

**SOUND CONSTITUTIONAL INTERPRETATION OR
POLITICAL REALITY? A CASE STUDY OF *STATE EX
REL. OHIO GENERAL ASSEMBLY V. BRUNNER***

BY KYANA DARNER

I. INTRODUCTION

In *State ex rel. Ohio General Assembly v. Brunner*,¹ the Ohio Supreme Court was called upon to determine whether the then-sitting Governor exceeded his authority by attempting to exercise his veto power over Amended Substitute Senate Bill 117 (Senate Bill 117).² This case study analyzes the court's answer to that question.

Articles II, III, and IV of the Ohio Constitution set forth the powers and responsibilities of the legislative, executive, and judicial branches of the state's government.³ The doctrine of separation of powers is implicitly embedded in the framework of the Ohio Constitution which defines "the substance and scope of powers granted to the three branches of state government."⁴ Each individual branch of government has the right to exercise its constitutional duties without fear of interference from the other branches.⁵ This equilibrium of independence and integrity becomes imbalanced when one branch of government exceeds the scope of its authority.

On January 8, 2007, Ohio Governor Ted Strickland attempted to veto a bill that was filed with the Ohio Secretary of State's Office by outgoing Governor Bob Taft before he left office.⁶ What followed was a political

Copyright © 2009, Kyana Darner

* Capital University Law School, J.D. 2009. M.A. The Ohio State University. B.A. The Ohio State University. I would like to thank former Ohio Supreme Court Justice Andrew Douglas for giving up his valuable time to assist me on this project.

¹ 872 N.E.2d 912 (Ohio 2007) [hereinafter *Brunner I*].

² *Id.* at 915.

³ OHIO CONST. arts. II–IV.

⁴ *S. Euclid v. Jemison*, 503 N.E.2d 136, 138 (Ohio 1986) (citations omitted).

⁵ *State ex rel. Dann v. Taft*, 848 N.E.2d 472, 484 (Ohio 2006) (footnote omitted).

⁶ For more than a dozen years before 2006, Republicans dominated state government in Ohio—serving as Governor and Lieutenant Governor, and holding most of the statewide offices (e.g., Attorney General, Auditor, Secretary of State, and Treasurer), the General Assembly (Senate and House), and the majority of the seats on the Ohio Supreme Court.

(continued)

battle between the Republican-dominated General Assembly's leadership and the Democratic statewide officeholders over the scope of the executive branch's authority in the legislative process and the question of when a bill becomes a law. The Republican-controlled state supreme court invalidated Governor Strickland's attempted veto by holding that the Governor's ten-day consideration period for action under article II, section 16 of the Ohio Constitution (section 16),⁷ expired before Strickland assumed office on January 8, 2007.⁸

In this case, the separation of power between the executive and legislative branches was challenged the moment Governor Strickland stepped into office and requested Senate Bill 117's return from the Secretary of State. The imbalance of power continued when the court validated the General Assembly's attempt to usurp the Governor's role in the legislative process. By analyzing the question of when the Governor's ten-day consideration period commences, the court opted to analyze the issue as one of first impression⁹ instead of utilizing a logical approach—grounded in precedent—as employed in the concurrences of Justices Lundberg Stratton and O'Donnell.¹⁰ This decision disturbed the equilibrium of divided powers that, not surprisingly, resulted in subsequent litigation less than a month later when the court was asked to clarify its decision as to exactly when Senate Bill 117 had become law for purposes of the referendum process.¹¹

JENNIFER BRUNNER, OHIO SEC'Y OF STATE, OFFICIAL ROSTER OF FEDERAL, STATE AND COUNTY OFFICERS 2007-2008 319-27 (2008); MICHAEL F. CURTIN & JULIA BARRY BELL, THE OHIO POLITICS ALMANAC 70, 76-77 (2d ed. 2006). In the 2006 election, Democrat Ted Strickland led a ticket that won five of the statewide offices. BRUNNER, *supra*, at 320, 322, 324, 326-27. Republicans retained control of the Supreme Court of Ohio and the General Assembly, although their margin of control in the House was substantially weakened. See Ohio Business Votes.com, Ohio Supreme Court Justices, <http://www.ohiobusinessvotes.org/court/justices.asp> (last visited May 7, 2009).

⁷ OHIO CONST. art. II, § 16.

⁸ State *ex rel.* Ohio Gen. Assembly v. Brunner, 872 N.E.2d 912, 921 (Ohio 2007).

⁹ *Id.* at 915.

¹⁰ See *id.* at 926-27 (Lundberg Stratton, J., concurring); *id.* at 931-33 (O'Donnell, J., concurring).

¹¹ State *ex rel.* Ohio Gen. Assembly v. Brunner, 873 N.E.2d 1232, 1232 (Ohio 2007) (*per curiam*) [hereinafter *Brunner II*].

Although the outcome in *State ex rel. Ohio General Assembly v. Brunner* was sound, the reasoning behind the supreme court's decision may have unintended consequences on the Ohio legislative process. For example, it has elevated the likelihood that the court will have to refine its interpretation of the term "forthwith"¹² in the event that a bill is again presented to the Governor following the General Assembly's adjournment sine die.¹³ Further, by ignoring the Secretary of State's role in the legislative process, the majority's decision may compromise the Secretary of State's ability to ensure certainty as to what is currently law in Ohio. In an effort to prevent a future General Assembly from abusing its power and circumventing the Governor's role in the legislative process, the General Assembly should adopt a rule prohibiting bill presentment to the Governor after it adjourns sine die.

II. BACKGROUND

A. Legislative Process—Procedural Responsibilities of the Secretary of State & Governor

1. Duties of the Secretary of State

The Ohio Secretary of State's role in the legislative process is to be the "official custodian" of the laws.¹⁴ The Secretary's responsibilities are ministerial in nature only, prohibiting the exercise of discretion when carrying out the statutorily assigned duties.¹⁵ According to the supreme court, "The Secretary of State is an executive officer who is not vested with any jurisdiction to determine judicial questions dealing with the constitutionality of any law."¹⁶

¹² See OHIO CONST. art. II, § 15(E).

¹³ "Adjournment sine die" is an adjournment where there is no return date scheduled. BLACK'S LAW DICTIONARY 44 (8th ed. 2004).

¹⁴ *Wrede v. Richardson*, 82 N.E. 1072, 1075 (Ohio 1907).

¹⁵ *Maloney v. Rhodes*, 345 N.E.2d 407, 410–11 (Ohio 1976) (The Secretary of State is responsible for those "ministerial acts" which "a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority, without regard to or the exercise of his [or her] own judgment upon the propriety of the act being done." (quoting BLACK'S LAW DICTIONARY 1148 (4th ed. 1951))).

¹⁶ *Id.* at 408 paragraph two of the syllabus (citing *State ex rel. Marcolin v. Smith*, Sec'y of State, 138 N.E. 881, 881–82 (Ohio 1922)).

