Presuming Liberty

USING OHIO'S CONSTITUTION TO LIMIT GOVERNMENT

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Ohioans who seek to protect their individual rights have largely overlooked a critical tool: the Ohio Constitution. Ohio's Constitution provides greater protection for individual rights than the federal Constitution. "Indeed, unlike the federal Bill of Rights, the Ohio Constitution begins with its own Bill of Rights, thereby emphasizing the prominence our Constitution affords to the protection of individual rights."[1] This claim is bolstered not just by the plain language of the document, but also by Ohio courts.

Despite this opportunity to protect and advance individual rights, the potency of the Ohio Constitution remains a secret to many, even in the legal community,[2] and Ohioans who value limited government have underutilized its protections. As federal courts waffle in protecting rights, this document explains how the Ohio Constitution has, can, and should be interpreted as more protective of individual rights. This document highlights several unique provisions that, when taken together, demonstrate that the framers of Ohio's Constitution intended for it to presume liberty, and guard against government interference.

Protection of individual rights through state constitutions is of growing criticality. Beginning during the New Deal era, under the duress of Franklin Roosevelt's court-packing threat, federal courts began to abandon these protections.

Since that time, the United States Supreme Court has abandoned liberty of contract protections in the face of minimum wage legislation;[3] rubber-stamped the federalization of labor law and employment;[4] refused to curtail effectively unlimited taxing authority;[5] created a standard that affords only an arbitrarily low level of federal protection to property rights and economic liberties;[6] permitted the internment of Japanese-American citizens;[7] allowed the chilling of political speech;[8] and acquiesced in the transfer of private homes to private corporations merely because doing so increased tax revenue.[9] In the last of these decisions, Justice Stevens openly invited state courts to use their constitutions to protect the same property rights that he felt federal courts could not: "[w]e emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."[10]

Thus, in refraining from protecting individual rights on so many fronts, while inviting states to do so, federal courts have largely ceded this ground to state courts. The necessary response by state courts must be to take their own constitutions, as independent source of rights, more seriously.

REASSERTING THE INDEPENDENT AUTHORITY OF THE OHIO CONSTITUTION

[w]hen a state court interprets the constitution of its state merely as a restatement of the Federal Constitution, it both insults the dignity of the state charter and denies citizens the fullest protection of their rights. -*Arnold v. Cleveland*[11]

The United States Supreme Court has

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repeatedly reminded state courts that they are free to construe their state constitutions so as to provide different, and broader, protections of individual liberties than those offered by the federal Constitution.[12] The Supreme Court has further declared that "state courts' interpretations of state constitutions are to be accepted as final, as long as the state court plainly states that its decision is based on independent and adequate state grounds."[13]

This deference echoes the judicial philosophy of federalism. That is, that "the decisions of the [United States Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of *state* law. Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them."[14]

The language and history of the federal and state Constitutions illustrate that our government was founded on federalism, a principle whereby the federal Constitution would limit the scope and influence of federal government.[15] Accordingly, Ohio courts are free to interpret the Ohio Constitution without adherence or deference to federal court decisions-- the United States Constitution provides a floor, not a ceiling, for individual rights enjoyed by state citizens.[16]

These calls from the federal bench have catalyzed a trend amongst state courts, one where they have emphasized the independent protections of their own constitutions. The trend is commonly referred to as "state constitutionalism" or "new federalism."[17] Underlying it is the following understanding: "states may not deny individuals or groups the minimum level of protections mandated by the federal Constitution. However, there is no prohibition against granting individuals or groups greater or broader protections."[18]

This trend shows signs of life in Ohio. The Ohio Supreme Court long ago acknowledged a nationwide trend toward states' exclusive use of state constitutions to examine "personal rights and liberties:" [W]e believe that the Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.[19]

After making this paradigmatic statement, the Ohio Supreme Court, recognized an obligation "not to disturb the clear protections provided by the drafters of [the Ohio] Constitution." As such, in *Arnold*, it interpreted the Ohio Constitution's protection of the Right to Bear Arms, articulated in Section 4, Article I of the Ohio Constitution, as more protective of that right than the Second Amendment.[20]

The above instance merely reaffirms that the Ohio Constitution and its Bill of Rights have always been the primary foundation of civil rights and civil liberties protection for Ohioans. To this end, Ohio courts have a history of finding that the Ohio Constitution provides protections for individual liberty that stretch beyond those of the U.S. Constitution.[21] In 2008, the Ohio Supreme Court acknowledged, in *State v. Gardner,* that "[w]e are, of course, free to determine that the Ohio Constitution confers greater rights on its citizens than those provided by the federal Constitution, and we have not hesitated to do so in cases warranting an expansion,"[22] and recognizing that "state constitutions are a vital and independent source of law."[23] In so stating, the Court relied heavily on arguably the most prominent case on individual rights in recent Ohio Supreme Court history–the 2006 decision of *Norwood v. Horney.*[24]

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NORWOOD'S PRONOUNCED GUARANTEE OF INDIVIDUAL RIGHTS

In 2004, Americans were shocked to learn that, according to the United States Supreme Court, the federal Constitution permitted local governments to take their homes and give them to private developers.[25] However, the Ohio Supreme Court later rejected this concept, and provided added protections for Ohioans, in *Norwood v. Horney*.

