 1983 in a case holding that a defense of sovereign immunity was not available in state court when that defense would not be available had the case been brought in federal court).

** Member of the Ohio bar. *See, e.g.*, Chapman v. Higbee Co., 319 F.3d 825, 827 (6th Cir. 2003) (en banc) (serving as counsel for amicus curiae supporting a successful plaintiff arguing that 42 U.S.C. § 1981 prohibits private racial discrimination); Junger v. Daley, 209 F.3d 481, 482 (6th Cir. 2000) (representing the successful plaintiff in a case holding that the First Amendment protects computer code); *see also* Gino J. Scarselli, *Tribute to Peter Junger*, 58 CASE W. RSRV. L. REV. 325 (2008).

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Recent years have seen important developments in Ohio constitutional law. In 2022, for example, the Ohio Supreme Court issued seven decisions invalidating legislative and congressional maps for violating the state's anti-gerrymandering rules.[1] Then in 2023, the voters first rejected a proposed constitutional amendment that would have increased the required level of support for approving constitutional amendments from a simple majority to 60 percent[2] and later approved an amendment enshrining strong and explicit protections for reproductive rights in the state

[1] On the rules aimed at limiting partisan gerrymandering, see OHIO CONST. arts. XI (legislative redistricting), XIX (congressional redistricting). On the legislative maps, see *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, 2022-Ohio-65 (first map), 2022-Ohio-342 (second map), 2022-Ohio-789 (third map), 2022-Ohio-1235 (fourth map), 2022-Ohio-1727 (fifth map). On the congressional maps, see *Adams v. DeWine*, 2022-Ohio-89 (first map); *Neiman v. LaRose*, 2022-Ohio-2471 (second map), *vacated and remanded on other grounds sub nom. Huffman v. Neiman*, 143 S. Ct. 2687 (2023). *See infra* notes 45–49 and accompanying text.

[2] Ohio Secretary of State, *Special Election: August 8, 2023*, https://www.ohiosos.gov/elections/election-results-and-data/2023-official-election-results/ (last visited Sept. 7, 2024) (select Issue Summary). That proposal also would have made it significantly more difficult for initiated constitutional amendments to qualify for the ballot by requiring a minimum number of signatures from all 88 counties, up from the 44-county requirement that has existed since 1912. *See* OHIO CONST. art. II, § 1g. The General Assembly set the election on this supermajority proposal for August despite having effectively banned August elections not long before out of concern for low voter turnout in summer elections. *See* Act of Dec. 14, 2022, Sub. H.B. 458, § 1 (codified at OHIO REV. CODE § 3501.022 (2023)). The legislature used a joint resolution rather than a regular bill to set the date. Both the choice of the date of the special election and the setting of the date by joint resolution prompted litigation. *See infra* note 4. Proponents of the supermajority amendment wanted the vote on this proposal before the November 2023 vote on a reproductive rights amendment, see *infra* note 3 and accompanying text, because they thought that the higher approval threshold would make it more difficult for the reproductive rights amendment to pass. *See* Jo Ingles, *LaRose says Issue 1 is '100%' about stopping possible abortion amendment*, STATEHOUSE NEWS BUREAU (June 6, 2023), https://www.statenews.org/government-politics/2023-06-06/larose-says-issue-1-is-100-about-stopping-possible-abortion-amendment; Jeremy Pelzer, *Spoiling abortion-rights amendment a 'great' reason to have August special election, Ohio Senate President Matt Huffman says*, CLEVELAND.COM (Mar. 23, 2023), https://www.cleveland.com/news/2023/03/spoiling-abortion-rights-amendment-a-great-reason-to-have-august-special-election-ohio-senate-president-matt-huffman-says.html; Andrew J. Tobias, *State issue 1 backers aim to avoid abortion. What Republicans told lobbyists in a closed-door fundraising pitch*, CLEVELAND.COM (June 1, 2023), https://www.cleveland.com/news/2023/06/state-issue-1-backers-aim-to-avoid-abortion-what-republicans-told-lobbyists-in-a-closed-door-fundraising-pitch.html.

constitution.[3] Both of those developments generated multiple rulings by the state supreme court.[4]

These events are the latest chapters in the long-running saga of greater awareness of state constitutions.[5] A proper understanding of state constitutional law requires detailed knowledge of the relevant state constitution. Steinglass and Scarselli have provided a new edition of the single most important book about the Ohio Constitution.[6] But this second edition, which contains more than two hundred more pages than the original, is far more than a cosmetic update. Although the structure is substantially identical in both editions, the new version significantly expands on numerous aspects of the original discussion and thoroughly summarizes developments since the first edition appeared nearly two decades ago. The book is divided into two parts: the first offers a concise and incisive 100-page account of Ohio constitutional history, and the second provides a detailed analysis of each provision of the Ohio Constitution that is current through 2022. Useful appendices report on the popular vote on proposed constitutional conventions dating back to 1819 and on proposed

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3 Ohio Secretary of State, *General Election: November 7, 2023*, https://www.ohiosos.gov/elections/election-results-and-data/2023-official-election-results/ (last visited Sept. 7, 2024) (selecting issues summary).