With respect to the legislative process, the Secretary's primary duty is to "have charge of and safely keep the laws and resolutions passed by the general assembly."¹⁷ Once the Governor has filed a piece of legislation with the Secretary of State's Office, the Secretary forwards copies of all engrossed bills to the clerk of each of the county courts of common pleas.¹⁸ The Secretary must also distribute copies of duly-enacted laws to prescribed individuals such as the county auditors, county libraries, state library boards, the Legislative Service Commission, the clerks of the Ohio Senate and House of Representatives, and the Library of Congress.¹⁹ The Secretary may be subjected to an action in mandamus to compel the performance of these statutory responsibilities.²⁰

2. *Duties of the Governor*

The Governor's role in the legislative process is governed by article II, section 16 of the Ohio Constitution. This section allows the Governor to choose among three alternative actions after a bill has been presented to him or her by the General Assembly.²¹ First, the Governor can approve a piece of legislation by signing it and filing the bill with the Secretary of State's Office.²² Second, if the Governor is opposed to the bill, the Governor can opt to return the bill along with his or her written objections to the house where it originated for the legislature's reconsideration.²³ Finally, a third option is:

If a bill is not returned by the [G]overnor within ten days, Sundays excepted, after being presented to him, it becomes law in like manner as if he had signed it, unless the general assembly by adjournment prevents its return; in which case, it becomes law unless, within ten days after such adjournment, it is filed by him, with his objections in writing, in the office of the [S]ecretary of [S]tate. The [G]overnor shall file with the [S]ecretary of [S]tate every

¹⁷ OHIO REV. CODE ANN. § 111.08 (LexisNexis 2007).

¹⁸ *Id.* § 149.08.

¹⁹ *Id.* §§ 149.09, 149.091.

²⁰ *Maloney*, 345 N.E.2d at 411.

²¹ OHIO CONST. art. II, § 16.

²² *Id.*

²³ *Id.*

bill not returned by him to the house of origin that becomes law without his signature.²⁴

Thus, a Governor can allow a bill to become law without a signature at the expiration of a ten-day consideration period. However, the commencement of the ten-day consideration period changes in the event that the General Assembly adjourns sine die.²⁵ It is this last situation that is of interest in this case.

3. Amended Substitute Senate Bill 117

Senate Bill 117 was introduced into the Ohio Senate on April 1, 2005, during the regular term of the 126th Ohio General Assembly.²⁶ Initially, this legislation eliminated the ban on using a criminal conviction record unless it was obtained as evidence in open court.²⁷ The legislation also provided that in designated criminal actions, a final judgment entered after a guilty plea or trial precluded a defendant from denying any essential fact used to sustain that judgment when it is entered as evidence during a civil proceeding based on the criminal action.²⁸ As Senate Bill 117 traveled through the legislative process, the bill was significantly amended in the House of Representatives to include changes made to the Consumer Sales Practices Act and product liability laws.²⁹ It was these provisions that caused Governor Strickland to attempt to veto Senate Bill 117.³⁰

Senate Bill 117 was passed by both the House of Representatives and Senate on December 14, 2006.³¹ The General Assembly adjourned sine die on December 26, 2006.³² The next day, after consultation with the Governor's staff, the clerk of the Senate presented Senate Bill 117, along

²⁴ *Id.*

²⁵ *Id.*

²⁶ 2006 Ohio Legis. Serv. Ann. page no. SRL-27 (West).

²⁷ OHIO LEGISLATIVE SERVICE COMMISSION, BILL ANALYSIS AS INTRODUCED, SENATE BILL 117 (2005), <http://www.lsc.state.oh.us/analyses126/s0117-i-126.pdf>.

²⁸ *Id.*

²⁹ 2006 Ohio Legis. Serv. Ann. page no. L-3810–L-3822 (West).

³⁰ Press Release, Office of the Governor, Statement of the Reasons for the Veto of Amended Substitute Senate Bill 117 from the 126th General Assembly (Jan. 8, 2007), <http://www.governor.ohio.gov/Default.aspx?tabid=73>.

³¹ *State ex rel. Ohio Gen. Assembly v. Brunner*, 872 N.E.2d 912, 915–16 (Ohio 2007).

³² *Id.* at 916.

with other final pieces of legislation, to Governor Taft for his action.³³ On January 5, 2007, the last business day of his term, outgoing Governor Taft filed, without his signature, Senate Bill 117 in the Office of Secretary of State J. Kenneth Blackwell.³⁴ The Governor's Office Bill Record, the paper journal that serves as the registry for every bill passed by the General Assembly,³⁵ confirmed that the Secretary of State's Office received and signed the legislation on January 5, 2007.³⁶

Significantly, upon taking office on January 8, 2007, Governor Ted Strickland requested the return of Senate Bill 117 from Jennifer Brunner, the new Ohio Secretary of State, who complied with this request.³⁷ The Governor then promptly prepared a veto message and returned the bill to the Secretary of State's Office, claiming that the ten-day period within which the Governor is permitted to act on a bill pursuant to section 16 had not yet expired.³⁸ Following Governor Strickland's attempted veto, the General Assembly, Senate President Bill Harris, and House of Representatives Speaker Jon Husted filed an action for a writ of mandamus compelling Secretary of State Brunner to amend the records of the Secretary of State's Office to preserve the action taken by former Governor Taft.³⁹ The action also requested that Secretary of State Brunner be required to perform the duties mandated in Chapter 149 of the Ohio Revised Code, and finally that the records reflect that the bill had not been vetoed.⁴⁰

III. DISCUSSION & ANALYSIS

A. State ex rel. Ohio General Assembly v. Brunner (Brunner I)

Brunner I presented an issue of first impression for the Ohio Supreme Court.⁴¹ Never before had the supreme court addressed the situation where a new Governor attempted to rescind the actions of his predecessor. The

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* (citing OHIO REV. CODE ANN. § 107.10(A) (LexisNexis 2007)).

³⁶ *Id.* at 916–17.

³⁷ *Id.*

³⁸ *Id.* at 917.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 915.

majority addressed the sole issue of whether Senate Bill 117 had become a duly-enacted law before Governor Strickland requested its return from the Secretary of State's Office.⁴² Secretary of State Brunner stated that she returned the bill to the Governor because the ten-day consideration period had not yet ended, giving Governor Strickland time to veto the bill.⁴³ She further contended that the ten-day consideration period only commences on the date of adjournment when the General Assembly presents the bill before it adjourns.⁴⁴ The relators, on the other hand, asserted that Senate Bill 117 had already become law and alleged that Secretary of State Brunner exceeded her authority when she made the judicial determination to return the bill.⁴⁵

On August 1, 2007, the supreme court granted the relators' writ of mandamus.⁴⁶ The final decision resulted in six separate opinions.⁴⁷ The court's lead opinion was authored by Justice Cupp and was joined by Chief Justice Moyer.⁴⁸ The opinion focused on the commencement of the Governor's constitutional ten-day consideration period.⁴⁹ Justices Lundberg Stratton, O'Connor, and O'Donnell filed concurring opinions.⁵⁰ Justices Pfeifer and Lanzinger filed dissents.⁵¹

⁴² *Id.*

⁴³ *Id.* at 920.

⁴⁴ *Id.* at 922.

⁴⁵ *Id.* at 920.

⁴⁶ *Id.* at 925.

⁴⁷ *Id.*

⁴⁸ *Id.* at 915, 925.

⁴⁹ *Id.* at 921 (“We hold that under [s]ection 16, [a]rticle II of the Ohio Constitution, the ten-day period for the [G]overnor to act upon Am.Sub.S.B. No. 117 began to run on the date that the General Assembly adjourned sine die, which was December 26, 2006. The time for the [G]overnor, therefore, to act upon the bill expired, at the latest, on Saturday, January 6, 2007, and the attempted veto by the [G]overnor on Monday, January 8, 2007, was without effect. Consequently, as asserted by relators, Am.Sub.S.B. No. 117 had already become law by the time the [S]ecretary of [S]tate returned the bill to the [G]overnor on January 8, 2007.”).

