



2004

## The Ohio Constitution on the Occasion of Its Bicentennial

Kevin Francis O'Neill  
*Cleveland State University*

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### Recommended Citation

Kevin Francis O'Neill, *The Ohio Constitution on the Occasion of Its Bicentennial*, 51 Clev. St. L. Rev. 333 (2004)  
*available at* <https://engagedscholarship.csuohio.edu/clevstlrev/vol51/iss3/3>

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## FOREWORD: THE OHIO CONSTITUTION ON THE OCCASION OF ITS BICENTENNIAL

KEVIN FRANCIS O'NEILL<sup>1</sup>

This symposium issue of the *Cleveland State Law Review* publishes the papers that were presented at a conference marking the bicentennial of the Ohio Constitution.<sup>2</sup> That conference, held here at Cleveland-Marshall College of Law in April 2003, examined the history and assessed the vitality of our state constitution. The conference was conceived and its planning was supervised by our Dean, Steven H. Steinglass, who has devoted significant scholarly attention to the Ohio Constitution.<sup>3</sup> In light of my own endeavors in state constitutional law, both as a lawyer<sup>4</sup> and as a scholar,<sup>5</sup> I gladly assisted Dean Steinglass in organizing the conference. In the paragraphs that follow, I briefly summarize each of the contributions to this symposium. Those papers cover a broad range of topics — from Ohio constitutional history and interpretation to race and equal protection, education and tort reform, separation of powers and the one-subject rule.

We begin where the conference began: with a keynote address by a state supreme court justice who is known and respected as much for her scholarly writings as for her judicial opinions — Chief Justice Shirley S. Abrahamson of the Wisconsin Supreme Court. Chief Justice Abrahamson provides the perfect introduction, tracing the rise, decline, and resurrection of state constitutional independence over the course of our nation's history. She identifies the origins of that resurrection and describes how it has been dubbed the “New Judicial Federalism.” Her remarks culminate with some insights regarding the future direction and vigor of state constitutional jurisprudence. She foresees a change of focus in state constitutional claims, shifting from the rights of criminal defendants to the protection of property and economic rights. This sea change may prompt a role reversal by current critics

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<sup>1</sup>Associate Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. For guiding this symposium issue into print, special thanks go to George Zilich, the editor-in-chief of our Law Review, and to Holli Goodman and April Mixon of the Law Review staff.

<sup>2</sup>*The Ohio Constitution — Then and Now: An Examination of the Law and History of the Ohio Constitution on the Occasion of Its Bicentennial*, Cleveland-Marshall College of Law, Cleveland State University (Apr. 24-25, 2003).

<sup>3</sup>See, e.g., STEVEN H. STEINGLASS & GINO J. SCARSELLI, *THE OHIO STATE CONSTITUTION: A REFERENCE GUIDE* (forthcoming 2005) (Greenwood Press).

<sup>4</sup>See *Eastwood Mall, Inc. v. Slanco*, 68 Ohio St. 3d 221, 626 N.E.2d 59 (1994) (invoked Ohio Constitution's Free Speech Clause — Article I, Section 11 — in unsuccessful effort to obtain right of access for speech activities in the common areas of privately-owned shopping malls); *Preterm Cleveland v. Voinovich*, No. 92CVH01-528, 1992 Ohio Misc. LEXIS 1 (Ohio C.P. May 27, 1992) (persuading trial court to hold that Ohio Constitution affords greater protection for reproductive freedom than the U.S. Constitution), *rev'd*, 89 Ohio App. 3d 684, 627 N.E.2d 570 (1993), *dismissed*, 68 Ohio St. 3d 1420, 624 N.E.2d 194 (1993).

<sup>5</sup>See Kevin Francis O'Neill, *The Road Not Taken: State Constitutions as an Alternative Source of Protection for Reproductive Rights*, 11 N.Y.L. SCH. J. HUM. RTS. 1 (1993).

and proponents of New Judicial Federalism, causing the former to applaud and the latter to rue any departure from federal constitutional norms. She concludes on a note of caution, observing a willingness by the Rehnquist Court to inject itself into state constitutional claims.