4 On the proposed 60% supermajority amendment, see State *ex rel.* One Pers. One Vote v. LaRose, 2023-Ohio-1928 (per curiam) (ordering partial revision of ballot language because the original language drafted by the secretary of state and approved by the ballot board misstated the number of valid signatures required for an initiated constitutional amendment to qualify for the ballot and because the title appearing on the ballot misleadingly suggested that the qualification requirements applied to legislatively proposed amendments as well as to initiated amendments, but otherwise rejecting challenges to the ballot language and title); State *ex rel.* One Pers. One Vote v. LaRose, 2023-Ohio-1992 (per curiam) (holding that the General Assembly may order a special election by joint resolution and need not do so by passing a bill that must be presented to the governor). On the reproductive rights amendment, see State *ex rel.* DeBlase v. Ohio Ballot Bd., 2023-Ohio-1823 (per curiam) (rejecting single-subject challenge to reproductive rights amendment); Giroux v. Committee Representing the Petitioners, 2023-Ohio-2786 (per curiam) (concluding that a proposed constitutional amendment need not include the text of any existing statute or constitutional provision that might be amended or repealed by the amendment); State *ex rel.* Ohioans United for Reprod. Rts. v. Ohio Ballot Bd., 2023-Ohio-3325 (per curiam) (ordering partial revision of ballot language for reproductive rights amendment referring to "the citizens of the State of Ohio" instead of "the State of Ohio" but rejecting challenges to other language, including substitution of "unborn child" for "fetus").

5 *See, e.g.*, JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

6 STEVEN H. STEINGLASS & GINO J. SCARSELLI, THE OHIO STATE CONSTITUTION (2d ed. 2022). Dean Steinglass also maintains a comprehensive website about the Ohio Constitution that readers of this book will want to consult for additional information. OHIO CONSTITUTION - *Law and History: Home*, CLEV. ST. UNIV. L. LIBR., https://guides.law.csuohio.edu/c.php?g=190570&p=1258212 (last visited Sept. 13, 2024). The Ohio Constitution News Blog reports on new developments related to the Ohio Constitution and points readers to additions to the website. OHIO CONSTITUTION NEWS, https://ohioconstitution.csulaw.org/ (last visited Sept. 13, 2024).

constitutional amendments dating back to 1857.[7] Throughout, the authors emphasize the extent to which Ohio has developed a distinctive body of constitutional doctrine, both in comparison with the body of law that has emerged under the U.S. Constitution and in comparison with some other states. This review will examine certain broad themes that pervade the book without trying to summarize its encyclopedic coverage. Suffice it to say that Steinglass and Scarselli have provided a sophisticated analysis that can inform ongoing debates about Ohio constitutional issues.

I. JUDICIAL REVIEW AND JUDICIAL INDEPENDENCE

Not long after the first Ohio Constitution was approved in 1802,[8] the state dealt with the question of judicial independence. The controversy arose over the question of judicial review, during the same period that the U.S. Supreme Court decided *Marbury v. Madison*.[9] In 1808, the lower house of the General Assembly impeached a trial judge and a supreme court justice who in separate cases invalidated a statute that expanded the authority of justices of the peace. Both jurists narrowly

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[7] Minor quibble: The appendices list the number of votes cast for and against but not the percentages on each side. In light of the effort to raise the required majority for approving constitutional amendments that failed in August 2023, *see supra* note 2 and accompanying text, that would have been helpful information for readers. Of course, the proposed supermajority requirement was not on the table when this book went to press, and interested readers can do the calculations themselves.

[8] The authors point out that there is some confusion about when Ohio officially became a state. *See* STEINGLASS & SCARSELLI, *supra* note 6, at 20. Although Congress enacted legislation in 1802 authorizing the residents to organize a state, *see* Act of Apr. 30, 1802, ch. 40, 2 Stat. 173, it did not formally admit Ohio to the union until the passage of legislation in connection with the state's sesquicentennial in 1953 that made Ohio's admission retroactively effective on March 1, 1803. *See* Joint Resolution for Admitting the State of Ohio into the Union, Pub. L. No. 83-204, 67 Stat. 407 (1953). The only contemporaneous congressional action following the approval of the 1802 Constitution was a measure recognizing that Ohio "ha[d] become one of the United States of America" and that federal laws applied there. Act of Feb. 19, 1803, ch. 7, § 1, 2 Stat. 201, 201. Resolving the exact date of Ohio statehood might seem to be a point of purely antiquarian interest, but that question has fueled challenges to the validity of the Sixteenth Amendment by tax resisters and to the validity of other laws by various eccentric litigants. Those challenges have consistently failed. *See* Allan Walker Vestal, *Were the Tax Protesters Right About Ohio Statehood?*, 83 U. PITT. L. REV. 731, 756–68 (2022). Vestal, who is not at all supportive of the tax resisters' rejection of the constitutionality of the income tax or other challenges to different laws, has some sympathy for the argument that Ohio was not properly admitted to statehood in 1803. *See id.* at 735–49. But even he does not suggest that laws passed between 1803 and 1953 are invalid or that the presidents with Ohio connections somehow lacked authority to serve. *See id.* at 769–73. (indicating that litigants do not seem to have contested the validity of Supreme Court precedents decided during the service of Chief Justices Chase, Waite, and Taft, and Justices McLean, Swayne, Matthews, Day, Clarke, Burton, and Stewart, all of whom were Ohioans). For a more acerbic reaction to tax resisters' claims about Ohio statehood, see Erik M. Jensen, *News Flash: Pay Your Income Taxes; The Sixteenth Amendment Was Properly Ratified*, J. TAX'N INVS., Summer 2021, at 69, 72–73.

