

Volume 14 | Issue 3

1963

Constitutional Law

Oliver Schroeder Jr.

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

Recommended Citation

Oliver Schroeder Jr., *Constitutional Law*, 14 W. Res. L. Rev. 406 (1963)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol14/iss3/8>

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

CONSTITUTIONAL LAW

LIMITATIONS ON JUDICIAL AUTHORITY

Judicial power in the American legal system is divided into two elements: the tribunal and the authority. The tribunals are specifically created as constitutional courts: in the federal constitution,¹ one supreme court and such inferior courts as the Congress may establish; in the Ohio Constitution,² a supreme court, courts of appeals, courts of common pleas, courts of probate, and such other courts inferior to courts of appeals as may be established. The element of judicial power identified as the authority for the courts to act has not been so clearly specified. Ever since the landmark case of *Marbury v. Madison*³ the courts have been involved in a process of constant intellectual ferment as they seek to delimit their authority in relation to the legislative and executive branches and between various levels of government — federal, state, and local. In cases reported last year, the Ohio judiciary grappled with several interesting issues involving judicial power.

The supreme court in an original mandamus action did not hesitate to compel the Cleveland City Council to comply with the mandatory charter provision requiring periodic reapportionment of city voting districts. It had been contended that this matter was legislative, political, and outside judicial authority. Without dissent the court held this was valid judicial action.⁴

The constitutional authority of the jury to assess compensation for property taken in condemnation proceedings is another facet of the judicial authority. The legislature can provide that the jury should find and return such verdicts separately upon each claim. Such legislative action is not an invasion of the judicial authority as expressed in the Ohio Constitution, because the matter is merely procedural.⁵

On the other hand, the judicial authority over direct contempt of the court is not subject to legislative limitation. A defendant, who removed securities from a deposit box in violation of a court order, converted them to cash, and deposited the cash in undisclosed banks whose names he refused to divulge, can be imprisoned by the court until he identifies the banks.⁶

1. U.S. CONST. art. III, § 1.

2. OHIO CONST. art. IV, § 1.

3. 5 U.S. (1 Cranch) 135 (1803).

4. State *ex rel.* Scott v. Masterson, 173 Ohio St. 402, 183 N.E.2d 376 (1962). Cf. Baker v. Carr, 369 U.S. 186 (1962), in which the Supreme Court held it within the judicial authority to compel congressional redistricting in Tennessee.

5. *In re* Appropriation of Easements for Highway Purposes, 172 Ohio St. 524, 178 N.E.2d 787 (1961).

6. *In re* Roberts, 185 N.E.2d 452 (Ohio Ct. App. 1962).

Judicial authority also plays a significant role within the court hierarchy. Actions under statutes prescribing certain procedures available to municipal boards of health or general health districts to abate nuisances must be brought before a county court within the county, or before a mayor or police judge of the municipality. A municipal court is without jurisdiction.⁷ Also, after a common pleas court has acquired full jurisdiction over a partition action, the probate court cannot compel the guardian to dismiss the action.⁸

The harshness of a rule fixing the time period for completing a bill of exceptions is a problem for the legislature and not one for the courts, so the judiciary cannot extend this time period. Legislative authority supersedes judicial authority in this matter.⁹

Other decisions involving judicial authority were rendered in 1962. In considering the denial of a variance request by a Board of Zoning Adjustment, one court emphasized the vital distinction between *administrative* power and *judicial* power:

[W]e would conclude that if the intent of the General Assembly was to make this Court a super administrator of all final orders of officers, boards, etc. of all political subdivisions of this State, it would have no such power. This would be the necessary effect of any holding that the appeal is truly *de novo* in the sense that the Court would, by appeal, possess all of the power of the tribunal appealed from. We must presume, however, that such constitutional limitations were borne in mind, and that no such intent existed. Thus, the language 'unsupported by the preponderance of substantial, reliable and probative evidence' does not and cannot mean that a court in such an appeal may merely determine the issues in the light of the action the judge would have taken had he been a member of the Board whose order is being appealed. In order to confer the exercise of *judicial* power, it must mean something other than this.¹⁰ (Emphasis added.)

