

ARTICLES

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Allan Walker Vestal*

INTRODUCTION

Starting almost fifty years ago, there were a number of cases in which taxpayers challenged the Federal income tax based on a claim that Ohio did not become a state in 1803—and for that reason, the Sixteenth Amendment was not actually ratified.¹ For example, one taxpayer alleged:

[T]he State of Ohio is not legally a state of the Union and, hence, the Sixteenth Amendment is null and void because it was improperly ratified; that the Internal Revenue Service works for the overthrow of the Constitution of the United States; that the Internal Revenue Service constitutes a secret police force; [and] that the

* Dwight D. Opperman Distinguished Professor of Law, Drake University Law School. I would like to thank my research assistant Marcos Danielson for his work on this piece, Mark Zaiger for his insightful comments on early drafts, and Law School Professor of Law Librarianship Rebecca Lutkenhaus for her creative assistance. I thank the John and Leslie Fletcher Endowed Faculty Research Fund for its generous support.

¹ I refer to the plaintiffs in these cases as “tax protesters,” the common terminology. See Internal Revenue Serv., *Illegal Tax Protesters*, FS-98-9 (1998), <https://www.irs.gov/pub/irs-news/fs-98-09.pdf> [<https://perma.cc/AWL8-97M4>] (“These illegal tax protesters argue the Constitutional amendment establishing the basis for income tax was never properly ratified.”); Christopher S. Jackson, *The Inane Gospel of Tax Protest: Resist Rendering unto Caesar—Whatever His Demands*, 32 GONZ. L. REV. 291, 293–95 (1996/1997); *Tax Protest Movement*, ANTI-DEFAMATION LEAGUE, www.adl.org/resources/backgrounders/tax-protest-movement [<https://perma.cc/H7T5-FWW8>]; Jonathan R. Siegel, *Income Tax: Voluntary or Mandatory?*, <http://www.jsiegel.net/taxes/IncomeTax.htm#for> [<https://perma.cc/VBC6-RUUX>].

Internal Revenue Service acts in deliberate furtherance of the Communist Manifesto²

These cases had several features in common. The taxpayers lost them all. In all the cases, the predicate claim about defects in the process by which Ohio was admitted to the Union was either ignored by the court or given no serious consideration.³

The taxpayers ultimate claim, that the Sixteenth Amendment was not ratified because Ohio was not a state when it voted for ratification was clearly wrong.⁴ But there is more to the underlying claim regarding Ohio statehood than the courts in these cases allowed. As a House committee noted when it reviewed the question of Ohio-statehood in 1953, “the case of Ohio is somewhat in a class by itself”⁵

There were earlier indications that Ohio statehood was more problematical than the courts in these tax protester cases allowed. For example, in the 1892 case of *Boyd v. Nebraska ex rel Thayer*,⁶ Chief Justice Fuller, writing for the Court, referred to the Congressional acts by which Ohio, Indiana, and Illinois entered the Union:

Reference to the various acts of congress creating the Indiana and Illinois territories, (2 St. pp. 58, 514) the enabling acts under which the state governments of Ohio, Indiana, and Illinois were formed, (2 St. p. 173; 3 St. pp. 289, 428;) and the act recognizing, and resolutions admitting those states, (2 St. p. 201; 3 St. pp. 399, 536;) and to their original constitutions⁷

A careful reader might note that the construction was not parallel. Chief Justice Fuller referred to the enabling acts for all three states, and to the acts of Congress

² *Lorre v. Alexander*, 77-2 CCH P9672 (W.D. Tex. 1977).

³ See discussion *infra* Part III.

⁴ See discussion *infra* Part III.

⁵ HOUSE COMM. ON INTERIOR & INSULAR AFFS., ADMITTING THE STATE OF OHIO INTO THE UNION, H.R. REP. NO. 83-343, at 3 (1953) [hereinafter 1953 Committee on Interior and Insular Affairs Report].

⁶ *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135 (1892).

⁷ *Id.* at 166.

admitting Indiana and Illinois.⁸ But as to Ohio he referred to “the act recognizing” the state, not to an act admitting it.⁹

Curiosity piqued, our careful reader might go to the cited acts of Congress. As to Indiana, the act admitting the state was straightforward. After noting the Indiana Enabling Act and finding that the Indiana Constitution and state government were republican in form and conformed to the requirements of the Northwest Ordinance,¹⁰ the act formally admitted Indiana to the Union:

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the State of Indiana, shall be one, and is hereby declared to be one of the United States of America, and is admitted into the Union on an equal footing with the original States, in all respects whatever.*¹¹

The Illinois Act of Admission was equally straightforward.¹²

⁸ *Id.*

⁹ *Id.*

¹⁰ Resolution for admitting the state of Indiana into the Union, 3 Stat. 399 (1816):

Whereas, in pursuance of an act of Congress, passed on the 19th day of April, 1816, entitled “An Act to enable the people of the Indiana Territory to form a constitution and State government, and for the admission of such State into the Union,” the people of the said Territory did, on the 29th day of June, in the present year, which constitution and state government, so formed is republican, and in conformity to the principles of the articles of compact between the original States and the people and States in the territory north-west of the river Ohio, passed on the thirteenth day of July, one thousand seven hundred and eighty seven.

Id.

¹¹ *Id.* at 399–400.

¹² The Illinois Act provided:

That, whereas, in pursuance of an act of Congress, passed on the eighteenth day of April, one thousand eight hundred and eighteen, entitled “An act to enable the people of the Illinois territory to form a constitution and state government, and for the admission of such state into the Union, on an equal footing with the original states,” the people of said territory did, on the twenty-sixth day of August, in the present year, by a convention called for that purpose, form for themselves a constitution and state government, which constitution and state government, so formed, is republican, and in conformity to the principles of the articles of compact between the original states and the people and states in the territory north-west of the river Ohio, passed on the

But the act of Congress “recognizing” Ohio was very different.¹³ Nowhere in the title, the preamble, or the text did the act cited by Chief Justice Fuller approve Ohio’s Constitution and state government or formally admit Ohio to the Union.¹⁴ Indeed, our careful reader would discover that the 1803 Due Execution Act cited by Chief Justice Fuller in *Boyd* was exclusively about establishing laws and legal authorities, not about admitting Ohio to the Union.¹⁵