With Chief Justice Abrahamson having set the stage — by sketching the nature, role, and significance of state constitutions — we commence our examination of the Ohio Constitution. Our initial focus is on Ohio constitutional history. Here we have contributions from two authors: Barbara A. Terzian and Jonathan L. Entin.

Terzian takes us from 1802 to the present, through two state constitutions and four constitutional conventions. She shows how the crucible of history shaped and reshaped the Ohio Constitution — from early struggles, on the very threshold of statehood, between Jeffersonian Republicans and Federalists; to the pressures exerted in their respective eras by Abolitionists, Progressives, and Prohibitionists; to the quests for suffrage by blacks and women; to the economic impact of the Civil War and the growing industrialization of subsequent decades. Terzian performs this survey with careful attention to the political dynamics at each of Ohio's constitutional conventions — in 1802, 1850-51, 1873-74, and 1912. She paints her picture with illuminating quotations from the letters and speeches of the convention delegates who forged and amended Ohio's Constitutions.

Entin focuses on the early history of race and equal protection under the Ohio Constitution. He observes that in 1802 — long before the United States adopted the Fourteenth Amendment, with its guarantee of equal protection, in 1868 — the Ohio Constitution featured an equality guarantee that drew on the natural rights principles embodied in the Declaration of Independence. He carefully examines a number of Ohio Supreme Court decisions from the Nineteenth Century that involved racial issues. In the process of deciding those cases, he observes, the court developed a jurisprudence that, although jarring to modern sensibilities, was in some respects surprisingly progressive for its time. Moreover, the reasoning employed in those cases is considerably less offensive than that of the U.S. Supreme Court in cases raising similar issues. By the end of the century, however, the Ohio Supreme Court had largely abandoned the effort to develop a distinctive jurisprudence of equality, deferring instead to the U.S. Supreme Court's approach under the Fourteenth Amendment. Entin sees in this Nineteenth Century example some parallels to the Ohio Supreme Court's treatment of the state bill of rights in the late Twentieth Century. He identifies the court's Nineteenth Century retreat from independence as foreshadowing the court's Twentieth Century discomfort with New Judicial Federalism.

Entin's concluding observations serve as the ideal transition to our next group of articles. We shift here from the history of the Ohio Constitution to its interpretation by the Ohio Supreme Court. Specifically, the focus here is on the methods of state constitutional interpretation that the Ohio Supreme Court has employed during the era of New Judicial Federalism. How has the court responded when asked to construe language in the Ohio Constitution that is similar or identical to language in the federal Constitution previously interpreted by the U.S. Supreme Court? Does it perform a truly independent reading of the state constitutional text, consulting the intentions of the Ohio framers and seeking guidance from Ohio's history, or does it conveniently adopt the federal approach to construing the analogous clause in the U.S. Constitution? On this important topic we have contributions from three authors: Robert F. Williams, Richard B. Saphire, and Marianna Brown Bettman.

Williams, a pre-eminent authority on state constitutional law, observes that the current wave of state constitutional independence has been underway since the 1970s, and that the Ohio Supreme Court, by professing to join the movement in 1993, is a relative newcomer. In the years since 1993, he observes, the court's interpretive methodology has alternated between two approaches: "reflective adoptionism" and "prospective lockstepping." Under the former approach, a state court acknowledges the possibility of different state and federal outcomes, considers the arguments in that specific case, and then, on balance, tends to adopt the federal approach in analyzing the state provision. Under the latter approach, the state court announces that not only in the instant case, but also *in the future*, it will interpret the state clause in accordance with federal analysis. Williams concludes that the Ohio Supreme Court should be commended for recognizing, at least in the abstract, that the state constitution is a document of independent force. It must be borne in mind, he writes, that New Judicial Federalism has only recently arrived in Ohio, that the Ohio Supreme Court has not yet settled upon a definitive method of interpretation, and that lawyers and scholars still have time to present the court with alternative approaches stressing state constitutional independence.