While the case is recognizable for its constitutional prohibition on economic development takings,[26] a considerable holding in its own right, the greater significance resides in the Court's finding that Section 19, Article I of the Ohio Constitution is more protective of property rights than its federal counterpart. Specifically, the Court held that "[i]n addressing the meaning of the public-use clause in Ohio's Constitution, *we are not bound to follow the United States Supreme Court's determinations of the scope of the Public Use Clause in the federal Constitution*, and we decline to hold that the Takings Clause in Ohio's Constitution has the sweeping breadth that the Supreme Court attributed to the United States Constitution's Takings Clause ... Moreover,… "[t]here is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use."[27] *Norwood* thus serves as a recent reminder that the Ohio Constitution has significant independent meaning, and a tribute to the tradition of using the Ohio Constitution to expand and protect individual rights.

NORWOOD IN CONTEXT: A REAFFIRMATION RATHER THAN AN ABERRATION

Through modern cases like *Norwood* and *Arnold,* the Ohio Supreme Court has merely rekindled a respect for the Ohio Constitution that was once so ingrained into our constitutional jurisprudence that it did not warrant special mention. A cursory examination of the history of Ohio Constitution's application demonstrates a deeply-rooted tradition of construing the Ohio Constitution so as to protect private property, contract, due process and other liberty interests in a manner that is explicitly stronger than guarantees of the federal Constitution.

The Ohio Supreme Court's 1941 ruling in *Direct Plumbing Supply v. City of Dayton* evidences the aforementioned tradition. In that case, the Court lauded the protections of the Ohio Constitution:

> The guaranties of sections 1, 2, and 19 of the Bill of Rights in the Constitution of Ohio are similar to those contained in the amendment to the federal Constitution referred to [the 14th Amendment]. If in the midst of current trends toward regimentation of persons and property, this long history of parallelism seems threatened by a narrowing federal interpretation of federal guaranties, it is well to remember that Ohio is a sovereign state and that the fundamental guaranties of the Ohio Bill of Rights have undiminished vitality. Decision here may be and is bottomed on those guaranties.[28]

In *Direct Plumbing Supply*, with no mention of the federal Constitution, and citing only Ohio's Bill of Rights, the Court decisively struck down the regulation at issue, noting that "[t]he burdens of the ordinance are unduly oppressive upon individuals and interfere with the rights of private property and the freedom of contract beyond the necessities of the situation. The ordinance is therefore held to be invalid as in contravention of Section 19, Article I, of the Constitution of Ohio."[29]

Direct Plumbing Supply is still good law–the Ohio Supreme Court cited it as recently as its 2008 decision in *Gardner* (discussed above), and Justice Celebrezze eloquently

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expanded on it in his concurrence in the Ohio Supreme Court's 1986 ruling in *State ex rel. The Repository, Div. of Thompson Newspapers, Inc. v. Unger.* [30] Referencing the Ohio Constitution's "sacred guarantees,"[31] Justice Celebrezze renewed *Direct Plumbing Supply's* call to view the Ohio Constitution as an independent source of individual rights:

> First, state courts have a duty to independently interpret and apply their state constitutions that stems from the very nature of our federal system and the vast differences between the federal and state constitutions and courts. Second, the histories of the United States and [state] constitutions clearly demonstrate that the protection of the fundamental rights...was intended to be and remains a separate and important function of our state constitution and courts that is closely associated with our sovereignty. By turning to our own constitution first we grant the proper respect to our own legal foundations and fulfill our sovereign duties. Third, by turning first to our own constitution we can develop a body of independent jurisprudence that will assist this court and the bar of our state in understanding how that constitution will be applied....Finally, to apply the federal constitution before the [state] constitution would be as improper and premature as deciding a case on state constitutional grounds when statutory grounds would have sufficed, and for essentially the same reasons.[32]

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Justice Celebrezee's opinion further reaffirms and enhances the fundamental principles that the Ohio Constitution provides independent protections for individual liberty; and the Court will apply the Ohio Constitution even as, and particularly when, federal guarantees give way.

The decisions in *Direct Plumbing*, *Unger*, *Arnold*, *Norwood*, and *Gardner*, demonstrate that the Ohio Constitution offers protections distinct from the federal Constitution and has historically been construed as more protective of individual rights than the federal Constitution. As such, it should be a destination, rather than an afterthought, amongst those seeking refuge from government intervention.

RESTORING THE PRESUMPTION OF LIBERTY THROUGH RECOGNITION OF NATURAL RIGHTS AND UNENUMERATED RIGHTS

We, the people of the State of Ohio, grateful to the Almighty God for our freedom, to secure its blessings and promote our common welfare, do establish this Constitution.
-Preamble to the Ohio Constitution (1851)

The above preamble to the Ohio Constitution expresses the defining principle of limited government: Our freedoms are inherent in our existence as human beings. This view is consistent with the Lockean theory of rights that is typically accepted as underpinning the foundations of American government. Even the Ohio Supreme Court recently acknowledged that the Ohio Constitution contains "Lockean notions."[33]

Locke strongly influenced political thought in the American colonies, particularly among revolutionists.[34] Thomas Jefferson eloquently encapsulated Locke's ideas in the Declaration of Independence when he wrote: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."[35]

In Locke's theory, might did not make right. Natural rights belonged to all people simply because they were human beings. Under the Lockean view, our rights are bestowed upon us by our creator; not from the legislative, executive, or judicial branches. Those branches of government were established to protect freedom. "In a state of nature-- that is, in the situation in which humanity finds itself, when there is no government-- all men are equal,"[36] wrote Locke. Not equal in every respect, of course, for people have different talents, characters, and experiences, but equal in the "right that every man hath to his natural freedom, without being subjected to the will or authority of any other man."[37] Since all are by right "equal and independent," it follows that "no one ought to harm another in his life, health, liberty, or possessions."[38] After all, men gave up the state of nature, and entered into societies, so that their united strength could secure peace and defend property.