Our careful reader might understandably conclude that Congress never passed an act admitting Ohio to the Union. But that would be wrong; Congress did pass such an act. The operative clause of the act admitting Ohio is almost word for word the same as the act admitting Indiana. After reciting the authorizing act and the actions taken by Ohio in passing a constitution and establishing laws, that act provided:

Therefore, be it

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the State of Ohio, shall be one, and is hereby declared to be one, of the United States of America, and is admitted into the Union on an equal footing with the original States, in all respects whatever.*¹⁶

Then why, our reader would ask, did Chief Justice Fuller not use a parallel construction, and make reference to the act of Congress admitting Ohio, rather than the 1803 Due Execution Act, which merely “recognizes” Ohio as a state? The reason is simple; the act of Congress admitting Ohio to the Union was not passed until 1953, more than six decades after Chief Justice Fuller wrote *Boyd*, and a century and a half after everyone thought Ohio had become a state.

Part I of the discussion traces the Congressional failure of 1803 to formally admit Ohio to the Union. Part II reviews the remedial measure of 1953. Part III

thirteenth day of July, one thousand seven hundred and eighty-seven:
Resolved, by the Senate and House of Representatives of the United States of America, in Congress assembled, That the state of Illinois shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever.

Resolution declaring the admission of the state of Illinois into the Union, 3 Stat. 536 (1818) [hereinafter Illinois Act of Admission].

¹³ Act of Feb. 19, 1803, ch. 60, 2 Stat. 202, 202–03 (1803) [hereinafter 1803 Due Execution Act].

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Joint Resolution for Admitting the State of Ohio into the Union, Pub. L. 83-204, 67 Stat. 407 (1953) [hereinafter 1953 Act of Admission].

explores the tax protester cases in which courts were asked to address the issue. Part IV considers two ways in the history of the nation might have been different had Ohio not been a state until 1953. Part V concludes by exploring the lessons we might take away from our handling of the Ohio-statehood question in the tax protester cases.

In the final analysis, the Congressional failure of 1803 is less clear-cut and consequential than the tax protestors argued, and more important than the courts and commentators allowed. It is also an interesting piece of American history.

I. 1803: “CONGRESS CHOSE TO IGNORE THE WHOLE BUSINESS.”

Comparing the steps by which Ohio, Indiana, and Illinois joined the Union leads to the easy conclusion that Congress simply forgot to pass an act of admission for Ohio. Thus, the characterization by the Ohio Congressman who led the effort to pass the 1953 Act of Admission that “[t]he State constitutional convention presented the Constitution of Ohio to Congress on February 19, 1803, and Congress chose to ignore the whole business.”¹⁷ Or the following explanation of how Congress “missed a critical step”:

[T]he 8th United States Congress missed a critical step. Adding a state to the Union required the congressional ratification of Ohio’s State Constitution. The Constitution of Ohio had been presented to congress, but for whatever reason congress failed to take the necessary ratification step. Without congressional approval of the state constitution, Ohio *technically* remained part of the Northwest Territory.¹⁸

The problem with this narrative of Congressional mistake is that it ignores both the spare wording of the Constitutional provision on point and the chronology of events in the earlier admissions of new states into the Union. It turns out that the situation of 1803 was rather more complicated than this narrative would suggest.

¹⁷ Tim Pawlak, *Ohio: The 48th State?*, OHIO HIST. CONNECTION (Mar. 15, 2018), <https://www.ohiohistory.org/ohio-the-48th-state/> [https://perma.cc/452Z-T4YE].

¹⁸ *Ohio Trivia: Is Ohio Legally a State?*, TOURING OHIO (emphasis in original), <http://touringohio.com/trivia/ohio-trivia.html> [https://perma.cc/NGM5-CC2Y].

The Constitutional provision on the admission of new states is quite general: “New States may be admitted by the Congress into this Union”¹⁹ The provision does not specify *how* Congress may admit new states, or indicate what process is required. The provision does not, by its terms, require Congressional ratification of a new state’s constitution or a certification that the state constitution and proposed state government are republican in form.

The chronology of early state admissions also complicates the narrative that Congress simply made a mistake with respect to Ohio. After the original thirteen states formed the Union, three states, Vermont, Kentucky, and Tennessee, were admitted before Ohio. These states were different from Ohio in two important respects. First, they were admitted with single acts of Congress, not the two-step process—an enabling act followed by an act of admission—used later.

Vermont was admitted to the Union in 1791. Prior to its admission Vermont was an independent Republican government.²⁰ It was admitted without an enabling act, by a Congressional act which was short and straightforward:

The State of Vermont having petitioned the Congress to be admitted a member of the United States, *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, and it is hereby enacted and declared*, That on the fourth day of March, one thousand seven hundred and ninety-one, the said State, by the name and style of “the State of Vermont,” shall be received and admitted into this Union, as a new and entire member of the United States of America.²¹

Kentucky was the second state admitted after the original thirteen, created in 1792 with the consent of Virginia out of territory that was part of the Commonwealth. Congress did not employ an enabling act for Kentucky. Rather, it passed an act which noted the consent of the Virginia legislature to the creation of the new state, and

¹⁹ U.S. CONST. art. IV, § 3, cl. 1. The clause continues: “but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.” *Id.*

²⁰ Richard E. Berg-Andersson, *Clearing up the Confusion Surrounding OHIO’s Admission to Statehood*, THE GREEN PAPERS (Jan. 17, 2007), <https://www.thegreenpapers.com/slg/explanation-ohio-statehood.phtml> [<https://perma.cc/8GTM-QLWG>].