⁵⁰ *Id.* at 925.

⁵¹ *Id.*

1. The Majority's Holding

The court's opinion focused on interpreting whether the Governor exceeded his constitutional authority within the legislative process.

The Ohio Constitution's prescribed procedure for the creation of statutory law bears upon the fundamental allocation of authority between the legislative and executive branches of state government. This court acts within its proper constitutional role in construing [s]ection 16, [a]rticle II, Ohio Constitution, when its meaning is squarely at issue, as it is in this case.⁵²

Specifically, the court examined the constitutional language that states:

If a bill is not returned by the [G]overnor within ten days . . . it becomes law in like manner as if he had signed it, unless the general assembly by adjournment prevents its return; in which case, it becomes law unless, within ten days after such adjournment, it is filed by him, with his objections The [G]overnor shall file with the [S]ecretary of [S]tate every bill not returned by him to the house of origin that becomes law without his signature.⁵³

In other words, the Governor has ten days to approve or veto a bill unless the General Assembly adjourns, thereby preventing a bill's return.⁵⁴ The court has held that the "adjournment" referenced in section 16 is adjournment sine die, where no reconvening date is scheduled.⁵⁵ Where the General Assembly adjourns sine die, the Ohio Constitution specifies that the required ten-day period begins from the date of the adjournment.⁵⁶ Accordingly, the majority held that "when the General Assembly adjourns sine die, preventing the return of a bill to the General Assembly, the bill 'becomes law unless, within ten days after such adjournment,' it is filed by the [G]overnor with the [G]overnor's objections in writing, in the office of

⁵² *Id.* at 921.

⁵³ OHIO CONST. art. II, § 16.

⁵⁴ *Id.*

⁵⁵ *Brunner I*, 872 N.E.2d at 922 (citing *State ex rel. Gilmore v. Brown*, 451 N.E.2d 235 (Ohio 1983)).

⁵⁶ *Id.*

the [S]ecretary of [S]tate.”⁵⁷ Here, the court determined that Senate Bill 117 became law at the latest on January 6, 2007, because the ten-day consideration period began on December 26, 2006.⁵⁸ Thus, the bill was a law by the time Governor Strickland attempted to veto it.

Secretary of State Brunner argued that this constitutional interpretation only applies when a bill is presented *before* the General Assembly adjourns.⁵⁹ She cited *Maloney v. Rhodes*,⁶⁰ where the court reviewed the procedural responsibilities of the Secretary of State and the Governor with respect to their duties when presented with a bill.⁶¹ In *Maloney*, outgoing Governor John Gilligan signed and delivered six bills to the Secretary of State’s Office before his term expired.⁶² Upon receipt of the bills from Governor Gilligan, the Secretary of State refused to file them and instead delivered the bills to the new Governor James Rhodes, who subsequently took no action on them.⁶³ In interpreting section 16, the *Maloney* court found Governor Rhodes’ inaction to be unconstitutional; the court held that once presented with the bills, the Governor was obligated to file them with the Secretary of State’s Office.⁶⁴ The *Maloney* court further found that a bill becomes law if the General Assembly adjourns during the Governor’s ten-day consideration period, unless the Governor files his objections with the Secretary of State’s Office within ten days after adjournment.⁶⁵ Brunner contended that the *Maloney* court’s interpretation presumed that the bill was in the Governor’s possession at the time of the General Assembly’s adjournment.⁶⁶

The court’s majority disregarded Brunner’s argument because *Maloney* did not address when the ten-day consideration period commences if the General Assembly adjourns before a bill is presented to the Governor.⁶⁷

⁵⁷ *Id.*

⁵⁸ *Id.* The court elected not to determine whether Sundays were excluded because under either situation, the outcome would have been the same. *Id.*

⁵⁹ *Id.* at 923.

⁶⁰ 345 N.E.2d 407 (Ohio 1976).

⁶¹ *Brunner I*, 872 N.E.2d at 923.

⁶² *Maloney*, 345 N.E.2d at 409.

⁶³ *Id.*

⁶⁴ *Id.* at 411.

⁶⁵ *Id.*

⁶⁶ *Brunner I*, 872 N.E.2d at 923.

⁶⁷ *Id.*

“Accordingly, [the majority noted that] this statement in *Maloney*, which was not essential to the holding, does not support the [S]ecretary’s argument.”⁶⁸ The court further stated that there was no constitutional support for Brunner’s position.⁶⁹ Instead, the majority held that its literal reading of section 16, specifically the phrase “prevents its return,” is dependent upon the type of adjournment that occurs, not whether the Governor has possession of the bill before adjournment takes place.⁷⁰ Therefore, the Ohio Constitution requires that when there is an adjournment sine die preventing a bill’s return, the starting date for the consideration period is the date of adjournment.⁷¹

The court also noted that it did not need to address the effect that an intentionally delayed bill presentment by the General Assembly following adjournment sine die would have on the legislative process.⁷² However, the lead opinion acknowledged that “the General Assembly does not have constitutional free reign to withhold a bill that it has enacted from timely presentment to the [G]overnor.”⁷³ Under section 15(E), article II, of the Ohio Constitution, the legislature is required to present a bill “forthwith” to the Governor for his approval or veto.⁷⁴ The court pointed to its holding in *Seeger v. For Women, Inc.*⁷⁵ that “forthwith” means “immediately,” “promptly,” or “without delay.”⁷⁶ Accordingly, the court held that starting the Governor’s ten-day consideration period from the date of adjournment did not constitute an intentional delay such that it impeded the Governor’s ability to review the bill.⁷⁷

Consequently, the lead opinion held that the Governor’s ten-day consideration period to act upon Senate Bill 117 began to run on the date

⁶⁸ *Id.*

⁶⁹ *Id.* at 922.

⁷⁰ *Id.* at 923.

⁷¹ *Id.* at 922.

⁷² *Id.* at 924.

⁷³ *Id.*

⁷⁴ OHIO CONST. art. 2, § 15(E). (“Every bill which has passed both houses of the general assembly shall be signed by the presiding officer of each house to certify that the procedural requirements for passage have been met and shall be presented forthwith to the [G]overnor for his approval.”).

⁷⁵ 854 N.E.2d 188 (Ohio 2006).

⁷⁶ *Brunner I*, 872 N.E.2d at 924.

⁷⁷ *Id.*

that the General Assembly adjourned sine die, which was December 26, 2006.⁷⁸ Therefore, at the latest, the time for the Governor to act upon the bill expired on Saturday, January 6, 2007. As such, Governor Strickland's attempted veto two days later was invalid, for Senate Bill 117 had already become law.⁷⁹

B. The Concurring Opinions

1. Justice Lundberg Stratton

Justice Lundberg Stratton's concurring opinion agreed with the majority's holding that the Governor's ten-day consideration period commences on the date of adjournment, but argued that the better analysis was the fact that Governor Taft had filed the bill with the Secretary of State's Office before leaving office.⁸⁰ She opined that "the stronger and simpler position invalidating the veto is to hold that when the [G]overnor decides to allow a bill to become a law without his or her signature and files the bill without written objections with the [S]ecretary of [S]tate, the [G]overnor's constitutional authority over the bill terminates."⁸¹

Justice Lundberg Stratton's concurrence found that Governor Strickland lacked the authority to request Senate Bill 117 from the Secretary.⁸² She contended that it is an established principle that once the power of an executive has been completely exercised, his authority over that matter ceases.⁸³ She pointed to *People ex rel. Partello v. McCullough*,⁸⁴ where the Illinois Supreme Court held that once the Governor had deposited a bill with the Secretary of State's office, the bill had "passed beyond his control, and he had no power thereafter to take the bill from the office of the Secretary of State, and veto it, and return it to the

⁷⁸ *Id.* at 921.