Saphire provides a detailed review and critique of the Ohio Supreme Court's interpretive methodology since 1984. This examination, superb in itself, is rendered all the more valuable by Saphire's inclusion of two other discussions — one placing the Ohio experience in a larger historical context, the other probing the legitimacy and limits of New Judicial Federalism. Saphire concludes that the Ohio Supreme Court's commitment to state constitutional independence has been marked by inconsistency and ambivalence. This trend will continue, he suggests, until the court develops and articulates a theory of Ohio constitutional interpretation — something that it has so far completely failed to do. Such a theory would have to provide answers to questions like: When is the text sufficiently ambiguous that a judge may look beyond the words? To what extent may judges consult historical sources, contemporary sources, and policy considerations when construing the text? To what extent and in what ways should they adopt approaches to interpretation that allow for greater or lesser degrees of judicial discretion? In the end, Saphire, like Williams, believes that lawyers and scholars can play a constructive role in suggesting answers to these questions and thereby promoting the independence of the Ohio Constitution.

Bettman analyzes Ohio Supreme Court decisions construing the Speech, Press, Search and Seizure, Free Exercise, and Establishment Clause analogues of the Ohio Constitution. Here in Ohio, she concludes, New Judicial Federalism remains in its infancy. The Ohio Supreme Court is still struggling with the fundamentals of state constitutional interpretation. It remains heavily dependant on federal methodology when construing analogous provisions of the state constitution. Bettman gives us the unique perspective of a law professor who previously served as an Ohio appellate court judge. This perspective sensitizes her to the current political make-up of the Ohio Supreme Court. Today's court, she observes, is far more conservative than the 1993 tribunal that proclaimed Ohio's embrace of New Judicial Federalism. Thus, there are strong political reasons to suppose that, at least for the time being, the court will not be taking any long strides toward state constitutional independence.

We turn now from questions of interpretation to separation of powers. On this topic we offer three articles. The first (authored by Curtis Rodebush) provides a critical analysis of separation of powers under the Ohio Constitution. The second (authored by Michael E. Solimine) examines the justiciability doctrines that prevail

in Ohio courts. The third (authored by Stephanie Hoffer and Travis McDade) looks at the Ohio Constitution's one-subject rule.

Rodebush has two aims, and he weaves them together with such skill that each complements the other. Reviewing the Ohio Supreme Court's performance in deciding separation-of-powers cases, he critiques that performance while offering a preferred method of analyzing any separation-of-powers issue. Drawing upon recent scholarship, Rodebush identifies two distinct approaches to separation-of-powers analysis — "formalism" and "functionalism" — and, canvassing the full range of separation-of-powers scenarios, he shows how one approach or the other is best suited to resolving a particular conflict.

Solimine focuses on principles of justiciability — specifically, the standing and political question doctrines — as imposing separation-of-powers restraints on the judicial branch. He shows that in several recent cases, the Ohio Supreme Court has departed from federal doctrine and lowered the thresholds of justiciability — making it easier for litigants in Ohio courts to establish standing and to avoid dismissal under the political question doctrine. While acknowledging that Ohio courts are not bound by federal law on these issues, Solimine examines the historical, institutional, and policy grounds for departing from federal norms. After an exhaustive analysis of the standing doctrine, he concludes that the federal approach remains optimal and that Ohio courts should continue to follow it. But as to the political question doctrine, he arrives at the opposite conclusion. That doctrine, he observes, has weaker roots in both federal and Ohio jurisprudence and its application is fraught with ambiguity. Accordingly, Solimine concludes that the Ohio Supreme Court correctly declined to use the political question doctrine as a basis for resolving the recent school-funding litigation.