[9] 5 U.S. (1 Cranch) 137 (1803).

survived removal by the upper chamber.[10] Moreover, this episode might actually have strengthened the judiciary. Not only did both impeachment targets remain on the bench, but the Ohio Supreme Court repeatedly asserted the power of judicial review even though it rarely struck down legislation during the first half of the nineteenth century.[11]

The tension between the judiciary and the General Assembly reflected one of the fundamental defects of the 1802 Constitution, which embodied legislative supremacy in many respects. The legislature appointed most state officials, including judges, and the governor lacked the power to veto bills.[12] Dissatisfaction with that arrangement led to a constitutional convention that produced a "radically different" constitution in 1851 that is still in effect.[13] The 1851 Constitution significantly curbed legislative authority, notably providing for popular election of judges.[14] The authors do not directly link this change to the exercise of judicial review, but they point out that in the second half of the nineteenth century (after the new constitution's adoption) and into the first decade of the twentieth century, the state supreme court "aggressively" exercised its power to strike down statutes, especially laws relating to public health, worker rights, and consumer protection.[15] Those rulings helped to fuel support for the 1912 constitutional convention that produced several dozen progressive amendments, including a misguided effort to make it more difficult for the supreme court to invalidate statutes.[16] But that amendment, which would be repealed in 1968 after proving unworkable in practice, effectively enshrined the institution of judicial review in the state constitution for the first time.[17]

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[10] STEINGLASS & SCARSELLI, *supra* note 6, at 26–27, 244. The grounds for impeaching those jurists were even flimsier than those used unsuccessfully against U.S. Supreme Court Justice Samuel Chase in 1804. But that episode came to stand for the notion that judges should not be impeached because of their controversial rulings. *See id.* at 26–27, 244; GEORGE LEE HASKINS & HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801–15, at 245 (1981); WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 114, 118–19, 125 (1992); 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 292–95 (rev. ed 1937).

[11] STEINGLASS & SCARSELLI, *supra* note 6, at 28-29. The Ohio Constitution provides for other methods to remove judges. One is legislative address, under which a two-thirds majority of both houses of the General Assembly may oust a judge after notice and hearing. OHIO CONST. art. IV, § 17. And judges, like other state officers, may be removed "for any misconduct involving moral turpitude or for other cause provided by law." OHIO CONST. art. II, § 38. The authors note these mechanisms but do not indicate that any judges have been targeted under them. STEINGLASS & SCARSELLI, *supra* note 6, at 267, 313.

[12] STEINGLASS & SCARSELLI, *supra* note 6, at 21, 28, 240.

[13] *Id*. at 39.

[14] *Id*. at 42.

[15] *Id*. at 49–51.

[16] *Id. a*t 57–59, 77, 300–01.

[17] *Id.* at 58.

From the 1912 convention until the late 1970s, the supreme court took a generally deferential approach to judicial review.[18] At that point, the court changed direction and again exercised its power of judicial review more assertively, especially with respect to tort and insurance law.[19]

II. THE JUDICIARY AND THE POLITICAL BRANCHES

Anticipating how incoming President (and former General) Dwight Eisenhower would experience his new office, outgoing President Harry Truman quipped: "He'll sit there . . . and he'll say, 'Do this! Do that!' *And nothing will happen.* Poor Ike-it won't be a bit like the Army. He'll find it very frustrating."[20] Truman's remark also captures the challenge that courts face after rendering their judgments: how to get the parties to comply. The U.S. Supreme Court faced this conundrum in the wake of *Brown v. Board of Education*,[21] the landmark ruling that outlawed segregated schools. That decision resulted in widespread resistance.[22] Steinglass and Scarselli show that the Ohio Supreme Court has faced analogous challenges in lower-profile but nevertheless significant areas: tort law, school funding, and redistricting. Let's consider each of these topics briefly.

When the court reinvigorated its exercise of judicial review in the 1980s, it notably did so with regard to restrictions on tort claims. Among those restrictions were statutes of limitations and repose, and damage caps, which were held to violate the state constitutional rights to remedy and due course of law;[23] the court also determined that the constitution prevented offsetting compensatory damages even when all or part of those damages were covered by collateral sources such as insurance, which effectively constitutionalized the collateral source rule.[24]

These pro-plaintiff rulings generated legislative pushback. The General Assembly passed a comprehensive tort-reform measure in late 1996 that purported to reject those decisions as precedents and establish the prior doctrinal regime as controlling for the future.[25] The supreme court, dividing along the lines of the disputed

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[18] *Id.* at 77–78.

[19] *Id.* at 78–80.

[20] RICHARD E. NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP 9 (1960).

[21] 347 U.S. 483 (1954).

[22] *See, e.g.,* Cooper v. Aaron, 358 U.S. 1 (1958) (Little Rock). For accounts of resistance elsewhere, see, e.g., E. CULPEPPER CLARK, THE SCHOOLHOUSE DOOR: SEGREGATION'S LAST STAND AT THE UNIVERSITY OF ALABAMA (1993); CHARLES W. EAGLES, THE PRICE OF DEFIANCE: JAMES MEREDITH AND THE INTEGRATION OF OLE MISS (2009); RACHEL LOUISE MARTIN, A MOST TOLERANT LITTLE TOWN: THE EXPLOSIVE BEGINNING OF SCHOOL DESEGREGATION (2023) (Clinton, Tennessee); BOB SMITH, THEY CLOSED THEIR SCHOOLS: PRINCE EDWARD COUNTY, VIRGINIA, 1951–1964 (1965). *See generally* NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S (1969).

[23] OHIO CONST. art. I, § 16.

[24] STEINGLASS & SCARSELLI, *supra* note 6, at 79–80, 173, 176–77.

[25] *Id.* at 173.

decisions, struck down the restoration measure in its entirety.[26] The legislature responded in 2003 with a less confrontational measure that asked the court to reconsider some of its earlier rulings and sought to reinstate some of the provisions of early tort-reform statutes.[27] The court responded in 2007 by ruling that some of the new provisions were facially constitutional while leaving open the possibility that they might be unconstitutional as applied and declining to address challenges to some others.[28]

Disparities in the funding of public schools also have generated tension between the Ohio Supreme Court and the General Assembly. The court initially rebuffed challenge to the school-funding system under the Equal Protection and Benefit Clause of the Ohio Constitution[29] not long after the U.S. Supreme Court rejected a similar claim from Texas based on the Equal Protection Clause of the Fourteenth Amendment.[30] Two decades later, however, in the long-running *DeRolph* litigation,[31] the court addressed funding disparities under the Thorough and Efficient Clause of the state constitution.[32]

On four separate occasions, the court held that the funding system was unconstitutional and that the legislature's remedial efforts failed to pass muster.[33] The court divided, 4-3, in all of these decisions.[34] And the last two rulings reflected the court's awkward position in relation to the legislature. The third decision, where the alignment of the justices was dramatically scrambled, relinquished jurisdiction because the General Assembly had acted in good faith even though certain additional

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[26] State *ex rel.* Ohio Acad. of Trial Laws. v. Sheward, 715 N.E.2d 1062 (Ohio 1999); STEINGLASS & SCARSELLI, *supra* note 6, at 80, 173, 237, 238.