²¹ An Act for the Admission of the State of Vermont into this Union, 1 Stat. 191 (1791) [hereinafter Vermont Act of Admission].

noted the convention in Kentucky which petitioned for statehood.²² The act continued with Congress directing that the area “shall, upon the first day of June, one thousand seven hundred and ninety-two, be formed into a new State, separate from and independent of, the said commonwealth of Virginia.”²³ The act concluded by providing that “the said new State, by the name and style of the State of Kentucky, shall be received and admitted into this Union, as a new and entire member of the United States of America.”²⁴

Tennessee had formed its own government prior to Congressional action, so no enabling act was passed by Congress. Tennessee was admitted to the Union by virtue of a Congressional act of admission.²⁵ After first making reference to the cession of the territory by North Carolina, the act provided:

That the whole of the territory ceded to the United States by the State of North-Carolina shall be one State, and that the same is hereby declared to be one of the United States of America, on an equal footing with the original States, in all respects whatever, by the name and title the State of Tennessee. That until the next general census, the said State of Tennessee shall be entitled to one Representative in the House of Representatives of the United States; and in other respects as far as they may be applicable, the laws of the United States shall extend to, and have force in the State of Tennessee, in the same manner, as if that State had originally been one of the United States.²⁶

The process used by Congress to admit new states changed with Ohio. On April 30, 1802, Congress passed an enabling act for Ohio statehood entitled: *An Act to Enable the People of the Eastern Division of the Territory Northwest of the River Ohio to form a Constitution and State Government, and for the Admission of Such into the Union, on Equal Footing with the Original States, and for Other Purposes.*²⁷

²² *An Act declaring the consent of Congress, that a new State be formed within the jurisdiction of the Commonwealth of Virginia, and admitted into this Union, by the name of the State of Kentucky*, 1 Stat. 189 (1791) [hereinafter *Kentucky Act of Admission*]; Berg-Andersson, *supra* note 20.

²³ *Kentucky Act of Admission*, *supra* note 22.

²⁴ *Id.*

²⁵ Berg-Andersson, *supra* note 20.

²⁶ *An Act for the admission of the State of Tennessee into the Union*, 1 Stat. 491 (1796) [hereinafter *Tennessee Act of Admission*].

²⁷ *An Act to Enable the People of the Eastern Division of the Territory Northwest of the River Ohio to form a Constitution and State Government, and for the Admission of Such into the Union, on Equal*

The act provided the boundaries of the new state,²⁸ assigned certain territory to the Indiana Territory,²⁹ authorized electors and a convention,³⁰ specified matters to be considered at the convention,³¹ provided for the level of representation for the new state in the House of Representatives “until the next general census shall be taken,”³² and made certain propositions to the convention.³³

When did the enabling act contemplate that Ohio would actually become a state? There was no provision of the enabling act that required Congressional approval and an affirmative act admitting Ohio to the Union. Surely the language of Article IV Section 3—“New States may be admitted by the Congress into this Union . . .”—contemplates the affirmative act of “admitting.”³⁴ As to Ohio, might the enabling act, itself, have been in some way self-executing, so that it constituted the affirmative act of admission? The enabling act charged the convention to meet and decide:

[W]hether it be or be not expedient at that time to form a constitution and state government for the people within the said territory, and if it be determined to be expedient . . . shall form for the people of said state, a constitution and state government, provided the same shall be republican, and not repugnant to the ordinance of the thirteenth of July, one thousand seven hundred and eighty seven, between the original states and the people of the territory northwest of the river Ohio.³⁵

Once the residents of Ohio met in convention, decided in favor of statehood, and formed a constitution and state government, could it be argued that the state would be admitted, without more, into the Union? Or, in the alternative, was an

Footing with the Original States, and for Other Purposes, ch. 40, 2 Stat. 173 (1802) [hereinafter Ohio Enabling Act].

²⁸ *Id.* § 2.

²⁹ *Id.* § 3.

³⁰ *Id.* § 4.

³¹ *Id.* § 5.

³² *Id.* § 6.

³³ *Id.* § 7.

³⁴ U.S. CONST. art. IV, § 3, cl. 1.

³⁵ Ohio Enabling Act, *supra* note 27, § 5.

affirmative act of admission required, what might be deemed a two-step reading? The language of § 1 of the enabling act is consistent with either reading:

That the inhabitants of the eastern division of the territory north west of the river Ohio, be, and they are hereby authorized, to form for themselves a constitution and state government, and to assume such name as they shall deem proper, and *the said state, when formed, shall be admitted into the union . . .*,³⁶

Under the self-executing reading, the language of § 2 of the enabling act might be paraphrased: “and the said state, when formed, shall be deemed admitted into the union . . .” The same enabling act language might be paraphrased under the two-step reading as “and the said state, when formed, shall be admissible into the union . . .”; or “and the said state, when formed, may be admitted into the union . . .”; or “and the said state, when formed, shall be admitted into the union upon the approval of Congress . . .” Of course, the enabling acts for Indiana and Illinois used the same “shall be admitted” language as the Ohio enabling act, and Congress passed acts of admission for both Indiana and Illinois.³⁷

If the language of the enabling act admits both readings, does the history of state admissions prior to Ohio decide the issue? Not really. The acts admitting Vermont³⁸ and Kentucky³⁹ used the same “shall be . . . admitted” construction as the Ohio enabling act, but their temporal triggers were dates certain, not the formation of the constitution and state government. The act admitting Tennessee was structured as an immediately effective grant of admission.⁴⁰

³⁶ *Id.* § 1 (emphasis added).

³⁷ 1953 Committee on Interior and Insular Affairs Report, *supra* note 5, at 2.

³⁸ Vermont Act of Admission, *supra* note 21 (“That on the fourth day of March, one thousand seven hundred and ninety-one, the said State, by the name and style of ‘the State of Vermont,’ shall be received and admitted into this Union, as a new and entire member of the United States of America.”).

³⁹ Kentucky Act of Admission, *supra* note 22 (The act admitting Kentucky provided that the specified territory “shall, upon the first day of June, one thousand seven hundred and ninety-two, be formed into a new State, separate from and independent of, the said commonwealth of Virginia . . .” and that “the said new State, by the name and style of the State of Kentucky, shall be received and admitted into this Union, as a new and entire member of the United States of America.”).

⁴⁰ Tennessee Act of Admission, *supra* note 26 (The act admitting Tennessee provided “[t]hat the whole of the territory ceded to the United States by the State of North-Carolina shall be one State, and that the same is hereby declared to be one of the United States of America, on an equal footing with the original States, in all respects whatever, by the name and title the State of Tennessee.”).

The record of the states admitted in a single act of Congress is revealing. As the House Committee on Interior and Insular Affairs noted in its 1953 study of the Ohio statehood issue:

It may be noted that there have been a dozen States besides Ohio whose admission to the Union was accomplished by a single enabling act. Examination discloses that eight of these had already formed their State constitutions and asked for admission; the enabling acts recite that the said constitution is found to be republican and the State is declared a member of the Union.