This section discusses two of the most Lockean provision in the Ohio Constitution, and the book-ends to Ohio's Bill of Rights: Section 1, Article I, and Section 20, Article I. These two sections pertain to general liberty, and create a context within which the remainder of the state Constitution should be viewed. In *City of Cincinnati v. Correll*, the Ohio Supreme Court stressed the importance of harmonizing constitutional provisions, such as Sections 1 and 20, with the remainder of the state Constitution:

The Constitution must be read and construed in its entirety so as to harmonize and give force and effect to all its provisions. Article I of the Constitution, known as the Bill of Rights, contains twenty sections defining rights of the people, collectively and individually, and guaranteeing the enjoyment of such rights.[5]

This passage suggests that these liberty-oriented provisions cast a shadow that influences the remainder of the Ohio Constitution. It is no stretch of logic at all, then, to say that the rest of the Constitution must be read in the Context of natural rights. Such a reading necessarily creates a "presumption of liberty."[40]

The Liberty Clause

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.
-Ohio Constitution, Section 1, Article I

That the framers of Ohio's 1851 Constitution shared Lockean views is evident from Section 1, Article I, the first right in Ohio's Bill of Rights. When the settlers of the Northwest Territory formed our state government, with the lessons of the American Revolution still fresh in their minds, they delegated a very limited set of powers to the General Assembly, and incorporated a Bill of Rights into the constitution to make sure that the state government would not disregard human rights as the British Parliament had done.[41] Section 1, Article I is the Ohio Constitution's point of departure in expressing these human rights.[42] It serves as a powerful articulation of those rights, outlining the inviolability of liberty and property in a manner more akin to the Declaration of Independence than to the federal Constitution. In fact, this "Liberty Clause" has no counterpart in the federal Constitution. It is, or at least rightfully should be, "the starting point for all questions of individual rights in Ohio."[43]

The 1896 Ohio Supreme Court case of *Palmer v. Tingle*,[44] obviously of a closer proximity in time to the drafting of the 1851 Constitution, illuminates the vitality of Section 1, Article I. The Court applied the natural rights language in that Section to mean the following:
The inalienable right of enjoying liberty and acquiring property, guaranteed by the first section of the bill of rights of the

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constitution, embraces the right to be free in the enjoyment of our faculties, subject only to such restraints as are necessary for the common welfare.[45]

The Court emphasized the importance of using the preamble and Section 1, Article I to create a *context* for constitutional interpretation that effectively amounts to an emphatic "presumption of liberty:"[46]

> It is worthy of notice that the constitution is established to secure the blessings of freedom, and to promote the common welfare. *As the constitution must be regarded as consistent with itself throughout, it must be presumed that the laws to be passed by the general assembly under the powers conferred by that instrument are to be such as shall secure the blessings of freedom, and promote our common welfare.* To make this more emphatic, the first section of the bill of rights provides that, 'All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety.'[47] (Emphasis added).

When speaking of "liberty," the Court did not view it as an amorphous, arbitrary concept: "[t]he word 'liberty,' as used in the first section of the bill of rights, does not mean a mere freedom from physical restraint or state of slavery, but is deemed to embrace *the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare*."[48] (Emphasis added).

This express deference to natural rights proceeded well into the Twentieth Century. In 1919, in *In Re W.C. Reilly*, the Court relied upon the language of Article I, Section I to invalidate a municipal ordinance that attempted to criminalize the conduct of "employing any person as a special guard during any industrial disturbance or strike, unless such person shall first have been empowered to act as such special guard by the director of public safety."[49] The Court reasoned that "the assumption heretofore has been that any one was acting entirely within his fundamental rights when he sought, without let or hindrance, from any one, to protect his property."[50] This exemplifies how, through Section 1, Article I, Ohio Courts may apply a theory of natural rights that amounts to a presumption of liberty.

In 1993, this methodology was bolstered by *Preterm Cleveland v. Voinonich*, where the Court of Appeals for the Tenth District of Ohio reaffirmed the vitality of Section 1, Article I. It did so by acknowledging "[i]t has long been recognized in Ohio that this constitutional provision *grants extensive rights to the individual*."[51] The Court added the following:

> Section 1, Article I, Ohio Constitution, together with Section 2, Article I, Ohio Constitution..., make it quite clear that, under the Ohio Constitution's Bill of Rights, every person has inalienable rights under natural law which cannot be unduly restricted by government, which is formed for the purpose of securing and protecting those rights, and that all governmental power depends upon the consent of the people. Thus, the Ohio constitutional provision is broader in that it appears to recognize so-called "natural law," which is not expressly recognized by the Bill of Rights or any other provision of the United States Constitution, although it is recognized in the Declaration of Independence. In that sense, the Ohio Constitution confers greater rights than are conferred by the United States Constitution,...In general, this provision guaranteeing the enjoyment of life and liberty confers upon the individual the right to do whatever he or she wishes to do so long as there is no valid law proscribing such conduct and so long as the conduct does not infringe upon rights of others recognized by the common law.[52]

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Through this expression, *Preterm*'s method of constitutional interpretation again shows how an Ohio court may use Section 1, Article I to both derive and apply a presumption in favor of liberty.