[27] STEINGLASS & SCARSELLI, *supra* note 6, at 95.

[28] Arbino v. Johnson & Johnson, 2007-Ohio-6948; *see* STEINGLASS & SCARSELLI, *supra* note 6, at 95–96, 121, 130, 177. The 2007 court had four justices who were not on the bench in 1999, although the authors do not focus on the implications of this change. That is consistent with their avoidance of judicial politics in most of the discussion.

[29] OHIO CONST. art. I, § 2 ("All political power is inherent in the people. Government is instituted for their equal protection and benefit . . . .").

[30] *Compare* Bd. of Educ. v. Walter, 390 N.E.2d 813, 818–22 (Ohio 1979), *with* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 44–55 (1973); *see* STEINGLASS & SCARSELLI, *supra* note 6, at 335–36.

[31] DeRolph v. State, 677 N.E.2d 733 (Ohio 1997) (*DeRolph I*); DeRolph v. State, 728 N.E.2d 993 (Ohio 2000) (*DeRolph II*); DeRolph v. State, 754 N.E.2d 1184 (Ohio 2001) (*DeRolph III*); DeRolph v. State, 2002-Ohio-6750 (*DeRolph IV*).

[32] OHIO CONST. art. VI, § 2 ("The General Assembly shall make such provisions . . . as . . . will secure a thorough and efficient system of common schools throughout the state . . . ."); STEINGLASS & SCARSELLI, *supra* note 6, at 336–38.

[33] STEINGLASS & SCARSELLI, *supra* note 6, at 336–38.

[34] *Id.*

reforms were required.[35] More than a year later, though, the court reconsidered its third ruling and held that the funding system remained unconstitutional despite the legislative ameliorative efforts, but nevertheless chose not to retain jurisdiction.[36]

The authors carefully recount *DeRolph*'s twists and turns without trying to explain why they happened. One possibility, suggested by *DeRolph III*, is that the original majority was unstable.[37] But that alone cannot account for *DeRolph IV*, where the original majority reasserted itself one final time. How can we account for this development? The answer likely reflects the changing composition of the court. *DeRolph IV* was issued in December 2002, less than a month before one of the justices in the original majority was due to retire and be succeeded by someone who was widely viewed as likely to side with the original dissenters.[38] Perhaps the original majority regrouped one last time out of concern that the new majority might repudiate the foundational holding that Ohio's school-funding system was unconstitutional and that the judiciary had the power to order fundamental changes to that system.[39] Regardless of whether that hypothesis is correct, the new justice who joined the court in January 2003 was Maureen O'Connor,[40] who would play a pivotal role in the recent redistricting cases.

As noted at the outset, redistricting has spawned intense legal and political conflict recently.[41] Between 2015 and 2018, Ohio voters approved constitutional amendments that were designed to discourage partisan gerrymandering and to promote bipartisan agreement on legislative and congressional maps.[42] But the new system did not work as anticipated when it was used for the first time following the 2020 Census. Steinglass and Scarselli thoroughly review the main events during this cycle while putting the reform measures into historical context.[43] The Ohio Supreme

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35 *DeRolph III*, 754 N.E.2d at 1200–01. The majority in this ruling consisted of two members of the original majority and two of the original dissenters. The minority consisted of the other two members of the original majority and one of the original dissenters. Not surprisingly, the dissents had very different views of how the court had gotten off the track.

36 *DeRolph IV*, 2002-Ohio-6750, ¶¶ 10–11. The court subsequently held that the trial judge could not exercise further jurisdiction over the case. State *ex rel.* State v. Lewis, 2003-Ohio-2476, ¶¶ 33–34.

37 *DeRolph III*, 754 N.E. 2d at 1188–89.

38 *See* Larry J. Obhof, DeRolph v. State *and Ohio's Long Road to an Adequate Education*, 2005 BYU EDUC. & L.J. 83, 140 (2005).

39 *See id.* at 140–41.

40 *Maureen O'Connor*, THE SUP. CT OF OHIO & THE OHIO JUD. SYST., https://www.supremecourt.ohio.gov/courts/judicial-system/supreme-court-of-ohio/justices-1803-to-present/maureen-oconnor/ (last visited Sept. 24, 2024).

41 *See supra* note 1 and accompanying text.

42 OHIO CONST. art. XI (legislative redistricting) (adopted 2015); OHIO CONST. art. XIX (congressional redistricting) (adopted 2018).

43 STEINGLASS & SCARSELLI, *supra* note 6, at 447–70, 553–66.

Court rejected five legislative maps and two congressional maps in 2022, all of them by 4-3 votes in which Chief Justice Maureen O'Connor sided with the three Democratic justices to provide the majority over dissents by the other three Republican justices.[44]

The redistricting saga further illustrates the limits of the court's leverage. Despite the majority's consistent rejection of the maps, in 2022 Ohio used legislative and congressional maps that the Ohio Supreme Court found to be inconsistent with the Ohio Constitution.[45] The legislative election used the third rejected map due to a federal court order.[46] The congressional election used the second rejected map while state officials sought review in the U.S. Supreme Court.[47] But until the next round of redistricting following the 2030 Census, the Buckeye State will use maps of uncertain constitutionality. On the legislative side, this is because the Ohio Redistricting Commission in September 2023 unanimously adopted modified district maps for both chambers of the General Assembly despite misgivings by minority Democrats. The Ohio Supreme Court dismissed a case challenging the new maps, reasoning that the unanimous adoption of the new maps superseded the party-line votes that adopted the earlier maps.[48] On the congressional side, the plaintiffs voluntarily dismissed their challenges when the case returned to the Ohio Supreme Court on remand from the U.S. Supreme Court.[49]

The 2023 maneuvering reflects the changed composition of the Ohio Supreme Court, similar to the denouement of *DeRolph*.[50] Chief Justice O'Connor, who cast the deciding vote in all seven redistricting decisions in 2022, had to retire due to her age.[51] Justice Sharon Kennedy, who dissented in all of the 2022 decisions, was elected to succeed O'Connor and took office in January 2023.[52] Her ascension

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44 *See supra* cases cited in note 1.