⁷⁹ *Id.*

⁸⁰ *Id.* at 925 (Lundberg Stratton, J., concurring).

⁸¹ *Id.*

⁸² *Id.* at 929.

⁸³ *Id.* at 926–27 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 157 (1803); *Cook v. Botelho*, 921 P.2d. 1126, 1129 (Alaska 1996); *Royster v. Brock*, 79 S.W.2d 707 (Ky. 1935)).

⁸⁴ 71 N.E. 602 (Ill. 1904).

Secretary of State's Office, accompanied by his veto."⁸⁵ Additionally, Justice Lundberg Stratton noted that the Arkansas Supreme Court in *Powell v. Hayes*⁸⁶ invalidated an action by the Governor to rescind his predecessor's approval of a bill and found that "when [the Governor] has exercised his power over [a bill], either by approval or veto, then the action is final and irrevocable."⁸⁷ She also looked to the Indiana Supreme Court, which in *Woessner v. Bullock*,⁸⁸ held that a Governor is not authorized to reconsider his veto once he has submitted his veto message to the appropriate entity.⁸⁹

Pursuant to section 16, the Governor "effectuates [his] decision by filing" a bill with the Secretary of State's Office.⁹⁰ Governor Taft fulfilled his constitutional responsibilities by allowing Senate Bill 117 to become law without his signature and filing it with the Secretary of State's Office. "This is the only act required by the Constitution for a [G]overnor choosing this alternative, and the [G]overnor performed that act."⁹¹ Upon filing, it was Justice Lundberg Stratton's opinion that the Governor's authority over the bill ended, regardless of when the ten-day consideration period expired.⁹²

Justice Lundberg Stratton further argued that Secretary of State Brunner acted outside of her authority when she transmitted the bill to Governor Strickland.⁹³ She too cited *Maloney*, which prohibited the Secretary from making judicial determinations on the constitutionality of bills.⁹⁴ Thus, by returning the bill to Governor Strickland, Secretary of

⁸⁵ *Brunner I*, 872 N.E.2d at 927 (Lundberg Stratton, J., concurring) (quoting *McCullough*, 71 N.E. at 605).

⁸⁶ 104 S.W. 177 (Ark. 1907).

⁸⁷ *Brunner I*, 872 N.E.2d at 927 (Lundberg Stratton, J., concurring) (quoting *Powell*, 104 S.W. at 182).

⁸⁸ 93 N.E. 1057 (Ind. 1911).

⁸⁹ *Brunner I*, 872 N.E.2d at 928 (Lundberg Stratton, J., concurring) (citing *Woessner*, 93 N.E. 1057).

⁹⁰ *Id.* at 928.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 929.

⁹⁴ *Id.* (citing *Maloney v. Rhodes*, 345 N.E.2d 407, 411 (Ohio 1976) ("The Secretary of State has no judicial power, authority, or jurisdiction to declare a law constitutionally invalid or to refuse to file it.")).

State Brunner made a judicial determination that Senate Bill 117 had not yet become law.⁹⁵ This judicial determination, according to Justice Lundberg Stratton, was not within the Secretary of State's authority.⁹⁶

2. *Justice O'Donnell*

Justice O'Donnell, in his concurrence, took a similar position to that of Justice Lundberg Stratton. With respect to Senate Bill 117, he agreed with the judgment of the majority, but also focused on the lack of authority by both the Governor and the Secretary of State.⁹⁷ "This case is one of a constitutional magnitude, in which the Supreme Court of Ohio is called upon to define and clarify the responsibilities and duties of the offices of [G]overnor and [S]ecretary of [S]tate with respect to legislation enacted by the Ohio General Assembly."⁹⁸

Although Justice O'Donnell stated that an unsigned bill does not automatically become law upon the Governor's filing with the Secretary's Office, the filing of the bill constitutes the Governor's last constitutionally-required act in the process for a bill to become law without his signature.⁹⁹ Governor Taft filed Senate Bill 117 without his signature with the Secretary of State's Office in conformity with the Constitution and completed his role in the legislative process.¹⁰⁰ Justice O'Donnell pointed

⁹⁵ *Id.* at 930. Secretary of State Brunner's response that accompanied the returned bill stated:

Nothing in law prohibits the Secretary of State from returning to the [G]overnor an act that has been filed with the office without signature, but which has not yet become law. Therefore, I am returning herewith Am.Sub.S.B. No. 117 to you, in accordance with your request, to allow you to determine within the Constitutional ten-day period which option you determine best in regard to the final disposition of Am.Sub.S.B. No. 117.

Id.

⁹⁶ *Id.*

⁹⁷ *Id.* at 931–32 (O'Donnell, J., concurring) ("I concur with the judgment of the majority but for a different reason and, therefore, write separately to emphasize that the Constitution does not permit either public official to undertake these actions.").

⁹⁸ *Id.* at 931.

⁹⁹ *Id.* at 932.

¹⁰⁰ *Id.*

to *Doe v. Executors of Dugan*,¹⁰¹ where the supreme court held that “[i]t is not competent for a public officer to undo what he has once done, and thus correct his errors, he is *functus officio*, and has lost his power over the subject.”¹⁰² Therefore, the act of filing “terminated the function of the office of the [G]overnor with respect to this legislation,”¹⁰³ and Governor Strickland was without any authority to recall the bill and attempt to veto it.

Justice O’Donnell shared Justice Lundberg Stratton’s opinion that the Secretary of State lacked authority to return the bill to the Governor.¹⁰⁴ He explained that the Secretary’s only constitutional role in the legislative process is to “serve as a depository for the filing of bills and laws.”¹⁰⁵ He reiterated that the functions of the Secretary are ministerial and, thus, there was no authority to make judicial determinations as to the constitutionality of a bill or the acts of the Governor or the legislature.¹⁰⁶ Accordingly, Justice O’Donnell held that the return of Senate Bill 117 to Governor Strickland was inconsistent with both the Ohio Constitution and the Secretary’s statutorily-required duties.¹⁰⁷

3. Justice O’Connor

Finally, Justice O’Connor issued a concurring opinion directly responding to Justice Pfeifer’s dissent and what she called “his improper accusation that the majority has not decided this case of first impression with honesty and integrity.”¹⁰⁸ She found his dissent to be disparaging of the other justices’ integrity.¹⁰⁹ Justice O’Connor recognized that it was natural for disagreements to occur among colleagues, but stressed that they

¹⁰¹ 8 Ohio 87 (Ohio 1837).

¹⁰² *Brunner I*, 872 N.E.2d at 932 (O’Donnell, J., concurring) (quoting *Dugan’s Exrs.*, 8 Ohio at 107). “Functus officio” means ‘having performed his or her office’ which in turn means that the public officer is ‘without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.’” *Id.* (quoting BLACK’S LAW DICTIONARY 696 (8th ed. 2004)).