In the case of Vermont and Kentucky Congress declared that the State “shall be received and admitted” as of a specific date, and Maine similarly was “declared to be one of the United States of America and admitted into the Union.” The admission of Tennessee was in fulfillment of the condition of cession of territory by North Carolina.⁴¹

As to those states which were admitted in a single act, all but Ohio were either admitted as of a specific date or were admitted with their constitutions and governments in place.

The history of state admissions following Ohio is helpful in deciding between a self-executing reading of the Ohio enabling act and a two-step reading. As the House Interior and Insular Affairs Committee observed: “Thus it appears that the case of Ohio is somewhat in a class by itself, in that Congress by an enabling act authorized the formation of a new State, and did not follow it up with another declaring the State a member of the Union.”⁴²

In deciding between a self-executing and two-step reading of the Ohio enabling act, it is also important to recognize the second way in which Ohio differed from the three states admitted to the Union before it: Ohio was a part of the Northwest Territory. This is relevant because the Fourteenth Section of the Northwest Ordinance establishes six “articles of compact” which “speak in terms of permanent guarantees, perpetual commitments, and never-ending promises.”⁴³ The introductory language to the section is clear:

⁴¹ 1953 Committee on Interior and Insular Affairs Report, *supra* note 5, at 3.

⁴² *Id.*

⁴³ Allan W. Vestal, “No Person . . . Shall ever be Molested on Account of his mode of Worship or Religious Sentiments . . .”: *The Northwest Ordinance of 1787 and Strader v. Graham*, 102 MARQ. L. REV. 1087, 1097 (2019) [hereinafter Vestal, *Strader v. Graham*].

It is hereby ordained and declared by the authority aforesaid, That the following articles shall be considered as articles of compact between the original states and the people and states in the said territory, and forever remain unalterable, unless by common consent, to wit:⁴⁴

The articles of compact of the Northwest Ordinance deal with religious liberty; legal guarantees such as habeas corpus, cruel and unusual punishment, and the sanctity of contract; schools, education, and the Native American population; territorial integrity, national debt, federal lands, and free navigation of inland waters; the formation of states; and slavery.⁴⁵

The fifth article of compact of the Northwest Ordinance requires that each state admitted out of the Northwest Territory “shall be at liberty to form a permanent constitution and state government: Provided the constitution and government so to be formed, shall be republican, and in conformity to the principles contained in these articles.”⁴⁶ The language of the Northwest Ordinance fifth article of compact is reflected in the Ohio Enabling Act provision that the constitutional convention:

[S]hall form for the people of the said state, a constitution and state government, provided the same shall be republican, and not repugnant to the ordinance of the thirteenth of July, one thousand and seven hundred and eighty seven, between the original states and the people of the territory northwest of the river Ohio.⁴⁷

The Ohio enabling act and the fifth article of compact of the Northwest Ordinance can be read to require Congress to make a finding that the constitution and government of the prospective state are republican and in conformity with the principles of the Northwest Ordinance. The fact of such a requirement, and the form that a finding in compliance might have taken, are illustrated by the histories of Indiana and Illinois.⁴⁸ The analysis was done by the Committee on Interior and

⁴⁴ Ordinance of 1787: The Northwest Territorial Government, *Article the Fifth*, reprinted in 1 U.S.C. at LV (2006), [https://memory.loc.gov/cgi-bin/query/r?ammem/bdsdcc:@field\(DOCID+@lit\(bdsdcc22501\)\)](https://memory.loc.gov/cgi-bin/query/r?ammem/bdsdcc:@field(DOCID+@lit(bdsdcc22501))) [<https://perma.cc/QFU9-6Q5G>] [hereinafter Northwest Ordinance].

⁴⁵ *Id.*; Vestal, *Strader v. Graham*, *supra* note 43, at 1097–98.

⁴⁶ Northwest Ordinance, *supra* note 44; *see* Vestal, *Strader v. Graham*, *supra* note 43, at 1097–98.

⁴⁷ Ohio Enabling Act, *supra* note 27, § 5.

⁴⁸ 1953 Committee on Interior and Insular Affairs Report, *supra* note 5, at 2.

Insular Affairs in 1953.⁴⁹ The Committee started by comparing the requirements under which statehood was to be obtained:

In the case of Indiana and Illinois, which like Ohio were carved out of the Northwest Territory, the enabling acts were very similar to that for Ohio; both provided that the new “State when formed, shall be admitted into the Union upon the same footing with the original States, in all respects whatever”; and both required that a constitution . . . “shall be republican and not repugnant to the ordinance” of 1787.⁵⁰

The Committee then reviewed how Congress certified compliance:

In both these cases, Congress subsequently “admitted” the new State Indiana in December 1806 and Illinois in December 1818. In each instance the resolution of admission recited the fact that the constitution of the new State was “republican, and in conformity to (or with) the principles” of the Northwest Ordinance.⁵¹

The failure of Congress to make the required finding with respect to Ohio—as it later did with respect to Indiana and Illinois—was not a *pro forma* failure.

There is not much to support the self-executing reading of the Ohio enabling act. But there is one episode involving Indiana’s entry into the Union, that can be read to provide some support.⁵² Congress passed the enabling act for Indiana on April 15, 1816, and it was signed by President Madison four days later.⁵³ The Indiana constitutional convention met June 10th, and the Indiana general assembly met on November 4th.⁵⁴ Ten days later Indiana electors were selected to vote for James Monroe for President.⁵⁵ The House and Senate were scheduled to meet in joint session to count the electoral votes for President on February 12, 1817, and the

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 2–3.

⁵² James A. Woodburn, *Admission of Indiana into the Union of States*, 22 IND. MAG. HIST. 1, 3 (1926).

⁵³ *Id.*

⁵⁴ *Id.* at 4–5.