Hoffer and McDade reveal the seismic shift in the Ohio Supreme Court's treatment of the one-subject rule. That rule — set forth in Article II, Section 15(D) of the Ohio Constitution — provides that "[n]o bill shall contain more than one subject." Its purpose is to prevent the packaging of several unrelated bills, none of which commands majority support, into one bill, thereby converting several minorities into one majority. As originally construed by the Ohio Supreme Court, the one-subject rule afforded no basis for judicial review. It merely prescribed a legislative norm — like the number of times a bill must be read aloud — and its enforcement should be left to the legislative branch. From this modest debut, the one-subject rule has been transformed into a source of enormous judicial power and discretion. This metamorphosis is recounted and critiqued with great precision by Hoffer and McDade. They conclude by applying the one-subject rule, in its virile new form, to legislation recently enacted by the Ohio General Assembly. In the process, they demonstrate that the rule's new reach poses separation-of-powers concerns, unduly magnifying the judicial power vis-à-vis the legislative branch.

We turn, finally, from the separation of powers to two hot-button issues in Ohio: school choice and tort reform. Molly O'Brien and Amanda Woodrum authored the school choice article, while James T. O'Reilly contributed the piece on tort reform.

O'Brien and Woodrum approach the school choice controversy by going back to first principles. They investigate the origin and meaning of the "common school" ideal that is embedded in the education clause of the Ohio Constitution. That clause — Article VI, Section 2 — requires the general assembly to create and fund "a thorough and efficient system of common schools," and it concludes with the admonition that "no religious or other sect, or sects, shall ever have any exclusive

right to, or control of, any part of the school funds of this state.” That provision was drafted and adopted by the delegates to Ohio’s 1851 constitutional convention. Through a painstaking examination of Ohio’s early history and the 1851 convention debates, the authors demonstrate that the term “common school,” as used in Article VI, Section 2, had a clear and specific meaning to the convention delegates. That meaning had been etched into the public mind through the efforts of educational activists who campaigned vigorously through the 1830s and 40s for the establishment of free, universal schooling. Those activists used the term “common school” to refer specifically to a non-sectarian, publicly funded school where children of all classes and backgrounds would be educated together. *This* is what the Ohio Constitution means by “common schools,” argue the authors. It is this type of school, and none other, they argue, for which public funding is authorized under the Ohio Constitution. Thus, they conclude, efforts by school choice proponents to secure public funding for privately-run sectarian schools directly conflict with the “common school” ideal that is enshrined in Ohio’s education clause.

O’Reilly examines Ohio tort reform from the ominous perspective of electoral fundraising for Ohio Supreme Court candidates. Though he concludes that tort law justice is not for sale in Ohio, he demonstrates the disquieting extent to which judicial candidates are selected and funded based on their approach to product liability, medical liability, and employer tort liability. In 2002, the candidates who won election to the Ohio Supreme Court spent about two dollars for every vote they received. A new justice begins a six-year term with the knowledge that one incumbent needed a \$758,000 reelection fund for the fight to retain her seat in 2002. O’Reilly explores how the pressures of raising so much money can drive a candidate into the arms of corporate political action committees. The Procter & Gamble Good Government Committee, for example, gave candidates over \$200,000 in 2002 alone. O’Reilly follows this exploration with a detailed analysis of recent tort decisions by the Ohio Supreme Court, an analysis that reveals the great extent to which tort reform is affected by the court’s interpretation of the Ohio Constitution. In performing this analysis, O’Reilly recounts the court’s ongoing feud with the Ohio General Assembly — and he inquires whether shifting political majorities on the court will produce zigzagging outcomes, thereby sacrificing stare decisis and doctrinal coherence.

In closing, we very much hope that lawyers and judges here in Ohio will find this symposium issue useful in advancing claims and deciding issues under the Ohio Constitution. To that end, we have departed from law review citation rules in the way that we have cited Ohio cases. Rather than citing only to the Northeast Reporter, as those rules require, we have added parallel citations to the official Ohio reporter. Since Ohio courts require citation to the official Ohio reports, we hope that our parallel citations will facilitate the use of this symposium issue by Ohio’s bench and bar.