¹⁰³ *Id.* at 933.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 934.

¹⁰⁸ *Id.* at 930 (O’Connor, J., concurring).

¹⁰⁹ *Id.* at 931.

must maintain a level of respect for one another.¹¹⁰ She reminded Justice Pfeifer that:

[e]ach justice takes an oath to fulfill [his or her] duty to the best of his or her ability. To wrongfully call into question the integrity of justices with opposing views maligns our personal and professional reputations, including that of our dissenting justice. Most offensively, however, it undermines the integrity of the court itself.¹¹¹

C. The Dissenting Opinions

1. Justice Pfeifer

In his dissenting opinion, Justice Pfeifer expressed strong reservations about the outcome of this case. He stated:

The foot-dragging of the General Assembly at the end of its term and the Pilate-like inaction of Governor Bob Taft have left the majority with the dirty work of finding some way to resuscitate Am.Sub. S.B. 117. Seemingly forgetting that this court's obligation is to interpret and uphold the Ohio Constitution—not to fix the mistakes of the other branches of government—the majority renders [s]ection 16, [a]rticle II of the Ohio Constitution an absurdity, striking a harmful blow to the separation of powers. The majority today allows the General Assembly, through the manipulation of its adjournment, to effectively render a [G]overnor's veto power a nullity . . . [t]he majority defies common sense . . . [it] has achieved a new level of judicial activism—a wholesale rewriting of the Ohio Constitution. And all the General Assembly had to do was ask.¹¹²

Because the General Assembly failed to enact Senate Bill 117 by the method set forth under the Ohio Constitution, Justice Pfeifer opined that

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 934 (Pfeifer, J., dissenting).

the relators asked the court to “distort the Constitution beyond recognition to achieve the result they desire[d].”¹¹³

Justice Pfeifer’s dissent first held that the court’s majority opinion mistakenly relies on article II, section 15(E), which requires the General Assembly to present bills to the Governor “forthwith,” to act as a “Band-Aid for the gaping hole it has created in the Constitution” with its holding.¹¹⁴ He cautioned that the majority’s holding would allow the General Assembly to circumvent the Governor’s statutorily prescribed ten-day consideration period, giving the Governor no time with which to act upon a piece of legislation.¹¹⁵ Because the Ohio Constitution does not state that bill certification must occur concurrently with passage *or* that it cannot be made *after* the General Assembly adjourns, the Governor does not gain any power over a bill until it has been presented to him.¹¹⁶ Therefore, under the decision of the court, the legislature could present a bill to him ten days after it adjourns sine die, thereby leaving the Governor with no time in which to sign or veto a bill.¹¹⁷

Justice Pfeifer argued that the establishment of the executive ten-day consideration period was deemed by the founders of the United States Constitution as a necessary and adequate time frame for the deliberation of a bill’s acceptance or rejection.¹¹⁸ “It is the lifeblood of the veto power, and of the separation of powers.”¹¹⁹ Justice Pfeifer pointed to *Okanogan Indian Tribes v. United States*,¹²⁰ otherwise known as *The Pocket Veto Case*, where the United States Supreme Court rejected an interpretation of the United States Constitution that would allow Congress to shorten the President’s consideration period.¹²¹

¹¹³ *Id.* at 935.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 936.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 937–38 (citing *The Pocket Veto Case*, 279 U.S. 655, 677–78 (1929) (interpreting U.S. CONST. art. I, § 7)).

¹¹⁹ *Id.* at 938.

¹²⁰ 279 U.S. 655 (1929).

¹²¹ *Brunner I*, 872 N.E.2d at 937 (Pfeifer, J., dissenting) (citing *The Pocket Veto Case*, 279 U.S. at 677–78).

The faithful and effective exercise of [the presidential veto] requires time in which the President may carefully examine and consider a bill . . . [t]o that end a specified time is given, after the bill has been presented to him, in which he may examine its provisions and either approve it or return it . . . [t]he power thus conferred upon the President cannot be narrowed or cut down by Congress, nor the time within which it is to be exercised lessened, directly or indirectly.¹²²

The United States Supreme Court further held in *La Abra Silver Mining Co. v. United States*¹²³ that if Congress adjourns before the President's ten-day consideration period has expired, the bill does not become a law at the expiration of the ten days.¹²⁴ Additionally, in *Edwards v. United States*,¹²⁵ the United States Supreme Court found no constitutional basis or policy reason for lessening the consideration period.¹²⁶

Justice Pfeifer further noted that the Supreme Courts of Illinois and Idaho have also preserved the Governor's ten-day consideration period.¹²⁷ In *People ex rel. Petersen v. Hughes*,¹²⁸ the Illinois Supreme Court struck down an attempt by the General Assembly to shorten the Governor's consideration period by presenting a bill after it had adjourned sine die.¹²⁹ The court found that the framers of the Illinois Constitution allowed the Governor ten days in which to give "careful examination and consideration,"¹³⁰ so as to give necessary attention to the consequences of the legislation, and that "the time allowed for [this] purpose cannot be abridged, or the provision thwarted, by either accident or design. The . . . whole time given to the [G]overnor must be allowed."¹³¹ Thus, the

¹²² *Id.* at 937 (quoting *The Pocket Veto Case*, 279 U.S. at 677–78).

¹²³ 177 U.S. 423 (1899).

¹²⁴ *Id.* at 454.

¹²⁵ 286 U.S. 482 (1932).

¹²⁶ *Id.* at 494–94.

¹²⁷ *Brunner I*, 872 N.E.2d at 939–41 (Pfeifer, J., dissenting) (citing *Cenarrusa v. Andrus*, 582 P.2d 1082 (Idaho 1978); *People ex rel. Petersen v. Hughes*, 25 N.E.2d 75 (Ill. 1940)).

¹²⁸ *Hughes*, 25 N.E.2d 75.

¹²⁹ *Id.* at 78–80.

¹³⁰ *Id.* at 78 (citation omitted).

¹³¹ *Id.* (citation omitted).

Illinois Supreme Court held that the General Assembly could not shorten the Governor's ten-day consideration period by presenting a bill to him after it had adjourned sine die.¹³² Additionally, the Idaho Supreme Court similarly held in *Cenarrusa v. Andrus*¹³³ that the General Assembly was not permitted to shorten the Governor's consideration period.¹³⁴ The court stated that:

[i]f we were to hold that the [G]overnor was without power to veto a bill more than ten days after adjournment, the legislature would be in a position to defeat at will one of the constitutionally granted powers of a separate and coequal branch of government merely by delaying presentment beyond the time in which the [G]overnor could act.¹³⁵

Therefore, by adhering to the constitutional intent of the drafters, the legislature will be prevented from stripping the executive from his or her constitutionally provided consideration period.

Additionally, Justice Pfeifer's dissent stated that the majority misinterpreted the Ohio Constitution to allow bill presentment to occur after the legislature had adjourned sine die.¹³⁶ "Nothing in the majority opinion would convince an objective reader that the conclusion is just or in any way supported by case law, statutory law, learned treaties, or the plain language of [s]ection 16, [a]rticle II of the Ohio Constitution."¹³⁷ Instead, Justice Pfeifer's interpretation of [s]ection 16 is that the ten-day consideration period does not begin until after presentment occurs.¹³⁸ This reading will uphold the constitutional intent by ensuring that the Governor is permitted sufficient time to consider the legislation before him.