In reviewing zoning orders, the judicial authority extends to determining whether the board action is arbitrary, capricious, or unreasonable. The judge must not sit as an administrative zoning officer, imposing his administrative opinion on the wisdom of the zoning order. Judicial authority does not extend constitutionally into this administrative function.

Finally, judicial authority, as represented by the constitutional provision guaranteeing that the courts shall be open to every wronged person, is not violated by the arbitration statutes or agreements to arbitrate.¹¹ The judicial process need not be the exclusive method for settling legal disputes in modern society.

7. *State v. Reynolds*, 113 Ohio App. 469, 178 N.E.2d 842 (1960).

8. *Child v. Snyder*, 181 N.E.2d 315 (Ohio C.P. 1962).

9. *Zimmerman v. White-Roth Machine Corp.*, 182 N.E.2d 880 (Ohio Ct. App. 1961).

10. *Broad-Miami Co. v. Board of Zoning Adjustment*, 185 N.E.2d 76, 79 (Ohio C.P. 1959).

11. *Tuschman Steel Co. v. Tuschman*, 181 N.E.2d 322 (Ohio C.P. 1961).

LIMITATIONS ON LEGISLATIVE AUTHORITY

As the limitations on judicial power are a constant constitutional problem, legislative limitations are also a legal challenge. The General Assembly can by legislation authorize the State Board of Education to approve finally the annexation of a school district territory to another school district in a municipality. The issue arose when a municipality annexed territory for municipal purposes and the annexed territory had its own school district. No standards for the annexation approval existed, but this failure was held not to be fatal to that approval. In the court's opinion no unlawful delegation of legislative authority to the State Board had occurred.¹² Likewise the state legislature can constitutionally delegate to the State Board of Education authority to divide "equitably" the funds and indebtedness between school districts involved in territory transfers. No legislative standards beyond the term "equitably" need be set forth.¹³

Also legislative authority was not unconstitutionally delegated to the Tax Commission in the requirement that a party objecting to a highway use tax assessment must post bonds "satisfactory" to the Commissioner. The bonds were conditioned upon payment of the tax as finally determined. This legislative standard was held to be adequate for valid administrative action.¹⁴

An interesting political issue involving the filling of vacancies in the office of clerk of courts pursuant to a 1961 legislative provision¹⁵ arose in *State ex rel. Hayes v. Jennings*.¹⁶ The Revised Code was amended to authorize members of the central committee of the political party to which the vacating officeholder belonged to appoint his successor. This procedure is not the appointment of an individual to an office by the General Assembly which would be prohibited under article II, section 27 of the Ohio Constitution.

Finally, the 1959 amendment entitling the unemployment compensation claimant to redetermination and recomputation of future weekly unemployment benefits was held not to be a legislative exercise of a judicial power in violation of the constitution.¹⁷

PROCEDURAL DUE PROCESS

In *State ex rel. Vitoratos v. Yacobucci*¹⁸ the Ohio Supreme Court held that a criminal defendant who had exhausted his right to appeal in one

12. Board of Educ. v. Board of Educ., 173 Ohio St. 130, 180 N.E.2d 576 (1962).

13. *State ex rel. Board of Educ. v. Board of Educ.*, 172 Ohio St. 533, 179 N.E.2d 347 (1961).

14. *Riss & Co. v. Bowers*, 114 Ohio App. 429, 182 N.E.2d 862 (1961).

15. OHIO REV. CODE § 305.02 (Supp. 1962).

16. 173 Ohio St. 370, 182 N.E.2d 546 (1962).

17. *General Indus. Co. v. Leach*, 173 Ohio St. 227, 181 N.E.2d 39 (1962).