⁵⁵ *Id.* at 6.

question arose as whether to count Indiana's votes.⁵⁶ The Indiana electors were elected before Congress formally admitted Indiana to the Union.⁵⁷ New York representative Taylor objected to counting Indiana's votes:

The Electors of President and Vice-President having been elected in Indiana before she was declared to be admitted to the Union by Congress, the votes of that state were no more entitled to be counted than if they had been received from Missouri or any Territory of the United States. The votes of Indiana having been given previous to her admission to the Union were illegal and ought not to be received.⁵⁸

Representative Sharp of Kentucky argued that the Indiana votes should be counted, using an argument that sounds like a self-executing reading of the enabling act:

Mr. Sharp, of Kentucky, moved a joint resolution that the votes of Indiana were properly and legally given and ought to be counted. The votes had been given after the people of Indiana had performed the conditions required of them to become an independent state.⁵⁹

The Indiana representative echoed the argument:

Indiana was or was not a state. Deciding that we decide the question before the house. Had the state complied with the conditions of the Enabling Act? She had. Had she adopted a republican constitution? She had. The authority which gives Indiana a vote in this House gives her a right to vote for President and Vice President.⁶⁰

Indiana's electoral votes were counted.⁶¹

In the end, notwithstanding the Indiana episode, it seems unconvincing to argue that the Ohio enabling act was self-executing. It simply is not correct that without

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 7.

⁵⁹ *Id.*

⁶⁰ *Id.* at 8.

⁶¹ *Id.*

further action by Congress, Ohio became a state upon the convention, passing a constitution and forming a government. The two-step reading of the Ohio enabling act is more consistent with our understanding of how the process was supposed to work. Consider, for example, how Professor James Woodburn characterized the process for admitting new states at a 1925 meeting of the Indiana Historical Society:

When conditions seem to justify it, the people of the Territory, through their Territorial Assembly, petition for statehood. If Congress is well disposed, that body passes an Enabling Act, authorizing, or enabling, the people of the Territory to elect representatives to a constitutional convention which is charged with the duty of drawing up a constitution for the prospective state. This constitution is submitted for the approval of Congress and if it is found acceptable, being republican in form, the two houses of Congress pass an act, or joint resolution, admitting the state. When this act is signed by the President the deed is done.⁶²

If the theory is not that the Ohio enabling act was self-executing, to what act do the commentators who believe Ohio became a state in 1803 point as the mechanism by which Ohio was admitted? Article IV Section 3 provides that “New States may be admitted by the Congress into this Union”⁶³ How, do they suggest, was Ohio admitted? Curiously, they do not.

A highly respected Ohio constitutional historian Dean Steven H. Steinglass illustrates the difficulty in this position in a law review article he wrote:

On February 19, 1803, Congress recognized Ohio’s adoption of a constitution and formation of a government, thus making Ohio the seventeenth state in the Union and the first state carved out of the Northwest Territory.⁶⁴

The associated footnote in Dean Steinglass’ article contains only one supporting reference, to the 1803 Due Execution Act:

On February 19, 1803, Congress adopted “[a]n Act to provide for the due execution of the laws of the United States, within the State of Ohio” in which it

⁶² *Id.* at 2.

⁶³ U.S. CONST. art. IV, § 3, cl. 1.

⁶⁴ Steven H. Steinglass, *Constitutional Revision: Ohio Style*, 77 OHIO S. L.J. 281, 292 (2016).

recognized that the people of Ohio did “form for themselves a constitution and state government” pursuant to the enabling act and noted that “the said state has become one of the United States of America.” Act of Feb. 19, 1803, ch. 60, 2 Stat. 202, 202–03.⁶⁵

The first clause of Dean Steinglass’ formulation, that in the Due Execution Act Congress “recognized Ohio’s adoption of a constitution and formation of a government,” seems carefully parsed to present the only case possible.⁶⁶ Congress may perhaps be said to have “recognized” Ohio’s adoption of a constitution and formation of a government in its passing references to the “State of Ohio” and its recitation of the actions taken by the people of Ohio, if “recognized” is used as a synonym for “noted.” To the extent the second clause of Dean Steinglass’ formulation, “thus making Ohio the seventeenth state in the Union and the first state carved out of the Northwest Territory,” treats “recognized” as a synonym for “approved,” it seems inconsistent with the record.⁶⁷

Any suggestion that the 1803 Due Execution Act was the vehicle by which Congress admitted Ohio to the Union under Article IV Section 3 cannot withstand even a cursory reading of the act itself. The title of the 1803 act was “An Act to provide for the due execution of the laws of the United States, within the State of Ohio.”⁶⁸ The title did not speak to the admission of Ohio as a state beyond the passing reference to the “State of Ohio.” The preamble of the 1803 Due Execution Act began:

Whereas the people of the eastern division of the territory northwest of the river Ohio did, on the twenty-ninth day of November, one thousand eight hundred and two, form for themselves a constitution and State government, and did give to the said State the name of the “State of Ohio,”⁶⁹

This, of course, was a correct recitation of the events in Ohio, but it did not constitute Congressional action either approving of Ohio’s Constitution and system of state

⁶⁵ *Id.* at 292 n.72.

⁶⁶ 1803 Due Execution Act, *supra* note 13.

⁶⁷ Steinglass, *supra* note 64, at 292.

⁶⁸ 1803 Due Execution Act, *supra* note 13, at 202–03.

⁶⁹ *Id.*

government or admitting Ohio as a state. The preamble continued with a reference to the authority under which the people of the Ohio territory acted:

in pursuance of an act of Congress entitled “An act to enable the people of the eastern division of the territory northwest of the Ohio to form a constitution and State government, and for the admission of such State into the Union on an equal footing with the original States, and for other purposes,”⁷⁰

The reference to the title of the enabling act did nothing to give Congressional approval to the actions of the people of the territory of Ohio. The preamble concluded:

[W]hereby the said State has become one of the United States of America; in order, therefore, to provide for the due execution of the laws of the United States within the said State of Ohio⁷¹

The preamble recited the conclusion, that “the said State has become one of the United States of America . . .” but did not purport to itself approve the constitution and state government or admit Ohio as a state.

A review of the substantive provisions of the 1803 Due Execution Act confirms that it was not the vehicle by which Congress admitted Ohio to the Union. Section 1 provided that the laws of the United States “shall have the same force and effect within the said State of Ohio as elsewhere within the United States.”⁷² Section 2 established the Federal court.⁷³ Section 3 provided for the salary of the Federal judge.⁷⁴ Section 4 provided for the appointment and compensation of a Federal attorney.⁷⁵ Section 5 provided for the appointment and compensation of a Federal marshal.⁷⁶

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* § 1.