¹³² *Id.* at 80.

¹³³ 582 P.2d 1082 (Idaho 1978).

¹³⁴ *Id.* at 1086–87.

¹³⁵ *Id.* at 1087.

¹³⁶ *State ex rel. Ohio Gen. Assembly v. Brunner*, 872 N.E.2d 912, 942 (Ohio 2007) (Pfeifer, J., dissenting).

¹³⁷ *Id.*

¹³⁸ *Id.* at 936.

2. Justice Lanzinger

Justice Lanzinger also wrote a dissenting opinion.¹³⁹ She concurred with Justice Pfeifer's position that the Governor's ten-day consideration period begins with the date of presentment after the General Assembly adjourns sine die.¹⁴⁰ She asserted that section 16 presumes that the Governor is in possession of a bill before the legislature adjourns without a reconvening date.¹⁴¹ It was her view that in order for an adjournment to "prevent a bill's return," the Governor must have already received the bill.¹⁴² In the situation where there is no adjournment, the ten-day consideration period commences with presentment.¹⁴³ In the event the legislature adjourns sine die and presentment occurs before adjournment, she too interpreted the effect of the majority's holding to allow the Governor extra time.¹⁴⁴

D. Right Outcome, Wrong Analysis

In *Brunner I*, the court's majority incorrectly focused on the commencement of the Governor's ten-day consideration period following an adjournment sine die by the General Assembly. The majority's interpretation of section 16 holds that this period begins on the date the legislature adjourns sine die, as opposed to the date when the bill is presented.¹⁴⁵ The court opted for a literal constitutional interpretation, instead of taking a more pragmatic, common sense approach that remains true to the constitutional intent of the Governor's consideration period.

Justices Lundberg Stratton and O'Donnell's concurring opinions make a more logical argument that focused instead on lack of constitutional authority for the Governor and Secretary of State's actions in vetoing and returning Senate Bill 117. This analysis delivered the same outcome as the majority, but in a manner that does not rely on counting days and having to revisit the question of whether to exclude Sundays. Furthermore, Justice Pfeifer's dissent correctly points out that the majority's holding permits the

¹³⁹ *Id.* at 943 (Lanzinger, J., dissenting).

¹⁴⁰ *Id.* at 943–44.

¹⁴¹ *Id.* at 944.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 921 (majority opinion).

General Assembly to circumvent the Governor's ten-day consideration period by allowing it to present a bill after it has adjourned sine die, thus giving it an unbalanced leg up in the legislative process.

1. Governor's Lack of Authority to Request the Bill's Return

The majority opinion failed to address Governor Strickland's lack of authority to request the return of Senate Bill 117 upon taking office on January 8, 2007. Section 16 only allows the Governor to sign, veto, or refuse to sign or veto a piece of legislation, and then file it with either the Secretary of State or the house where it originated.¹⁴⁶ Nothing in the Ohio Constitution authorizes the Governor to request a bill's return from the Secretary once it has been filed.

Furthermore, a Governor cannot undo legislation that has already become law. "It is well settled that once an executive power has been completely exercised, the authority of the executive to rescind the completed exercise of that power ceases."¹⁴⁷ Thereafter, neither the current nor a successor Governor is permitted to retrieve the bill and act upon it.¹⁴⁸ The Ohio Constitution precludes the Governor from changing his mind once a bill becomes a law. If a Governor had the ability to make and unmake laws, he or she would then be vested with lawmaking power, a power that has been strictly reserved to the legislature by the express wishes of the drafters of the Ohio Constitution.¹⁴⁹

Therefore, on January 5, 2007, when Governor Taft filed Senate Bill 117 with the Secretary of State's Office, all of the Governor's constitutionally-granted authority had been exercised; as a result, when Governor Strickland assumed office three days later, the Office of the Governor no longer had any power over this bill. It is important to note that if the court had used this analysis, it would not have been necessary for it to determine on what date the ten-day consideration period began.

¹⁴⁶ See *Maloney v. Rhodes*, 345 N.E.2d 407, 411 (Ohio 1976) (citation omitted).

¹⁴⁷ *Brunner I*, 872 N.E.2d at 926-27 (Lundberg Stratton, J., concurring) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 157 (1803)).

¹⁴⁸ *Id.* at 929.

¹⁴⁹ *State v. Lathrop*, 112 N.E. 209, 210 (Ohio 1915).

2. *Secretary of State's Lack of Authority to Return the Bill*

The court's lead opinion also neglected the fact that Secretary of State Brunner stepped outside of her role as custodian of legislation when she granted Governor Strickland's request to return the bill. The Secretary's response that accompanied the returned bill stated:

Nothing in law prohibits the Secretary of State from returning to the [G]overnor an act that has been filed with the office without signature, but which has not yet become law. Therefore, I am returning herewith [Senate Bill] 117 to you, in accordance with your request, to allow you to determine within the Constitutional ten-day period which option you determine best in regard to the final disposition of [Senate Bill] 117.¹⁵⁰

The majority failed to recognize that it was not within the scope of Secretary of State Brunner's authority to determine that the bill had not yet become law. As described above, her role in the legislative process is to perform ministerial functions only; she is not permitted to make judicial determinations.¹⁵¹

Allowing the Secretary to make judicial determinations can significantly affect a bill's filing date. The date a bill is filed with the Secretary of State's Office determines the beginning of the ninety-day period within which individuals can submit a petition for referendum opposing a law.¹⁵² If the Secretary is permitted to return bills that have previously been filed, petitioners would be uncertain as to which filing date serves as the commencement of the ninety-day referendum period. This notion is contrary to the express provisions of article II, section 1(c) of the Ohio Constitution.¹⁵³ As noted by Justices Lundberg Stratton and O'Donnell, the Secretary of State's role in the legislative process is to be

¹⁵⁰ *Brunner I*, 872 N.E.2d at 930 (Lundberg Stratton, J., concurring).

¹⁵¹ *Maloney v. Rhodes*, 345 N.E.2d 408 at paragraph two of the syllabus (citing *State ex rel. Marcolin v. Smith*, 138 N.E. 881, 887 (Ohio 1922)).

¹⁵² OHIO CONST. art. II, § 1(c).

¹⁵³ *Id.*

the depository for all bills and to perform her statutorily-required functions, not to make determinations as to the constitutionality of a bill.¹⁵⁴

As a result of the majority's failure to recognize this point, the court was forced to clarify its holding less than a month later in *State ex rel. Ohio General Assembly v. Brunner (Brunner II)*.¹⁵⁵ Secretary of State Brunner asked the court to determine whether the ninety-day referendum period had tolled during the litigation process.¹⁵⁶ The court in *Brunner II* held that the bill's filing date was January 5, 2007, the original filing date by former Governor Taft; therefore, the referendum period expired April 5, 2007.¹⁵⁷ However, the court allowed the electors ninety days from August 1, 2007, the date the court declared Senate Bill 117 a valid law, in order to file a petition for referendum.¹⁵⁸ The court did not want to "unintentionally deprive[] the citizens of the right to referendum that they would have enjoyed were it not for the unavoidable delays associated with judicial review."¹⁵⁹

Interestingly enough, *Brunner II* had five separate opinions and only Chief Justice Moyer was in the majority in both *Brunner I* and *Brunner II*.¹⁶⁰ The majority in *Brunner II* noted that it could not "simply brush aside the powers specifically reserved by the citizens of this state in the Constitution."¹⁶¹ However, the dissenting opinions noted that the majority overlooked the express provisions set forth in section 1(c).¹⁶² Justice Cupp stated that "the Ohio Constitution does not provide for this result. We have never held that a possible confusion over the effectiveness of a [G]overnor's veto automatically suspends the [ninety]-day referendum period provided in [s]ection 1(c), [a]rticle II."¹⁶³ Thus, because the court focused on the start date of the Governor's ten-day consideration period in

¹⁵⁴ See OHIO REV. CODE ANN. § 149.08 (LexisNexis 2007 & Supp. 2008). An example of which is forwarding all duly-enacted laws to the clerk of courts.