18. 173 Ohio St. 462, 184 N.E.2d 98 (1962).

case and voluntarily dismissed his appeal in another was not entitled to compel by mandamus the furnishing of the warrant, the copy of the jury venire, affidavits, and the copy of the impaneled jury. Procedural due process had not been denied.

In unemployment compensation procedure, the employer who receives notice of (1) eligibility for unemployment benefits, (2) allowance of the first claim, (3) allowance of additional claims, and (4) determination of the employer's tax rate has had adequate due process protection. The failure to provide additional notice of the allowance of continuing weekly benefits for unemployment is not a denial of this constitutional right.¹⁹

The legislative enactment requiring three-days notice of the intention to introduce evidence of an alibi in criminal proceedings also withstood attack as a denial of due process.²⁰

A court of appeals found no ascertainable standard of conduct in the legislative definition of a misdemeanor for keeping any animal which "emits audible sounds" to the "annoyance" of inhabitants. The lack of certainty and definiteness was held to be a denial of due process.²¹

A trial court declared unconstitutional a statute making it illegal to manufacture a device for a policy or numbers game. The statute did not require any knowledge or intent that such a device be used for illegal gambling. For this reason, the due process requirement of the fourteenth amendment of the United States Constitution was held to have been violated.²²

SUBSTANTIVE CONSTITUTIONAL ISSUES

Interstate Commerce

In the federal-state commerce area the primary and almost exclusive constitutional litigation today encompasses state taxation of interstate commerce. In 1961 the Ohio Supreme Court held that an Ohio manufacturer which fabricates precast concrete walls and ships them directly to out-of-state building sites is liable as a consumer for sales tax on the cost of materials consumed in construction.²³ Further, a court of appeals

19. *State ex rel. Youngstown Sheet & Tube Co. v. Leach*, 173 Ohio St. 397, 183 N.E.2d 369 (1962). See also *Warren Sanitary Milk Co. v. Board of Review*, 179 N.E.2d 385 (Ohio C.P. 1961), where the Unemployment Compensation Administration issued a reconsideration decision affirming the disallowance of compensation claims. Claimants then filed an appeal with the Board of Review. The employer was not given notice of the time and place of the hearing. The board referee heard the claim and reversed the administrator. No notice of this decision was given to the employer. The court held the employer was an interested party entitled to notice in order to meet the requirement of procedural due process.

20. *State v. Cunningham*, 185 N.E.2d 327 (Ohio Ct. App. 1961).

21. *City of Columbus v. Becher*, 115 Ohio App. 239, 184 N.E.2d 617 (1961).

22. *State v. Lisbon Sales Book Co.*, 182 N.E.2d 641 (Ohio C.P. 1961).

23. *Marietta Concrete Corp. v. Bowers*, 172 Ohio St. 475, 178 N.E.2d 504 (1961).

held a foreign trucking firm liable for the highway use tax on its interstate operations over Ohio highways.²⁴

Religion

Can a person soliciting charitable contributions while operating a revival meeting in a rented theater be required to register with the municipality? A court of appeals answered this question in the affirmative.²⁵ The Cincinnati ordinance which was enforced exempted such solicitations by members of an established and bona fide organization and also exempted collections taken at regular assemblies or services.

If a reputable physician certifies that an emergency blood transfusion is required for a three-year-old child, the court under Ohio Revised Code section 2151.33 may summarily order such medical treatment even though the parents are Jehovah Witnesses who oppose the transfusion on religious grounds. No denial of religious liberty will occur.²⁶

Equal Protection

The Ohio Intangible Tax Act does not deny equal protection if interpreted to mean that distribution by a corporation of its preferred stock dividend on a share-for-share basis to common stockholders is income yield. If the distribution had been made as a stock split and recapitalization, a tax would not have accrued. This creation of two different classifications was not unreasonable under the equal protection concept.²⁷

Freedom of the Press

Current cases in this area have been concerned with the constitutional issue: what is obscenity? The constitutional application of knowingly possessing obscene materials²⁸ had a severe test last year.