Over time, some Ohio judges have attempted to marginalize Section 1, Article I. In *State v. Williams*,[53] the Court was confronted with a case where the lower court found certain provisions of a sexual offender registration law to violate Article I, Section I's "natural rights of privacy, favorable reputation, the acquisition of property, and the ability to pursue an occupation."[54]

The *Williams* Court ignored the principle demarcated in *Palmer*, *In Re W.C. Reilly*, and *Preterm*, noting instead, "the absence of Ohio precedent:"

[T]he language in Section 1, Article I of the Ohio Constitution is not an independent source of self-executing protections. Rather, it is a statement of fundamental ideals upon which a limited government is created. But it requires other provisions of the Ohio Constitution or legislative definition to give it practical effect. This is so because its language lacks the completeness required to offer meaningful guidance for judicial enforcement.[55]

The Ohio Supreme Court thus resolved, on this occasion, to abstain from enforcing a significant provision of the Ohio Constitution. When viewed in light of prior precedents, this leaves the Liberty Clause in a state of flux.

Encouragingly, though, the Court noted that it can and should applied so as to guarantee a right to privacy and a "right to pursue a lawful occupation free from government interference"[56] In expressing these rights through analysis of Section 1, Article I, the Court implied, if paradoxically, that the natural rights provision is the vehicle within which these rights are couched.[57]

More encouraging yet is that the Court's opinion, when construed so as to apply even the least expansive reading of Section 1, Article I still stands for the proposition that the Section articulates "aspirational ideals"—a construction consistent with the understanding that the Ohio Constitution mandates a presumption of liberty.[58] Finally, nothing in *State v. Williams* nullifies the Ohio Supreme Court's earlier mandate, in *City of Cincinnati v. Correll*, that the Constitution be "read and construed in its entirety so as to harmonize and give force and effect to all its provisions.[59] Consequently, advocates of limited government should still make use of the Liberty Clause to demonstrate that the Ohio Constitution generally presumes individual liberty.

Residual and Undelegated Rights

This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers, not herein delegated, remain with the people.
-Ohio Constitution, Section 20, Article I

Just as the Ohio Constitution's Bill of Rights begins with a sweeping statement of general liberty, it ends with one. The Founders' placement of Section 20, Article I into the 1851 Constitution fundamentally evidences their commitment to the idea that the Ohio Constitution was devised to protect liberty. The clause draws on the wisdom of James Madison, who drafted Section 20's federal counterpart, the 9th Amendment:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into the

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system; but I conceive, that it may be guarded against.[60]

This rationale shows that Section 20 exists as a "reservoir" of retained rights. This intent is further illuminated through the ratification debates for the constitutions of the states that contain no bill of rights at all: Pennsylvania, North Carolina, and South Carolina. In Pennsylvania, the Founders feared that an attempt at enumeration of rights would mean "everything that is not enumerated is presumed to be given," and worried that "an imperfect enumeration would throw all implied power into the scale of the government and the right of the people would be rendered incomplete."[61]

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Meanwhile, South Carolinians refrained from passing a bill of rights as well, fearing that "as we might perhaps have omitted the enumeration of some of our rights, it might hereafter be said we had delegated to the general government a power to take away such of our rights as we had not enumerated."[62] Finally, North Carolinians concurred, noting that it would be both "useless" and "dangerous" to "enumerate a number of rights,… because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one."[63] As one North Carolinian ratifier put it, "[l]et any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it."[64]

In an attempt to alleviate the type of concerns raised in Pennsylvania and the Carolinas, and guided by the Madisonian rationale, Ohio's founders committed to include a provision to protect all rights that could not be concisely protected in the bill of rights. To this end, although rarely given the opportunity, Ohio courts have acknowledged Section 20's unique role: Of course, the specific guarantees of the Bill of Rights, which were placed in the Constitution to limit the authority of the will of the majority, are rights guaranteed which must be so protected. But as Section 20, Article I, declares, these are not the only rights of the people recognized by the document.[65]

It has further been recognized that Section 20 alleviates Judges' need to stretch the language of other provisions to protect individual rights-- there is no need to find rights, such as the right to privacy, in the "penumbras" and "emanations" of other constitutional rights—"an amorphous, hard-to-define concept."[66] It is in this light that the Ohio Supreme Court should be understood to have recognized the unarticulated rights to contract, freely labor, and to do business are "sacred" and "fundamental."[67]

Finally, Section 20 emphasizes that the state is an entity of limited authority. In *State ex rel. A. Bentley & Sons Co. v. Pierce*, The Ohio Supreme Court concluded that a County was powerless to spend a single dollar beyond the amount that its citizens approved for a $250,000 memorial building, noting that where there is doubt as to the right of any government body to expend public moneys, "such doubt must be resolved in favor of the public and against the grant of power."[68]

The Court reasoned that Section 20 announces "the same basic doctrine" as the Tenth Amendment to the federal Constitution,[69] and that:

[t]his same doctrine of delegated power with reference to Constitutions very generally prevails when the Legislature assumes to confer, within its constitutional grant, certain powers upon various political subdivisions of the state or upon some officer, board or commission of such subdivision,… and, if there be no express grant, it follows, as a matter of course, that there can be no implied grant…. [D]oubt is to be resolved, not in favor of the grant, but against it.[70]

This decision demonstrates that Section 20 effectively serves Ohio as the functional equivalent of both the Ninth and Tenth Amendments to the federal constitution—it expands individual rights, while limited government conduct to delegated activities only.[71] In this sense, Section 20, in conjunction with the Liberty Clause of Section 1, create a presumptive sphere of individual liberty, and a presumptive limitation on governmental authority.[72]

PRAGMATICAL APPLICATION OF THE PRESUMPTION OF LIBERTY: HOW THE COURTS MUST INTERPRET THE OHIO CONSTITUTION

The Constitution is not neutral. It was designed to take the government off of the backs of the people.
- Supreme Court Justice William O. Douglas[73]

In recent years, when engaging in analysis of constitutional rights, Ohio Courts have too-frequently applied a presumption that all legislation is constitutional,[74] and erected artificially high barriers[75] to the invalidation of liberty-impinging legislation. Such an approach is at odds with the view that the Ohio Constitution should be viewed in the context of, and harmonized with, the Liberty Clause and the Unenumerated Rights Clause.