¹⁵⁵ 873 N.E.2d 1232 (Ohio 2007) (per curiam).

¹⁵⁶ *Id.* at 1232.

¹⁵⁷ *Id.* at 1233.

¹⁵⁸ *Id.* at 1232–33.

¹⁵⁹ *Id.* at 1235.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 1237 (O'Donnell, J., dissenting); see also *id.* at 1239 (Cupp, J., dissenting).

¹⁶³ *Id.* at 1239 (Cupp, J., dissenting).

Brunner I—and not the Secretary of State’s role in the legislative process—the majority was forced to clarify that decision in *Brunner II*.

E. Constitutional Misinterpretation

Finally, as Justice Pfeifer correctly points out in his dissenting opinion, the majority’s interpretation of section 16 is in contravention of the constitutional intent of the [G]overnor’s ten-day consideration period.¹⁶⁴ According to the court, “[t]he Constitution does not specify that the ten-day period begins to run from its presentment to the [G]overnor, but instead specifies counting the ten days ‘after such adjournment.’”¹⁶⁵ The majority intentionally ignored the consequences of its holding by choosing not to “decide the constitutional effect of a deliberate effort by the General Assembly to delay presentment of a bill for the purpose of reducing or eliminating a [G]overnor’s ten-day period after adjournment to veto a bill.”¹⁶⁶

The framers of both the Ohio and the United States Constitutions determined that ten was the appropriate number of days in order to give the executive time to consider and deliberate on a piece of legislation.¹⁶⁷ With respect to the presidential consideration period, if Congress adjourns before that ten-day period expires, any bills remaining in the President’s possession do not become law.¹⁶⁸ The United States Supreme Court upheld this notion by rejecting attempts to shorten it.¹⁶⁹ In Ohio, the ten-day period stems from the Constitutional Convention of 1912, where the debate transcripts demonstrate the delegates’ intention that the date of presentment serve as the commencement date for the Governor’s ten-day consideration period.¹⁷⁰ Yet here, the court’s majority disagreed with the

¹⁶⁴ *State ex rel. Ohio Gen. Assembly v. Brunner*, 872 N.E.2d 912, 934 (Ohio 2007) (Pfeifer, J., dissenting).

¹⁶⁵ *Id.* at 922.

¹⁶⁶ *Id.* at 924.

¹⁶⁷ U.S. CONST. art. I, § 2; OHIO CONST. art. II, § 16.

¹⁶⁸ *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 454 (1899).

¹⁶⁹ *The Pocket Veto Case*, 279 U.S. 655, 677–78 (1929).

¹⁷⁰ *Brunner I*, 872 N.E.2d at 941–42 (Pfeifer, J., dissenting) (citing 1 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 570–71 (Mar. 4, 1912) (statement of Mr. Doty)).

framers' intent and allowed the General Assembly to delay presentment and shorten the Governor's ten-day consideration period.¹⁷¹

The only requirement on the General Assembly for bill presentment is that it occurs "forthwith."¹⁷² While the court has interpreted this to mean "immediate" or "without delay," there is nothing that could potentially stop the legislature from presenting the bill ten days after it has adjourned.¹⁷³ In this case, Senate Bill 117 was not presented to the Governor until after the General Assembly had adjourned.¹⁷⁴ As Justice Pfeifer points out, the Governor should get additional time to consider the bill if presentment occurs after adjournment.¹⁷⁵

Justice Pfeifer's interpretation of the constitutionally-provided consideration period more closely aligns with the intention behind the ten-day period. Oftentimes, an adjournment sine die occurs at the end of the legislative year; periodically, it coincides with the end of a Governor's term in office.¹⁷⁶ This results in a large number of bills being passed by the legislature and delivered to the Governor's desk en masse. It is this situation where the consideration period is most essential. It ensures that the Governor does not make hasty decisions with respect to the approval or rejection of the avalanche of bills given to him at the eleventh hour. The court failed to recognize the importance of this consideration period and instead granted the General Assembly the ability to lessen the Governor's deliberation period, potentially giving him an inadequate amount of time in which to give appropriate thought to the proposed legislation.

IV. SIGNIFICANCE

A. Need for an Interpretation of "Forthwith"

As a result of the court's holding, the court may be forced to revisit the Ohio Constitution and determine the definition of "forthwith" as found in article II, section 15(E). Because the court's prior interpretations are only

¹⁷¹ *Id.* at 921–22.

¹⁷² OHIO CONST. art. 2, § 15(E).

¹⁷³ *Seeger v. For Women, Inc.*, 854 N.E.2d 188, 191 (Ohio 2006).

¹⁷⁴ *Brunner I*, 872 N.E.2d at 916.

¹⁷⁵ *Id.* at 938–39 (Pfeifer, J., dissenting).

¹⁷⁶ *See id.* at 940–42 (citing *People ex rel. Petersen v. Hughes*, 25 N.E.2d 75, (Ill 1940)); 1 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 570–71 (Mar. 4, 1912)).

vague guidelines, the General Assembly can control the Governor's consideration period.¹⁷⁷ Here, the General Assembly delayed thirteen days in presenting Senate Bill 117 to Governor Taft.¹⁷⁸ Should the General Assembly continue to present bills to the Governor after adjournment, the court will be forced to once again make a constitutional determination as to what the terms "immediately" and "without delay" mean. Is it two days? Can it be five days if there is a weekend or a holiday involved? Are Sundays excepted? By focusing on the commencement of the consideration period, the court's majority exposed itself to potential subsequent litigation on the issue of how quickly the legislature must present a bill to the Governor following adjournment sine die.

B. Certainty as to What Is Law

"[C]ertainty must exist with respect to law"¹⁷⁹ The majority failed to recognize this proposition when it ignored the Secretary of State's role in the legislative process. The Secretary is required to inform libraries, clerks of court, the Legislative Service Commission, etc. when a bill has become a duly-enacted law.¹⁸⁰ It is the Secretary's responsibility to have a current list of the state's laws, so that the public knows what is and is not prohibited conduct in Ohio.¹⁸¹ If the Secretary has the ability to return bills that have been filed, "there would arise a condition of endless doubt respecting a subject upon which every consideration requires that there should be immediate and enduring certainty."¹⁸² As the court noted in *State ex rel. Chatfield v. Kieseewetter*,¹⁸³

[I]t is of great interest to each citizen, as well as to the public official, that there be some authentic record to which he may resort to ascertain certainly and definitely

¹⁷⁷ *See id.* at 935.

¹⁷⁸ *Id.*

¹⁷⁹ *Thorton v. Salak*, 858 N.E.2d 1187, 1191 (Ohio 2006).