45 STEINGLASS & SCARSELLI, *supra* note 6, at 450, 566.

46 *Id.* at 450.

47 *Id.* at 566.

48 League of Women Voters of Ohio v. Ohio Redistricting Comm'n, 2023-Ohio-4271.

49 Neiman v. LaRose, 2023-Ohio-3141. The U.S. Supreme Court had vacated and remanded the Ohio Supreme Court's ruling for further consideration in light of the decision in a North Carolina case. Huffman v. Neiman, 143 S. Ct. 2687 (2023).

50 *See supra* text accompanying note 38.

51 Ohio law prohibits any judge or justice from taking office, either for the first time or for another term, after the age of 70. OHIO CONST. art. IV, § 6(C). Chief Justice O'Connor could not seek another term in 2022 because she had turned 70 the previous year. *Maureen O'Connor*, THE SUP. CT. OF OHIO & THE OHIO JUD. SYST., https://www.supremecourt.ohio.gov/courts/judicial-system/supreme-court-of-ohio/justices-1803-to-present/maureen-oconnor/ (last visited Sept. 24, 2024).

52 *Sharon L. Kennedy*, THE SUP. CT. OF OHIO & THE OHIO JUD. SYST., https://www.supremecourt.ohio.gov/courts/judicial-system/supreme-court-of-ohio/justices-overview/sharon-kennedy/ (last visited Sept. 24, 2024).

created a vacancy in her previous seat, which allowed the governor to appoint a temporary successor.[53] Gov. Michael DeWine appointed Joseph T. Deters, a Republican from Cincinnati, to fill that vacancy.[54] The challengers in the congressional map litigation, perhaps regarding Deters as unsympathetic to their position, moved to dismiss their case.[55] Whatever the cogency of their suspicions, Deters subsequently sided with the other Republican justices to provide the decisive fourth vote to dismiss the challenges to the new legislative maps.[56]

These episodes illustrate the contingent nature of the Ohio Supreme Court's power. The court ruled in the tort, school funding, and redistricting cases, but the losing parties did not simply acquiesce. In the funding litigation, the General Assembly took more than symbolic steps toward reform that the court found to be inadequate before ending the case. In the tort and redistricting contexts, however, legislators and mapmakers persisted in their positions and ultimately obtained a surprising degree of success. Steinglass and Scarselli do not make this an organizing theme of their book, but their work provides some valuable tools for thinking more carefully about the subject. Their discussion is very valuable for its careful analysis of the court's interpretation of the Ohio Constitution.

III. SEPARATION OF POWERS

The Ohio Constitution, like its federal counterpart, lacks an explicit provision relating to separation of powers.[57] The Ohio Supreme Court, unlike its federal counterpart, has produced a modest body of jurisprudence about separation of powers. For example, there is no case law defining the governor's "supreme executive power".[58] The U.S. Supreme Court has frequently grappled with the definition of

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53 OHIO CONST. art. IV, § 13.

54 *Joseph T. Deters*, THE SUP. CT. OF OHIO & THE OHIO JUD. SYST., https://www.supremecourt.ohio.gov/courts/judicial-system/supreme-court-of-ohio/justices-overview/joseph-deters/ (last visited Sept. 24, 2024).

55 *See* Neiman Petitioners' Application for Dismissal, Neiman v. LaRose, No. 2022-2098 (Ohio filed Sept. 5, 2023) (granted Sept. 7, 2023); Petitioners' Application for Dismissal Without Prejudice, League of Women Voters of Ohio v. Ohio Redistricting Comm'n, No. 2022-0303 (Ohio filed Sept. 5, 2023) (granted Sept. 7, 2023).

56 *See* League of Women Voters of Ohio v. Ohio Redistricting Comm'n, 2023-Ohio-4271, at 7 (listing the way each justice voted in the case).

57 STEINGLASS & SCARSELLI, *supra* note 6, at 23, 193.

58 OHIO CONST. art. III, § 5. *See* STEINGLASS & SCARSELLI, *supra* note 6, at 276. Much of the federal case law on executive power deals with the president's power to remove appointed officials. *See infra* note 59. There does not seem to be case law on the governor's power to remove, although Gov. Mike DeWine has refused to remove trustees of Youngstown State University for their controversial selection of a new president because he says that he lacks the power to do so. *See* Sabrina Eaton, *Gov. DeWine Won't Step in on Youngstown State's Decision to Make Rep. Bill Johnson Its President*, CLEVELAND.COM (Jan. 17, 2024), https://www.cleveland.com/news/2024/01/gov-dewine-wont-step-in-on-youngstown-states-decision-to-make-rep-bill-johnson-its-president.html. Whatever the scope of the governor's

"[t]he executive Power" that is vested in the president.[59] Nor has the Ohio Supreme Court had occasion to define the "legislative power" that is vested in the General Assembly as well as in the people through initiative and referendum.[60] Again, this contrasts sharply with the U.S. Supreme Court's case law that seeks to define the "legislative Powers" that are vested in Congress.[61] And neither the Ohio Constitution nor the Ohio Supreme Court has defined the "judicial power of the state" that is vested in the courts explicitly provided for or otherwise allowed.[62] The constitution does, however, forbid the General Assembly from granting divorces or exercising "any judicial power," although that provision also fails to define the power that the legislature may not exercise.[63] Unlike federal courts, which have limited jurisdiction, common pleas courts have general jurisdiction.[64] Moreover, the Ohio Constitution does not contain a "case or controversy" requirement analogous to that applicable to federal courts, although Ohio courts generally follow federal doctrines in this area

removal power, there are other mechanisms for removing Ohio officers. *See supra* note 11; *see also* STEINGLASS & SCARSELLI, *supra* note 6, at 276.