⁷³ *Id.* § 2.

⁷⁴ *Id.* § 3.

⁷⁵ *Id.* § 4.

⁷⁶ *Id.* § 5.

If the 1803 Due Execution Act was not the mechanism by which Congress admitted Ohio to the Union, what was it? The answer is found in the Congressional acts passed with respect to the admission of Vermont and Tennessee.

Congress passed the act admitting Vermont into the Union, which provided: “the said State . . . shall be received and admitted into this Union, as a new and entire member of the United States of America.”⁷⁷ Two days earlier, Congress had approved another act which provided that “from and after the third day of March next, all the laws of the United States, which are not locally inapplicable, ought to have, and shall have, the same force and effect within the State of Vermont as elsewhere within the United States,” the equivalent of the 1803 Due Execution Act for Ohio.⁷⁸

Congress passed the act admitting Tennessee into the Union, which provided: “that the same is hereby declared to be one of the United States of America, on an equal footing with the original States, in all respects whatever, by the name and title the State of Tennessee.”⁷⁹ In the same act, Congress provided: “in other respects as far as they may be applicable, the laws of the United States shall extend to, and have force in the State of Tennessee, in the same manner, as if that State had originally [been] one of the United States.”⁸⁰ Again, this is the equivalent of the 1803 Due Execution Act for Ohio.

As use of the “recognized” trope implicitly concedes, it cannot plausibly be asserted that the 1803 Due Execution Act was the instrument by which Congress intended to exercise its Article IV, Section 3 power that “New States may be admitted by the Congress into this Union”⁸¹ Still less can it be asserted that the 1803 Due Execution Act constituted Congressional approval of the proposed constitution and government of Ohio as meeting the requirements of the fifth article of compact of the Northwest Ordinance that the constitution and state government be republican and conform to the principles of the Northwest Ordinance.

⁷⁷ Vermont Act of Admission, *supra* note 21.

⁷⁸ *Id.*

⁷⁹ Tennessee Act of Admission, *supra* note 26, at 491–92.

⁸⁰ *Id.*

⁸¹ U.S. CONST. art. IV, § 3, cl. 1.

The breadth of the confusion was illustrated by an earlier narrative by Dean Steinglass.⁸² It started with an admission that Congress failed to act to admit Ohio in 1803: “Congress acknowledged Ohio as a state in an act of February 19, 1803, but it never took formal action to admit Ohio into the union.”⁸³ The authors then allowed that: “Consequently, there have [been] a number of competing views as to when Ohio first became a state”⁸⁴ They then list:

[F]ive different dates [that] have been proposed, including April 30, 1802, the date on which Congress passed the Enabling Act permitting Ohio to pursue statehood; November 29, 1802, the date on which the convention adjourned; February 19, 1803, the date on which Congress passed an Act extending federal laws to the “State” of Ohio; and March 1, 1803, the date on which the General Assembly first met; and March 3, 1802, the date on which Congress consented to a final modification of the Enabling Act.⁸⁵

The authors do not explain, and it is not at all clear, how one could possibly say that Ohio became a state on the date when Congress passed the Enabling Act, or modified the Enabling Act, or on the date when the constitutional convention adjourned, or on the date when the general assembly first met.

If the Ohio enabling act was not self-executing, then one ought to be able to identify the point at which Ohio was admitted to the Union. The use of the trope that Ohio statehood was “recognized” indicates the difficulty of saying how admission was done.

Given the lack of clarity as to *how* they claim Ohio became a state in 1803, it seems stunningly imprecise for Steinglass and Scarselli to have written that “in 1953, Congress formally *recognized* Ohio as the seventeenth state of the union,”⁸⁶ rather than use the actual language of the 1953 Act of Admission: “That the State of Ohio, shall be one, and is hereby declared to be one, of the United States of America, and

⁸² See STEVEN H. STEINGLASS & GINO J. SCARSELLI, THE OHIO STATE CONSTITUTION: A REFERENCE GUIDE 13 (2004), <https://www.law.csuohio.edu/sites/default/files/lawlibrary/ohioconlaw/ohioconstitutionessay.pdf> [<https://perma.cc/QXQ2-MX99>].

⁸³ *Id.* at 17–18.

⁸⁴ *Id.* at 18.

⁸⁵ *Id.*

⁸⁶ *Id.* (emphasis added) (citing the 1953 Act of Admission, *supra* note 16).

is admitted into the Union on an equal footing with the original States, in all respects whatever.”⁸⁷ We shall discuss the characterization of the 1953 Act of Admission in Part II.

II. 1953: “. . . THE CASE OF OHIO IS SOMEWHAT IN A CLASS BY ITSELF.”

For a century and a half after the failure of 1803, the issue of whether Ohio had been properly admitted as a state lay dormant. The matter emerged as an issue only in 1953, as preparations were being made to celebrate the sesquicentennial of Ohio’s 1803 “admission” to the Union:

In 1953, some 150 years and 31 states later, Ohio was getting ready to celebrate the state’s 150th birthday. In preparation for Ohio’s sesquicentennial, some Ohio teachers headed to Washington, D.C. to obtain copies of documents pertaining to Ohio becoming a state in 1803 But a problem occurred because, the Library of Congress did not have some of the documents. Namely, the legislation that granted statehood to Ohio. It was quickly realized that Ohio technically hadn’t been legally admitted into the United States in 1803. This was a problem.⁸⁸

And so, in 1953, the House Committee on Interior and Insular Affairs studied the issue and issued a report.⁸⁹ The Committee report chronicled the authorization of Ohio statehood passed by Congress in April of 1802,⁹⁰ the meeting of the constitutional convention at Chillicothe and the adoption of a constitution in November of 1802,⁹¹ and the appointment of a Senate committee to “inquire whether any, and if any, what, legislative measures may be necessary for admitting the State of Ohio into the Union or for extending the laws of the United States.”⁹² The Senate committee reported on Ohio’s progress, including an observation that the

⁸⁷ 1953 Act of Admission, *supra* note 16.