Moreover, this approach appears at odds with traditional canons of constitutional construction. Those canons mandate that Ohio Courts "give meaning to *all* the words which appear in the Constitution," since "words are not inserted * * * without some purpose."[76] Further, "[i]n the construction of a section of the constitution the whole section should be construed together, and effect given to every part and sentence."[77] Put another way, courts may not "give a construction which would render words superfluous."[78] What these Canons demonstrate is that Clauses such as the Liberty Clause and the Unenumerated Rights Clause must be revered and taken into account, rather than ignored, in every determination where individual liberty is at stake. Legal analysis that coordinates these canons with freedom-expanding provisions is an important first step in vindicating the rights protected by the Ohio Constitution.

Next, Ohio Courts should embrace the understanding, articulated in *Arnold* but applied inconsistently since, that whenever a right expressed in the Ohio Constitution is usurped, strict scrutiny of the usurping regulation is warranted. All rights expressed in the constitution, rather than just some, are fundamental rights, since "fundamental rights" are at their root "[t]hose rights which have their source, and are explicitly or implicitly guaranteed, in the federal Constitution * * * and state constitutions * * *[.]"[79] The Court made this recognition in *Arnold*, noting that "Fundamental rights (personal liberties) are those rights which are explicitly or implicitly embraced by our Constitution and the federal Constitution. Our goal should be to preserve the existence of these sacred rights."[80]

Norwood supplies an example of this analysis, noting that "the courts must ensure that the grant of authority is construed strictly and that any doubt over the propriety of the taking is resolved in favor of the property owner."[81] Put another way, when liberty is presumed, close cases are resolved in favor of individual rights, not government power. This approach represents an example of how the presumption of liberty is not just a theoretical proposition, but a methodology that can be placed into action in Ohio.

The mechanics of such a test are eloquently outlined by the dissenting Justices in *Arnold*:

THE MAJORITY ADOPTS THE POSITION THAT AS LONG AS THE LEGISLATION IS ENACTED TO PROMOTE PUBLIC HEALTH AND SAFETY IT NEED ONLY BE REASONABLE TO PASS CONSTITUTIONAL MUSTER, EVEN THOUGH IT INTERFERES WITH A PERSONAL OR COLLECTIVE LIBERTY.

"Fundamental rights (personal liberties) are those rights which are explicitly or implicitly embraced by our Constitution and the federal Constitution. Our goal should be to preserve the existence of these sacred rights.

In Ohio, the freedom movement has a unique ally: the Ohio Constitution. Both the text and context of that document show it to be one that presumes liberty.

Such standard is appropriate when analyzing legislative restrictions on nonfundamental rights. However, I believe a stricter standard must be utilized when the legislation places restrictions upon fundamental rights, ... A 'strict scrutiny' test, i.e., whether the restriction is necessary to promote a compelling governmental interest, as opposed to the less demanding 'reasonable' or 'rational relationship' test, ought to be applied. Under the strict scrutiny analysis, a law which impinges upon a fundamental right is presumptively unconstitutional unless a compelling governmental interest justifies it. Furthermore, any such infringement must be drawn with 'precision.' 'And if there are other, reasonable ways to achieve those goals with a lesser burden on a constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'[82] (Internal citations omitted).

The employment of such a test would ensure that rigorous analysis is undertaken before an Ohioan is deprived of his liberty. After all, "the ultimate deference must be to the Constitution, which is superior to power of all branches of government…. Excessive deference to government power equals judicial abdication of constitutional duties and results in tyranny meant not to be tolerated in our constitutional system."[83]

CONCLUSION

In Ohio, the freedom movement has a unique ally: the Ohio Constitution. Both the text and context of that document show it to be one that presumes liberty-- it creates islands of government authority in a sea of liberty, rather than islands of liberty awash in a sea of government authority. The next step for the liberty movement is to use targeted litigation to bring Ohio's constitutional culture back into touch with its roots, and to compel courts to consistently recognize and enforce this presumption of liberty.

NOTES

1 See *Preterm Cleveland v. Voinovich* (1993), 89 Ohio App.3d 684, 627 N.E.2d 570 (Young, concurring and dissenting).

2 See *Preterm Cleveland v. Voinovich* (1993), 89 Ohio App.3d 684, 627 N.E.2d 570 (Young, concurring and dissenting, and noting that "[i]t is not uncommon, for instance, for Ohio attorneys to be totally unfamiliar with the important cases or developments in Ohio constitutional law, while at the same time showing conversance with, for instance, the major decisions on federal abortion law by name and significance."), relying on Porter & Tarr, The New Judicial Federalism and the Ohio Supreme Court: Anatomy of a Failure (1984), 45 Ohio St. L.J. 143.

3 *West Coast Hotel v. Parrish* (1937), 300 U.S. 379.

4 *National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937), 301 U.S. 1.

5 *Stewart Machine Co. v. Davis* (1937), 301 U.S. 548, 584, 57 S.Ct. 883, 889, 81 L.Ed. 1279

6 *United States v. Carolene Products Co.* (1938), 304 U.S. 144.

7 *Korematsu v. United States* (1944), 323 U.S. 214, 216, 65 S.Ct. 193, 89 L.Ed. 194.