59 U.S. CONST. art. II, § 1, cl. 1. *See, e.g.*, Trump v. United States, 144 S. Ct. 2312, 2327–32 (2024) (holding that the president is absolutely immune from prosecution for official actions that lie within the core of executive power and at least presumptively immune from prosecution for other official conduct); Seila Law LLC v. CFPB, 591 U.S. 197, 213-26 (2020) (holding that Congress may not restrict the grounds for removing the head of an independent agency that exercises significant executive power); Morrison v. Olson, 487 U.S. 654, 693–96 (1988) (holding that the independent counsel provisions of the Ethics in Government Act do not intrude on executive power); Bowsher v. Synar, 478 U.S. 714, 727–32 (1986) (holding that Congress may not vest executive power in an official who is removable by Congress); Humphrey's Ex'r v. United States, 295 U.S. 602, 631–32 (1935) (holding that the president's unfettered power to remove officials applies only to "purely executive" officers).

60 OHIO CONST. art. II, § 1. On the initiative and referendum, see OHIO CONST. art. II, §§ 1a–1g; *see also* STEINGLASS & SCARSELLI, *supra* note 6, at 192–93.

61 U.S. CONST. art. I, § 1. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 951–52 (1983) (stating that when either or both houses of Congress act, such action is presumptively legislative in nature). *But see Bowsher*, 478 U.S. at 749 (Stevens, J., concurring in the judgment) (questioning whether it makes sense to characterize a function as legislative, executive, or judicial because "a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned").

62 OHIO CONST. art. IV, § 1.

63 OHIO CONST. art. II, § 32. The General Assembly also cannot typically appoint state officers. OHIO CONST. art II, § 27; STEINGLASS & SCARSELLI, *supra* note 6, at 253–54. That provision reflected skepticism of legislative patronage *Id.* at 248–49.

64 STEINGLASS & SCARSELLI, *supra* note 6, at 290.

with a few notable exceptions involving cases that implicate the general public interest.[65]

But Ohio recognizes the nondelegation doctrine, under which the General Assembly may not give away its legislative power just as federal doctrine suggests that Congress may not delegate its legislative power.[66] It turns out that the Ohio nondelegation doctrine, like the federal analogue, is mostly rhetorical. Although in principle legislative power cannot be delegated, statutes may confer discretion on administrators to act provided that the discretion is sufficiently constrained.[67] Indeed, the Ohio Supreme Court has used the same test for evaluating nondelegation claims as its federal counterpart, asking whether the statute contains an "intelligible principle" to limit the administrator's action.[68] And it apparently has never invalidated a law for violating the nondelegation doctrine, whereas the U.S. Supreme Court has done so on very rare occasions.[69]

The Ohio Constitution also outlines requirements for the passage of legislation, but the state supreme court has generally taken a deferential approach to assessing the General Assembly's compliance with those requirements. The court has declined to go behind the daily legislative journals to find compliance with the rule mandating that a bill be considered on three legislative days.[70] The court has further given the General Assembly wide latitude to comply with the single-subject rule for legislation,[71] particularly with regard to the state budget, although a few laws have run afoul of the rule.[72]

Steinglass and Scarselli point out one potentially important separation of powers issue that has not been litigated. During the COVID-19 pandemic, the General

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65 Common pleas courts have jurisdiction only over "justiciable matters," OHIO CONST. art. IV, § 4(B), a limitation that does not apply to the supreme court or the court of appeals. *See* OHIO CONST. art. IV, §§ 2(B), 3(B); *see also* STEINGLASS & SCARSELLI, *supra* note 6, at 290–93.

66 STEINGLASS & SCARSELLI, *supra* note 6, at 194.

67 *Id.* at 194–95.

68 *Compare* Blue Cross of Ne. Ohio v. Ratchford, 416 N.E.2d 614, 615 syl., 618 (Ohio 1980), *with* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

69 Federal legislation has been struck down for violating the nondelegation doctrine on only three occasions, all during a brief period in the 1930s. *See* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935); Panama Refin. Co. v. Ryan, 293 U.S. 388, 430 (1935). Most of the current U.S. Supreme Court justices have expressed interest in reinvigorating the nondelegation doctrine. *See* Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari); Gundy v. United States, 588 U.S. 128, 149 (2019) (Alito, J., concurring in the judgment); *id.* (Gorsuch, J., joined by Roberts, C.J., & Thomas, J., dissenting), although that has not yet resulted in further invocation of the doctrine to invalidate legislation.

70 STEINGLASS & SCARSELLI, *supra* note 6, at 236–37; *see* OHIO CONST. art. II, § 15(C).

71 OHIO CONST. art. II, § 15(D).

72 STEINGLASS & SCARSELLI, *supra* note 6, at 238–39.

Assembly overrode the governor's veto of a bill that authorized the legislature to overturn public health orders by means of a concurrent resolution, which is not subject to a gubernatorial veto, instead of by way of a bill, which requires either gubernatorial approval or an override vote by a supermajority of both chambers of the legislature.[73] Although the authors do not use this terminology, that arrangement is the sort of legislative veto that the U.S. Supreme Court rejected in *INS v. Chadha*[74] because it circumvented the bicameralism and presentment requirements of the federal Constitution, requirements that also appear in the Ohio Constitution.[75] The authors cite an 1897 case that rejected the notion that the General Assembly could repeal or modify a statute via a joint resolution,[76] but so far the validity of the legislative veto of public health orders has not been tested in court.