⁸⁸ Pawlak, *supra* note 17; *see also* Bowman v. United States, 920 F. Supp. 623, 625 n.4 (E.D. Pa. 1995) (“[I]t appears that, in 1953, on the occasion of the sesquicentennial of Ohio’s admission to statehood, Congress—on being advised that in 1803 there had been no presidentially approved congressional declaration of Ohio’s admission—enacted, and President Eisenhower signed, a resolution declaring Ohio’s statehood, retroactive to March 1, 1803.”).

⁸⁹ *See* 1953 Committee on Interior and Insular Affairs Report, *supra* note 5, at 1–2.

⁹⁰ *Id.* (referencing Ohio Enabling Act, *supra* note 27).

⁹¹ *Id.* at 2.

⁹² *Id.* (referencing 12 ANNALS OF CONG. 21 (1803)).

“Constitution and government so formed is republican, and in conformity to the principles contained in the articles of the [Northwest Ordinance],” and brought a bill to the Senate.⁹³

The bill brought to the Senate by the 1803 committee was the problem.⁹⁴ After noting that Ohioans did “form for themselves a constitution and state government, and did give to the said state the name of the ‘State of Ohio,’” in pursuance to Congressional authorization, “whereby the said state has become one of the United States of American,” the 1803 Due Execution Act focused on the extension of the laws of the United States into Ohio and the establishment of courts.⁹⁵ As the Committee on Interior and Insular Affairs Committee noted in 1953, the 1803 Due Execution Act “then made provision for establishment of a district court with necessary officers, etc., but no further mention of ‘admission.’”⁹⁶

In 1953, when considering whether a joint resolution of admission was necessary for Ohio to join the Union, the Interior and Insular Affairs Committee reviewed the record regarding the admission of other states. The Committee report compared the admissions of the first three states which were to be formed out of the Northwest Territory: Ohio in 1803, Indiana in 1816, and Illinois in 1818.⁹⁷

Moving on to other examples, the Committee noted that Alabama in 1819, and Missouri in 1820, were admitted after Congress reviewed their constitutions and forms of government.⁹⁸ The Committee then turned to the “dozen States besides Ohio whose admission to the Union was accomplished by a single enabling act.”⁹⁹ But upon closer examination, each of these cases was distinguishable from Ohio,¹⁰⁰ leading the Committee to conclude:

⁹³ *Id.*

⁹⁴ *See id.* (referencing 1803 Due Execution Act, *supra* note 13).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *See id.*

⁹⁸ *Id.* at 3.

⁹⁹ *Id.*

¹⁰⁰ *See id.* Of the twelve states, eight had already written their constitutions and their enabling acts make the required finding. Vermont and Kentucky were declared admitted as of dates certain. Maine was declared admitted. Tennessee’s admission “was in fulfillment of the condition of cession of territory by North Carolina.” *Id.*

Thus it appears that the case of Ohio is somewhat in a class by itself, in that Congress by an enabling act authorized the formation of a new State, and did not follow it up with another declaring the State a member of the Union. This is [a] matter of fact.¹⁰¹

While the 1953 Committee did not adopt a finding that Ohio *was not* a state on the basis of the failure of Congress to pass a joint resolution of admission in 1803, it did suggest a legislative remedy. The Committee proposed that Congress adopt the missing resolution of admission for Ohio a century and a half late, and make it relate back to 1803. The Committee unanimously recommended enactment of House Joint Resolution 121.¹⁰² The joint resolution of admission passed the House of Representatives May 19, 1953,¹⁰³ passed the Senate on August 1, 1953,¹⁰⁴ and was approved by President Eisenhower on August 7, 1953, to become Public Law 83-204.¹⁰⁵

In 1953, Congress passed a joint resolution of admission for Ohio which was¹⁰⁶—with the substitution of references to Ohio for references to Indiana and insignificant changes in punctuation—identical to the resolution Congress passed in 1816 admitting Indiana to the Union.¹⁰⁷ It should be presumed that Congress

¹⁰¹ *Id.*

¹⁰² *See id.* at 4.

¹⁰³ 99 CONG. REC. D-304 (1953). The measure passed on the consent calendar, without amendment, and was sent to the Senate. *See id.*

¹⁰⁴ 99 CONG. REC. D-603 (1953). The measure passed on call of calendar, without amendment, and was sent to the President. *See id.*

¹⁰⁵ 99 CONG. REC. H11160 (daily ed. Aug. 3, 1953) (notifying the House of Representatives that President Eisenhower approved and signed H.R. Res.121 on Aug. 7, 1953).

¹⁰⁶ 1953 Act of Admission, *supra* note 16.

¹⁰⁷ Compare 1953 Act of Admission, *supra* note 16, with 30 ANNALS OF CONG. 20–21 (1816). The Ohio Joint Resolution read:

Whereas, in pursuance of an act of Congress, passed on the thirtieth day of April, one thousand eight hundred and two, entitled “An Act to enable the people of the Eastern division of the territory northwest of the river Ohio to form a constitution and state government, and for the admission of such state into the Union, on an equal footing with the original States, and for other purposes”, the people of the said territory did, on the twenty-ninth day of November, one thousand eight hundred and two, by a convention called for that purpose, form for themselves a constitution and state government, which constitution and state government, so formed is republican, and in conformity to the principles of the articles of compact between the original States and the

intended to do in 1953 for Ohio the same thing it did in 1816 for Indiana: take the final step in the process of admitting a new state to the Union. Ergo, Ohio was not a state until Congress and the President acted in 1953. It is consistent with this reading of Congressional intent to note that, when it passed the joint resolution “[f]or admitting the State of Ohio into the Union” in 1953, Congress attempted to make its action relate back to 1803.¹⁰⁸

In 1953, the Interior and Insular Affairs Committee made a desultory attempt to cast the proposed “Joint Resolution for Admitting the State of Ohio into the Union” as a minor calendar clarification. “The intent of House Joint Resolution 121,” it declared, “is to end confusion as to the exact date on which Ohio entered the Union.”¹⁰⁹ It framed the confusion as being the difference between celebrating the anniversary of statehood on March 3 or November 29:

Though the matter of a formal declaration of admission may be considered unessential, there actually is some confusion as to the exact date when Ohio should

people and States in the territory north-west of the river Ohio, passed on the thirteenth day of July, one thousand seven hundred and eighty-seven: Therefore, be it *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the State of Ohio, shall be one, and is hereby declared to be one, of the United States of America, and is admitted into the Union on an equal footing with the original States, in all respects whatever.