8 *McConnell v. Federal Elections Commission* (2003), 540 U.S. 93, 124 S.Ct. 619.

9 *Kelo v. New London* (2005), 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439.

10 Id.

11 *Arnold v. Cleveland*, (1993), 67 Ohio St.3d 35, 616 N.E.2d 163.

12 *Arnold v. Cleveland*, (1993), 67 Ohio

St.3d 35, 616 N.E.2d 163, citing, *e.g., City of Mesquite v. Aladdin's Castle, Inc.* (1982), 455 U.S. 283, 293, 102 S.Ct. 1070, 1077, 71 L.Ed.2d 152, 162 (" * * * [A] state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee."); and *California v. Greenwood* (1988), 486 U.S. 35, 43, 108 S.Ct. 1625, 1630, 100 L.Ed.2d 30, 39 ("Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."). See, also, *Pruneyard Shopping Ctr. v. Robins* (1980), 447 U.S. 74, 81, 100 S.Ct. 2035, 2040, 64 L.Ed.2d 741, 752.

13 *Arnold v. Cleveland*, (1993), 67 Ohio St.3d 35, 616 N.E.2d 163, citing *Michigan v. Long* (1983), 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476-3477, 77 L.Ed.2d 1201, 1214-1215.

14 Brennan, State Constitutions and the Protection of Individual Rights (1977), 90 Harv.L.Rev. 489, 502. (emphasis added).

15 *Arnold,* supra. citing *Debolt v. Ohio Life Ins. & Trust Co. (1853), 1 Ohio St. 563.*

16 *PruneYard Shopping Ctr. v. Robbins* (1980), 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741; *State v. Brown* (1992), 63 Ohio St.3d 349, 588 N.E.2d 113.

17 *Arnold,* supra; see also Brennan, State Constitutions and the Protection of Individual Rights (1977), 90 Harv.L.Rev. 489, and Comment, Interpretation and Authority in State Constitutionalism (1993), 106 Harv.L.Rev. 1147.

18 *Arnold,* supra.

19 *Arnold,* supra.

20 Arnold, supra. (noting that "rather than focusing merely on the preservation of a militia, as provided by the Second Amendment, the people of Ohio chose to go even further. Section 4, Article I not only suggests a preference for a militia over a standing army, and the deterrence of governmental oppression, it adds a third protection and secures to every person a fundamental *individual* right to bear arms for "their *defense and security* * * *."(Emphasis added.), and that "this clause was obviously implemented to allow a person to possess certain firearms for defense of self and property."), citing *State v. Hogan* (1900), 63 Ohio St. 202, 218-219, 58 N.E. 572, 575.

21 *Preterm Cleveland v. Voinovich* (1993), 89 Ohio App.3d 684, 627 N.E.2d 570, citing *Direct Plumbing Supply Co. v. Dayton* (1941), 138 Ohio St. 540, 21 O.O. 422, 38 N.E.2d 70. To the same effect, see, for example, *State v. Smith* (1931), 123 Ohio St. 237, 174 N.E. 768; *State v. Mapp* (1960), 170 Ohio St. 427, 11 O.O.2d 169, 166 N.E.2d 387; *State ex rel. The Repository v. Unger* (1986), 28 Ohio St.3d 418, 28 OBR 472, 504 N.E.2d 37; and *Bd. of Edn. v. Walter* (1979), 58 Ohio St.2d 368, 12 O.O.3d 327, 390 N.E.2d 813, all cases where the Ohio Supreme Court found the Ohio Constitution as conferring rights greater than those of the U.S. Constitution.

22 State v. Gardner (2008) 118 Ohio St.3d 420, 889 N.E.2d 995, citing *Norwood v. Horney,* 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (holding that the Ohio Constitution's Takings Clause affords greater protection than the corresponding federal provision).

23 Gardner, supra, citing generally William J. Brennan Jr., The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights (1986), 61 N.Y.U.L.Rev. 535. Note that Gardner also employed the following caution sign: "We must be cautious and conservative when we are asked to expand constitutional rights under the Ohio Constitution, particularly when the provision in the Ohio Constitution is akin to a provision in the U.S. Constitution that has been reasonably interpreted by the Supreme Court. *State v. Brown,* 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175, ¶ 28 and 29 (O'Connor and Stratton, JJ., dissenting) (where the language used by the federal and Ohio Constitutions is "virtually identical," it is "illogical" to suggest that the provisions should be interpreted differently).

24 110 Ohio St.3d 353, 853 N.E.2d 1115, 36 Envtl. L. Rep. 20,161, 2006 -Ohio- 3799

25 See *Kelo v. New London* (2005), 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439.

26 *Norwood*, supra, stating "[a]lthough economic factors may be considered in determining whether private property may be appropriated, the fact that the appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the public-use requirement of Section 19, Article I of the Ohio Constitution."

27 *Norwood*, supra, citing *Midkiff*, 467 U.S. at 240, 104 S.Ct. 2321, 81 L.Ed.2d 186.

28 *Direct Plumbing Supply v. City of Dayton* (1941), 138 Ohio St. 540, 38 N.E.2d 70, 137 A.L.R. 1058, 21 O.O. 422, citing *Wilson v. City of Zanesville*, supra; *Steele, Hopkins & Meredith Co. v. Miller*, 92 Ohio St. 115, 110 N.E. 648, at p. 651.

29 *Direct Plumbing Supply* , supra.

30 *State ex rel. The Repository, Div. of Thompson Newspapers, Inc. v. Unger* (1986), 28 Ohio St.3d 418, 504 N.E.2d 37.