IV. RACE AND GENDER

Race and gender were significant constitutional issues in Ohio from the very beginning. The original 1802 Constitution limited voting rights to white males, and the legislature soon afterward passed a number of statutes that restricted Black rights.[77] The 1851 Constitution retained the racial and gender restrictions on voting.[78] The 1912 constitutional convention proposed separate amendments to remove the words "white" and "male" from the provision on voting rights,[79] but these were among the few proposals that the voters rejected that year.[80] The racial and gender restrictions on voting were finally removed in 1923, three years after the Nineteenth Amendment prevented states from banning women's suffrage and fifty-three years after the Fifteenth Amendment forbade states from prohibiting race-based denial of voting rights.[81]

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[73] *Id.* at 195–96.

[74] 462 U.S. 919 (1983).

[75] *Compare* U.S. CONST. art. I, § 7, cls. 2–3, *with* OHIO CONST. art. II, §§ 15(A), 16.

[76] State *ex rel.* Att'y Gen. v. Kinney, 47 N.E. 569 (Ohio 1897) (per curiam); *see* STEINGLASS & SCARSELLI, *supra* note 6, at 196.

[77] STEINGLASS & SCARSELLI, *supra* note 6, at 18–19, 318. By about 1850, Ohio courts construed those statutes in ways that limited the definition of who was Black, *id*. at 19 n. 89. For example, Ohio did not follow the "one-drop" rule that defined anyone with any Black ancestry to be Black, but that rule did not emerge even in the South until later in the nineteenth century. *See* SCOTT L. MALCOLMSON, ONE DROP OF BLOOD: THE AMERICAN MISADVENTURE OF RACE 356 (2000); THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619-1860, at 27 (1996).

[78] STEINGLASS & SCARSELLI, *supra* note 6, at 36, 319.

[79] OHIO CONST. art. V, § 1.

[80] STEINGLASS & SCARSELLI, *supra* note 6, at 61, 320.

[81] *Id.* at 67–68, 320.

The racial and gender restrictions went beyond voting rights. Both the 1802 and 1851 constitutions also limited membership in the state militia to white males.[82] Only in 1953 was the racial bar repealed; it took until 1961 for the gender barrier to fall.[83] There is little or no jurisprudence about gender discrimination under the Ohio Constitution, largely because litigation on that subject relied on the federal Fourteenth Amendment.[84]

But the Ohio law of racial discrimination involved more than explicitly racial constitutional provisions. The Ohio Supreme Court in 1872 rejected a challenge to segregated schools, a decision that the U.S. Supreme Court invoked in *Plessy v. Ferguson*[85] as part of its rationale for approving the notorious "separate but equal" doctrine. And in 1933, the state supreme court rejected a challenge to an Ohio State University policy that excluded a Black student from a required course on the basis of her race.[86] Those rulings were troublesome not only for their results, but also because the court relied only on the Equal Protection Clause of the Fourteenth Amendment without mentioning the Equal Protection and Benefit of the Ohio Constitution.[87] The state provision was adopted nearly two decades before the federal provision, before the Civil War, so contains different language and reflects different concerns that might support different interpretations. The notion of giving independent significance to

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82 *Id.* at 36.

83 *Id.* at 436. The Ohio Constitution of 1851 limited eligibility for elective and appointive office to voters, which effectively limited those positions to white males. A 1913 constitutional amendment allowed women, who were still ineligible to vote, to serve on boards and commissions addressing the interests of women and children, but that provision was deleted long after the Nineteenth Amendment guaranteed women's suffrage. *Id.* at 501 (discussing OHIO CONST. art. XV, § 4).

84 *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (invalidating a rule that removed pregnant teachers from the classroom at the end of their fourth month in a case litigated under equal protection but decided on due process grounds). *See* STEINGLASS & SCARSELLI, *supra* note 6, at 118. Similarly, litigation involving abortion restrictions relied on federal law. *See, e.g.*, Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990); Planned Parenthood Sw. Ohio Region v. DeWine, 696 F.3d 490 (6th Cir. 2012); Cincinnati Women's Servs., Inc. v. Taft, 468 F.3d 361 (6th Cir. 2006). The Supreme Court's ruling in Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022), which repudiated the federal right to abortion, led to a lawsuit challenging the state's so-called heartbeat law that outlawed abortions after about six weeks of pregnancy; the Ohio Supreme Court dismissed an appeal from the granting of a preliminary injunction that blocked enforcement of that law in light of the voters' approval of a constitutional amendment protecting reproductive rights in November 2023. Preterm-Cleveland v. Yost, No. 2023-Ohio-4570; *see supra* note 3 and accompanying text. One abortion-related case challenged the heartbeat law and other restrictions contained in a state budget bill, but the challenge was rejected on standing grounds. Preterm-Cleveland, Inc. v. Kasich, 2018-Ohio-441; *see* STEINGLASS & SCARSELLI, *supra* note 6, at 239.

85 163 U.S. 537, 545 (1896) (citing State *ex rel.* Garnes v. McCann, 21 Ohio St. 198 (1871)). *See also* Gong Lum v. Rice, 275 U.S. 78, 86 (1927) (citing *Garnes* in a case involving segregated schools).

86 State *ex rel.* Weaver v. Bd. of Trs. of Ohio State Univ., 185 N.E. 196 (Ohio 1933).

87 STEINGLASS & SCARSELLI, *supra* note 6, at 118.

state constitutions is a relatively recent development. But the possibility that at least one of these older cases might have come out differently under the Ohio Constitution offers a bridge to another central theme of this book.

