THE OHIO CONSTITUTION OF 1802: AN INTRODUCTION

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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. Gottleib, 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).