¹⁸⁰ OHIO REV. CODE ANN. §§ 149.09, 149.091 (LexisNexis 2007).

¹⁸¹ *See id.* (requiring the Secretary of State to maintain a list of all "enrolled acts and joint resolutions" and a "table indicating Revised Code sections affected"); *see also id.* § 111.08 (stating that the "[S]ecretary of [S]tate shall have charge of and safely keep the laws and resolutions passed by the [G]eneral [A]ssembly").

¹⁸² *Wrede v. Richardson*, 82 N.E. 1072, 1075 (Ohio 1907).

¹⁸³ 12 N.E. 807 (Ohio 1887).

what laws are enacted by the legislature, what control him in the daily transactions of business, and of what, at his peril, he is bound to take notice.¹⁸⁴

Moreover, as set forth above, a bill's filing date begins the ninety-day referendum period.¹⁸⁵ It is essential that this date remain fixed so that the electors are aware of the date the referendum period expires. The significance of this concept was evidenced by the subsequent litigation that stemmed from this case.¹⁸⁶ Had the majority focused on something other than counting days, it would have warded off the need to clarify its decision.

C. Recommendation

The Ohio Constitution vests in the General Assembly the authority to enact any law that does not conflict with either the Ohio or United States Constitutions.¹⁸⁷ Flowing from this plenary power is the ability to establish rules by which it governs itself. Using this rulemaking authority, the General Assembly should adopt a rule prohibiting bill presentment to the Governor after adjournment sine die. A rule such as this would prevent the legislature from circumventing the Governor's role in the legislative process. This would serve two objectives: (1) it would eliminate any confusion in the commencement of the ten-day consideration period by establishing that it begins only on presentment to the Governor; and (2) it would ensure the concomitant result that the Governor would have the necessary time in which to deliberate on the proposed legislation.

This recommendation also aligns with the intent behind the Governor's consideration period. The purpose of the consideration period is "to afford to the Governor an opportunity for the considerate exercise of the discretion which is thus vested in him."¹⁸⁸ Thus, the legislature should not be permitted to shorten the ten-day period.

¹⁸⁴ *Id.* at 810.

¹⁸⁵ OHIO CONST. art. II, § 1(c).

¹⁸⁶ *E.g.*, *State ex rel. Ohio Gen. Assembly v. Brunner*, 873 N.E.2d 1232 (Ohio 2007) (*per curiam*).

¹⁸⁷ *State ex rel. Jackman v. Cuyahoga Ct. Com. Pl.*, 224 N.E.2d 906, 909 (Ohio 1967); *see also* OHIO CONST. art. 2, § 1.

¹⁸⁸ *Wrede v. Richardson*, 82 N.E. 1072, 1074 (Ohio 1907).

The ten-day rule creates a time frame determined to be necessary by the founders for the executive to properly consider a bill, or a pile of bills, before it becomes law With the ten-day rule, there can be no game-playing with the legislative calendar; the legislature cannot prevent the executive from ultimately having the opportunity to exercise his constitutional powers.¹⁸⁹

The General Assembly determines what date a bill is going to be presented to the Governor.¹⁹⁰ Oftentimes it consults with the Governor's Office to settle on the exact day, as was the case here with Senate Bill 117.¹⁹¹ One would imagine that by the time that the Senate consulted with Governor Taft's Office, the General Assembly knew when it would adjourn for the year, as well as the fact that, by this time, the ten-day period would be running. As it currently stands, the General Assembly has complete control over how long the Governor has to consider a piece of legislation.¹⁹² However, by forcing bill presentment to occur before adjournment, the legislature would be stripped of this power, and the Governor would be guaranteed to have his full ten days. This would allow the legislative intent of the consideration period to be carried out and prevent the General Assembly from usurping the Governor's deliberation time.

V. CONCLUSION

The doctrine of separation of powers has been engrained in the structure of Ohio government since the 1800s.¹⁹³ The Ohio Constitution has a built in separation of powers system to ensure that one branch of government is not able to encroach upon the power of another.¹⁹⁴ As the majority of the court acknowledges, "[t]he Ohio Constitution's prescribed

¹⁸⁹ *Brunner I*, 872 N.E.2d at 938 (Pfeifer, J., dissenting).

¹⁹⁰ OHIO CONST. art. II, § 15.

¹⁹¹ *Brunner I*, 872 N.E.2d at 916.

¹⁹² See OHIO CONST. art. II, § 16 (giving the Governor ten days to sign a bill before it automatically becomes law); see also *id.* art. II, § 1 ("The legislative power of the state shall be vested in a General Assembly.").

¹⁹³ *State ex rel. Bray v. Russell*, 729 N.E.2d 359, 361 (Ohio 2000).

¹⁹⁴ *Id.* (citing *State ex rel. Bryant v. Akron Metro. Park Dist.*, 166 N.E. 407, 410 (Ohio 1929)).

procedure for the creation of statutory law bears upon the fundamental allocation of authority between the legislative and executive branches of state government.”¹⁹⁵ With respect to the passage and enactment of Senate Bill 117, Governor Strickland, Secretary of State Brunner, and the General Assembly disregarded this segregation of authority. Even the supreme court, in its holding in *State ex rel. Ohio General Assembly v. Brunner*, calls into question this venerable doctrine by allowing the state legislature to circumvent the Governor’s ten-day consideration period to approve or veto a piece of legislation.¹⁹⁶

Although the outcome in *Brunner I* was sound in its result, the reasoning behind the supreme court’s decision may have unintended consequences on the Ohio legislative process. The majority invalidated Governor Strickland’s attempted veto by holding that the Governor’s ten-day period for action under article II, section 16 of the Ohio Constitution had expired by the time he assumed office on January 8, 2007 and declaring that Senate Bill 117 had already become law.¹⁹⁷

The court’s majority opted for a results-oriented constitutional analysis that focused on when the Governor’s ten-day consideration period began. The court should have followed the analysis found in the concurring opinions by Justices Lundberg Stratton and O’Donnell and, alternatively, held that Governor Strickland had no authority to request the bill’s return because the bill had become a valid law on the basis that Governor Taft had performed all the constitutionally-required duties necessary in order for a bill to become a valid law. It should have also held that Secretary of State Brunner lacked the authority to return the requested bill to Governor Strickland, for she was acting outside of her ministerial role as the custodian of legislation. These two alternative approaches would have still given the majority the outcome that it desired.

By tackling the commencement of the Governor’s ten-day consideration period, the court validated the General Assembly’s attempt to usurp the Governor’s role in the legislative process by giving the legislature the ability to reduce the Governor’s ten-day consideration period of a bill. This decision also elevated the likelihood that the court will have to clarify its interpretation of “forthwith” in the event that a bill

¹⁹⁵ *Brunner I*, 872 N.E.2d at 921.

¹⁹⁶ *Id.* at 924.

¹⁹⁷ *Id.* at 921.

is, once again, presented to the Governor following the legislature's adjournment sine die.¹⁹⁸

In an effort to prevent the General Assembly from abusing its power and circumventing the doctrine of separation of powers in the legislative process, the General Assembly should adopt a rule prohibiting bill presentment to the Governor after it adjourns sine die. This would ensure that the legislature is not able to encroach upon the Governor's constitutionally-prescribed duties and maintain a balance of power between the branches of Ohio's state government.

¹⁹⁸ OHIO CONST. art. II, § 15(E).