V. THE NEW JUDICIAL FEDERALISM

Much of the revived interest in state constitutional law reflects the possibility that state constitutions could provide greater protection of individual rights than the federal Constitution.[88] Steinglass and Scarselli make this an important theme of their book on the Ohio Constitution. As noted in the immediately preceding discussion of equality, the Ohio Supreme Court has generally relied on the Fourteenth Amendment rather than Ohio's Equal Protection and Benefit Clause. This state of affairs reflects a negative synergy: the court cannot develop a state-based equality jurisprudence if litigants do not advance state-based arguments, but litigants have little reason to advance state-based arguments when the court shows little interest in them.

The authors trace the evolution of Ohio equality doctrine from 1895, where the Ohio Supreme Court seems to have treated the state's Equal Protection and Benefit Clause as functionally equivalent to the Equal Protection Clause of the Fourteenth Amendment, to occasional modern suggestions that the Ohio Constitution might provide more robust equality protection than its federal counterpart.[89]

More generally, the Buckeye State came relatively late to the new judicial federalism. Not until 1993 did the Ohio Supreme Court suggest that the state constitution might have independent legal significance, but the court has not developed a consistent or principled methodology for determining when to afford greater protection to individual rights under state law than the U.S. Constitution required.[90] Although the court has given weight to state constitutional provisions more often in recent years, the record remains inconsistent and the analysis often superficial.[91] One notable illustration is *City of Norwood v. Horney*,[92] where the court held that the state constitution prohibits government from taking private property from one owner and transferring it to another private party for purposes of economic development. This conclusion differed from that of the U.S. Supreme Court in *Kelo v. City of New London*,[93] which rejected a similar claim based on the Takings Clause of the Fifth Amendment but virtually invited state courts to adopt a more restrictive view of the taking power under their own laws.[94] Still, the *Norwood* court did not provide

88 *See supra* note 5 and accompanying text.

89 STEINGLASS & SCARSELLI, *supra* note 6, at 120–21.

90 *Id.* at 80–82.

91 *Id.* at 95–100.

92 2006-Ohio-3799.

93 545 U.S. 469 (2005).

94 *Id.* at 489 (emphasizing that "[n]othing in our opinion precludes any State from placing further restrictions on its exercise of the takings power").

a state-based rationale for its different interpretation of the similarly worded takings provisions of the Ohio and federal constitutions.[95]

The authors clearly sympathize with the notion that state constitutions can independently protect individual liberty. They criticize the Ohio Supreme Court's inconsistency in that regard, but they also recognize that a pragmatic approach might be appropriate for a body of elected judges. At the same time, this discussion should encourage lawyers and litigants to think more carefully about the value of relying on the state constitution and developing careful arguments that can help them prevail in court when federal constitutional doctrine might seem less than promising.

VI. AMENDING THE CONSTITUTION

As befits its status as the sixth oldest state charter,[96] the Ohio Constitution has been amended many times. Ohio amendments are directly incorporated into the constitutional text as opposed to being appended to the document and numbered consecutively, as is the case at the federal level. But this book contains detailed information on amendments, both in the commentary on individual provisions and in helpful appendices.[97] Beyond that, it explains the history of the Ohio amendment process, something that was directly relevant to the proposal to require a supermajority vote to approve constitutional amendments that the voters rejected in August 2023.[98]

Under the 1851 Constitution, amendments could be proposed either by a convention or by the General Assembly.[99] The rules relating to legislatively proposed amendments originally required a special kind of supermajority: not only a majority vote favoring adoption of the amendment but also a majority affirmative vote among all votes cast at the election.[100] This supermajority requirement resulted in the failure of most amendments proposed by the General Assembly before it was repealed by an amendment that came out of the 1912 constitutional convention and was approved by the voters.[101]

The 1912 convention further authorized, and the voters approved, a system of initiated constitutional amendments that also could be approved by a simple majority vote.[102] This was part of a package of changes that provided for initiated statutes, to which we will turn momentarily. As a result of the 1912 revisions, it became much easier to amend the state constitution, although legislatively proposed

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95 STEINGLASS & SCARSELLI, *supra* note 6, at 97.

96 *Id.* at 3.

97 *See supra* note 7 and accompanying text.

98 *See supra* note 2 and accompanying text.

99 Because there have been only two constitutional conventions since the adoption of the 1851 Constitution (in 1873–1874 and 1912), discussion here focuses on legislatively proposed amendments.

100 STEINGLASS & SCARSELLI, *supra* note 6, at 44, 517, 519.

101 *Id.* at 45, 47–48, 62-63, 517, 519.

102 *Id.* at 62–63, 519.

amendments have fared considerably better at the ballot box than amendments proposed by initiative.[103]

Ohio also adopted the initiative for statutes in 1912, but some peculiar features of that process have resulted in minimal efforts to pass legislation by initiative.[104] In particular, there is no safe harbor that prevents the General Assembly from repealing or substantially modifying an initiated statute after the measure becomes effective. Because initiatives can reach the ballot only in the face of legislative inaction, the prospect of having hostile or skeptical elected officials flout the voters' decision has encouraged reliance on constitutional amendments, which are much more difficult to repeal or revise. The book notes that a committee of the Ohio Constitutional Modernization Commission endorsed changes, including the adoption of a safe harbor period, that would make initiated laws more attractive, but the full commission could not act on that idea before it went out of existence in 2017.[105]

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The Ohio Constitution is the Buckeye State's foundational legal and political document. Steinglass and Scarselli have provided a comprehensive analysis of that document. Theirs is the definitive work on the subject. It belongs on every judge's and lawyer's bookshelf, and it deserves a wide reading among informed citizens.

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103 *Id.* at 63–64, 519.

104 *Id.* at 199–200.

105 *Id.* at 200–01.