In one case the defendant owned a stored auto trailer. It was locked with chains and padlocks and contained a large quantity of packaged duplicate pornographic material of the vilest kind. The accused had visited this trailer several times during the year prior to his arrest. When arrested he was leaving the storage place with a package resembling those found in the trailer, and he possessed keys fitting the padlock. It was held to be constitutional to apply the criminal statute under these conditions to the defendant.²⁹

The exhibition of the motion picture "The Lovers" also was held to

24. *Riss & Co. v. Bowers*, 114 Ohio App. 429, 182 N.E.2d 862 (1961).

25. *City of Cincinnati v. Epley*, 185 N.E.2d 483 (Ohio Ct. App. 1962).

26. *Ex rel. Clark*, 185 N.E.2d 128 (Ohio C.P. 1962).

27. *Cobourn v. Bowers*, 173 Ohio St. 4, 179 N.E.2d 354 (1962). Two judges dissented as to the interpretation of "income" under the statute. *Id.* at 11, 179 N.E.2d at 359.

28. OHIO REV. CODE § 2905.34 (Supp. 1962).

29. *State v. Wetzell*, 173 Ohio St. 16, 179 N.E.2d 773, *appeal dismissed*, 371 U.S. 62 (1962).

violate the criminal code prohibition against knowingly exhibiting or possessing an obscene film. After the supreme court viewed the film, the majority stated: "Les Amants (The Lovers) was not hard-core pornography, *i.e.*, filth for filth's sake. It was worse. It was filth for money's sake." Judge Taft concurred in the affirmation of the conviction on the ground that reasonable minds could determine beyond a reasonable doubt that the film was obscene. He did not believe he was required to make a personal judgment on the film.³⁰

Taking Property

The state and local police power to regulate the use of property for safety, health, welfare, or moral purposes clashes with the individual's right to have his property protected. The judiciary must constantly balance these opposing forces to provide orderly security in the community.

Even municipal corporations have the right to property protection vis-à-vis state regulation. In 1962 the supreme court by a vote of four to three held that the city of Akron was not unconstitutionally deprived of property by the Ohio Watercraft Act. This statute prohibits political subdivisions from imposing any license fees or other charges on watercraft owners for the privilege of operating their boats on municipal waters.³¹

In another decision a township zoning ordinance requiring lots to be no less than 80,000 square feet each was held not to be confiscatory in regard to an individual who sought to create lots of 20,000 square feet.³²

Urban renewal raises major problems of land confiscation. Under Cleveland's home rule charter the city can condemn land in an area declared to be blighted. The courts have acknowledged their authority to invalidate the arbitrary exercise of the police power, but, where the governmental use of the power in public improvement is concerned, the courts will only invalidate the action when the power is transcended, or when fraud or gross abuse of discretion is involved. The home rule municipality need not follow the general law of the state but can proceed under its own charter.³³

However, state statutes prohibiting erection of outdoor advertising signs within 660 feet of the right-of-way of interstate routes were held unconstitutional in a common pleas court as an unlawful taking of property.³⁴

OLIVER SCHROEDER, JR.

30. *State v. Jacobellis*, 173 Ohio St. 22, 179 N.E.2d 777, *cert. granted*, 371 U.S. 808 (1962).

31. *State ex rel. McElroy v. City of Akron*, 173 Ohio St. 189, 181 N.E.2d 26 (1962).

32. *State ex rel. Grant v. Kiefaber*, 114 Ohio App. 279, 181 N.E.2d 905 (1960).

33. *Grisanti v. City of Cleveland*, 181 N.E.2d 299 (Ohio Ct. App.), *appeal dismissed*, 173 Ohio St. 386, 182 N.E.2d 568, *appeal dismissed*, 371 U.S. 68 (1962).

34. *Ghaster Properties, Inc. v. Preston*, 184 N.E.2d 552 (Ohio C.P. 1962).