31 *Unger,* supra., at 41, 422.

32 *State ex rel. The Repository, Div. of Thompson Newspapers, Inc. v. Unger (*Celebrezee, concurring). Internal citations omitted.

33 *Norwood*, citing Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985) 10-18.

34 Id.

35 David A. J. Richards, Foundations of American Constitutionalism (New York, 1989); David A. J. Richards, Toleration and the Constitution (New York, 1986); Jerome Huyler, Locke in America: The Moral Philosophy of the Founding Era (Lawrence, Kans., 1995).

36 John Locke, Two Treatises of Government, Peter Laslett, ed. (New York, 1988), 269, 304, 271, 350, 288.

37 Id.

38 Id.

39 *Correll v. City of Cincinnati*, (1943), 141 Ohio St. 535.

40 See Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, NJ: Princeton University Press, 2004).

41 See *State v. Nieto* (1920), 101 Ohio St. 409, 417, 419-420, 130 N.E. 663 (Wannamaker, J., dissenting). See, also, *State ex rel. Bruestle v. Rich* (1953), 159 Ohio St. 13, 24, 110 N.E.2d 778 ("one of the purposes of a constitution is to curb government power").

42 See *Daugherty v. Wallace* (1993), 87 Ohio App.3d 228, 235-236, 621 N.E.2d 1374 (noting that this section is one of the specific limitations on the state's police power).

43 See *Preterm Cleveland v. Voinovich* (1993), 89 Ohio App.3d 684, 627 N.E.2d 570 (Young, concurring and dissenting).

44 *Palmer v. Tingle* (1896), 55 Ohio St. 423, 36 W.L.B. 315, 45 N.E. 313

45 Id.

46 See Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, NJ: Princeton University Press, 2004) (discussing why the courts should begin with a presumption in favor of liberty, rather than state power, when construing the constitutionality of challenged regulations).

47 *Palmer,* supra.

48 Id., citing *People v. Marx*, 99 N. Y. 377, 2 N. E. 29; *Bertholf v. O'Reilly*, 74 N. Y. 509; *In re Jacobs*, 98 N. Y. 98. Emphasis added.

49 *In Re W.C. Reilly* (1919), 31 Ohio Dec. 364, 23 Ohio N.P. (N.S.) 65.

50 Id.

51 *Preterm Cleveland v. Voinovich* (1993), 89 Ohio App.3d 684, 627 N.E.2d 570, citing *Palmer & Crawford v. Tingle* (1896), 55 Ohio St. 423, 45 N.E. 313, and holding that "In light of the broad scope of 'liberty' as used in the Ohio Constitution, it would seem almost axiomatic that the right of a woman to choose whether to bear a child is a liberty within the constitutional protection. * * * Although Ohio recognizes a common-law right of privacy (citing Housh v. Peth (1956), 165 Ohio St. 35, 59 O.O. 60, 133 N.E.2d 340), it is not necessary to find a constitutional right of privacy in order to reach the conclusion that the choice of a woman whether to bear a child is one of the liberties guaranteed by Section 1, Article I, Ohio Constitution."

52 *Preterm Cleveland v. Voinovich* (1993), 89 Ohio App.3d 684, 627 N.E.2d 570. Compare with Article I, Section 20 (residual rights).

53 *State v. Williams* (2000), 88 Ohio st.3d 7, 722 N.E. 2d 1018, 2000-Ohio-258.

54 *State v. Williams* (2000), 88 Ohio st.3d 7, 722 N.E. 2d 1018, 2000-Ohio-258.

55 Id.

56 Williams, supra, noting the following: "*The right to privacy* has been described as "the right to be let alone; to live one's life as one chooses, free from assault, intrusion or invasion except as they can be justified by the clear needs of the community living under a government of law." *Time, Inc. v. Hill* (1967), 385 U.S. 374, 413, 87 S.Ct. 534, 555, 17 L.Ed.2d 456, 481 (Fortas, J., dissenting); see, also, *Housh v. Peth* (1956), 165 Ohio St. 35, 39, 59 O.O. 60, 62, 133 N.E.2d 340, 343. As Justice Brandeis observed, the right to privacy is "the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States (1928), 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944, 956 (Brandeis, J., dissenting). Yet the right to privacy is not absolute. See State ex rel. Beacon Journal Publishing Co. v. Akron (1994), 70 Ohio St.3d 605, 608, 640 N.E.2d 164, 167. Privacy of the individual will yield when required by public necessity. See also *Time, Inc.*, 385 U.S. at 413, 87 S.Ct. at 555, 17 L.Ed.2d at 481. "*Every individual has the right to pursue a lawful occupation free from government interference unless the public good so requires*". See Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock, Landing & Slaughter-House Co. (1884), 111 U.S. 746, 757, 4 S.Ct. 652, 660, 28 L.Ed. 585, 591.

57 Id.

58 Finally, the Court's egregious oversight in overlooking over 100 years of Ohio precedent in delineation of the rights protection by Article I, Section I raises the prospect that, when confronted with this precedent, the Court may be obliged to temper its rhetoric.

59 *Correll*, supra.

60 Madison, *Notes of Debates,* 627 (letter to Constitutional Convention to Congress).

61 Merril Jensen, ed., *The Documentary History of the Ratification of the Constitution,* vol. 2 (Stevens Point, Wis: Worzalla Publishing, 1976), 388 (Statement of James Wilson to the Pennsylvania ratifying convention, November 28, 1787).

62 *Barnett,* supra, citing Elliot, *Debates,* 4:316 (Friday, January 18, 1788).

63 Barnett, supra., citing Elliot, Debates, 167 (James Iredell, North Carolina ratifying convention, Tuesday, July 29, 1788).

64 Id.

65 See *Preterm Cleveland v. Voinovich* (1993), 89 Ohio App.3d 684, 627 N.E.2d 570 (Young, concurring and dissenting).

66 Id.

67 See *Eastwood Mall, Inc. v. Slanco* (1994), 68 Ohio St.3d 221, 626 N.E.2d 59, (acknowledging that [the Ohio Supreme Court has previously] held that: "The right to contract, the right to do business and the right to labor freely and without restraint are all constitutional rights equally sacred, and the privilege of free speech cannot be used to the exclusion of other constitutional rights nor as an excuse for unlawful activities with another's business * * *." citing *Crosby v. Rath* (1940), 136 Ohio St. 352, 355-356, 16 O.O. 496, 497, 25 N.E.2d 934, 935; See also *Meadowmoor Dairies, Inc. v. Milk Wagon Drivers' Union,* 371 Ill. 377, 21 N.E.2d 308, and *Roth v. Local Union, Ind.*, 24 N.E.2d 280.

68 *State ex rel. A. Bentley & Sons Co. v. Pierce* (1917), 96 Ohio St. 44, 117 N.E. 6, 15 Ohio Law Rep. 56, 15 Ohio Law Rep. 105.

69 "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

70 *State ex rel. A. Bentley & Sons Co. v. Pierce* (1917), 96 Ohio St. 44, 117 N.E. 6, 15 Ohio Law Rep. 56, 15 Ohio Law Rep. 105.

71 Constitutional scholar Randy Barnett observes that the Ninth and Tenth Amendments to the federal constitution "can be viewed as establishing a general constitutional presumption of individual liberty." See Randy E. Barnett, ed., *The Rights Retained by the People* (Fairfax, VA: George Mason University Press, 1989), p. 34.

72 Though not explicity so, Courts have effectively used this combination to protect unenumerated rights such as the Freedom to contract, the right of privacy, and the right to work. By no means can this list be said to be an exhaustive listing of those unenurerated rights which can, are, or should be represented by Ohio Constituion. See *Palmer*, supra:

Liberty to acquire property by contract can be restrained by the general assembly only so far as such restraint is for the common welfare and equal protection and benefit of the people, and such restraining statute must be of such a character that a court may see that it is for such general welfare, protection, and benefit. *The judgment of the general assembly in such cases is not conclusive.*"* * * The usual and most frequent means of acquiring property is by contract, and one of the most valuable and sacred rights is the right to make and enforce contracts. The obligation of a contract, when made and entered into, cannot be impaired by act of the general assembly. Const. art. 2, § 28.* * * Contracts and compacts have been entered into between men, tribes, and nations during all time from the earliest dawn of history; and the right and liberty of contract is one of the inalienable rights of man, fully secured and protected by our constitution, and it may be restrained only in so far as it is necessary for the common welfare and the equal protection and benefit of the people. That such restraint of the right and liberty of contract is for the common, public welfare, and equal protection and benefit of the people, must appear, not only to the general assembly, in the face of popular clamor, or the pressure of the lobby, but also to the courts; and it must be so clear that a court of justice, in the calm deliberation of its judgment, may be able to see that such restraint is for the common welfare and equal protection and benefit of the people. * * *

73 Supreme Court Justice William O. Douglas, *The Court Years*, 1939-1975: *The Autobiography of William O. Douglas* (New York: Random House, 1980), p.8.

74 *Williams,* supra., citing a presumption that all legislation is constitutional.

75 See *Ohio Grocers Assn. v. Wilkins*, 2008-Ohio-4420, indicating that one challenging the constitutionality of legislation must prove his case, "beyond a reasonable doubt."

76 Eastwood Mall, Inc. v. Slanco (1994), 68 Ohio St.3d 221, 626 N.E.2d 59 (Wright, dissenting). Citing *State ex rel. Carmean v. Bd. of Edn.* (1960), 170 Ohio St. 415, 422, 11 O.O.2d 162, 166, 165 N.E.2d 918, 923.

77 *Froelich v. Cleveland* (1919), 99 Ohio St. 376, 124 N.E. 212, paragraph one of the syllabus.

78 *Eastwood Mall*, supra., citing *Ohio Gas Co. v. Pub. Util. Comm.* (1988), 39 Ohio St.3d 295, 299, 530 N.E.2d 875, 879.

79 Black's Law Dictionary (6 Ed.1990) 674

80 *Arnold*, supra.

81 *Norwood,* supra., citing *Pontiac Improvement Co*., 104 Ohio St. at 453-454, 135 N.E. 635, citing Giesy, 4 Ohio St. at 326.

82 Arnold, *supra*, (Hoffman and Pfeifer, concurring and dissenting), citing *Dunn v. Blumstein* (1972), 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274; *Skinner v. Oklahoma ex rel. Williamson* (1942), 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655; *Shapiro v. Thompson* (1969), 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600; *San Antonio Indep. School Dist. v. Rodriguez* (1973), 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16; *N.A.A.C.P. v. Button* (1963), 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405, 421; *Dunn, supra,* 405 U.S. at 343, 92 S.Ct. at 1003, 31 L.Ed.2d at 285, citing *Shelton v. Tucker* (1960), 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231, 237; *Lakewood v. Pillow* (1972), 180 Colo. 20, 501 P.2d 744.

83 See Clint Bolick, *David's Hammer: The Case for an Activist Judiciary* (Cato Institute, 2007), p. 160.

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