1953 Act of Admission, *supra* note 16. The Indiana admissions Joint Resolution read:

Whereas, in pursuance of an act of Congress, passed on the 19th day of April, 1816, entitled “An Act to enable the people of the Indiana Territory to form a constitution and State government, and for the admission of such State into the Union,” the people of the said Territory did, on the 29th day of June, in the present year, which constitution and state government, so formed is republican, and in conformity to the principles of the articles of compact between the original States and the people and States in the territory north-west of the river Ohio, passed on the 13th day of July, 1787: *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the State of Indiana, shall be one, and is hereby declared to be one, of the United States of America, and is admitted into the Union on an equal footing with the original States in all respects whatever.

30 ANNALS OF CONG. 20–21 (1816).

¹⁰⁸ 1953 Act of Admission, *supra* note 16, § 2 (“This joint resolution shall take effect as of March 1, 1803.”).

¹⁰⁹ 1953 Committee on Interior and Insular Affairs Report, *supra* note 5, at 1.

be considered to have become a member of the Union. For example, the Senate Manual . . . gives the date as March 3, 1803; while the Congressional Biographical Directory . . . gives November 29, 1802.¹¹⁰

But in a situation where the mechanism for admission is unclear, the *date* of admission becomes a proxy for the *means* of admission. The two dates given by the 1953 Committee, then, are two possibilities for identifying the means of admission. November 29, 1802, is the date the Ohio constitutional convention adjourned. March 3, 1803, is . . . well, nothing really. March 3, 1802, is the date the enabling act for Ohio was finalized. March 1, 1803, is the date the Ohio general assembly met for the first time¹¹¹ and is the date used in the relation-back provision of the 1953 Act of Admission.¹¹²

At the same time, the Interior and Insular Affairs Committee did acknowledge the existence of more fundamental issues: “Question has been raised from time to time concerning the procedure upon admission of Ohio, some even going so far as to assert that Ohio was never ‘admitted’ to the Union at all.”¹¹³ Thus, the 83rd Congress and President Dwight Eisenhower essentially conceded the issue when they acted 150 years later to correct the omission of the 7th Congress and President Thomas Jefferson.

Congress attempted in its remedial act to correct its failure retroactively to 1803, by inserting the language “This joint resolution shall take effect as of March 1, 1803.”¹¹⁴ The attempt to make the 1953 Act of Admission relate back to 1803 created another problem. The 1953 Act is cast in term of approval of the constitution adopted in 1802:

[T]he people of the said territory did, on the twenty-ninth day of November, one thousand eight hundred and two, by a convention called for that purpose, form for themselves a constitution and state government, which constitution and state government, so formed is republican, and in conformity to the principles of the articles of compact between the original States and the people and States in the

¹¹⁰ *Id.* at 3–4.

¹¹¹ STEINGLASS & SCARSELLI, *supra* note 82, at 13.

¹¹² 1953 Act of Admission, *supra* note 16.

¹¹³ 1953 Committee on Interior and Insular Affairs Report, *supra* note 5, at 1.

¹¹⁴ 1953 Act of Admission, *supra* note 16, § 2.

territory north-west of the river Ohio, passed on the thirteenth day of July, one thousand seven hundred and eighty-seven¹¹⁵

But by 1953, the constitution passed in 1802 had been superseded for over a century. Ohioans adopted a new constitution in 1851¹¹⁶ and made sweeping amendments to that constitution in 1912.¹¹⁷ If the 1953 Act of Admission did not relate back to the constitution passed in 1802, then the requirement of the enabling act of 1802, that the “constitution and state government, so formed is republican, and in conformity to the principles of the articles of compact between the original States and the people and States in the territory north-west of the river Ohio,” would have applied to the Constitution of 1851, as amended by the amendments of 1912.¹¹⁸ And Congress, in 1953, failed to make such a finding. Thus, it might be argued that if the 1953 Act of Admission did not relate back to 1803, it was ineffective.

The 1803 Due Execution Act and the 1953 Act of Admission left open a number of issues for the courts to decide. While the Ohio-statehood question has been mentioned by the courts, it has not been the subject of a well-briefed and thoughtfully considered analysis by any court. It is that history to which we now turn.

III. LITIGATING THE ISSUE OF OHIO’S STATEHOOD: CONFRONTING A “VIRTUALLY IMPENETRABLE WALL OF LEGALISTIC GIBBERISH . . .”

We should start by noting that the tax protesters were simply wrong in their ultimate claim that because of any defect with respect to Ohio’s admission to the Union the Sixteenth Amendment was not ratified. There were forty-six states in 1909 when the Sixteenth Amendment was sent to the states for ratification. New Mexico and Arizona were admitted while the ratification process was underway, bringing the

¹¹⁵ *Id.*

¹¹⁶ OHIO CONST. of 1851.

¹¹⁷ OHIO CONST. of 1912.

¹¹⁸ Ohio Enabling Act, *supra* note 27.

number of states to forty-eight.¹¹⁹ Thus the agreement of thirty-six states was required for the amendment to be ratified.¹²⁰

The ratification history of the Sixteenth Amendment is straightforward.¹²¹ On February 25, 1913, Secretary of State Philander Knox issued a certification relating to the Sixteenth Amendment. He stated:

[I]t appears from official documents on file in this Department that the Amendment to the Constitution of the United States proposed as aforesaid has been ratified by the Legislatures of the States of Alabama, Kentucky, South Carolina, Illinois, Mississippi, Oklahoma, Maryland, Georgia, Texas, Ohio, Idaho, Oregon, Washington, California, Montana, Indiana, Nevada, North Carolina, Nebraska, Kansas, Colorado, North Dakota, Michigan, Iowa, Missouri, Maine, Tennessee, Arkansas, Wisconsin, New York, South Dakota, Arizona, Minnesota, Louisiana, Delaware, and Wyoming, in all thirty-six.¹²²

Based on the thirty-six listed states, Secretary Knox stated, “that the States whose Legislatures have so ratified the said proposed Amendment, constitute three fourths of the whole number of the States in the United States”¹²³ But that was not the final ratification count from the Knox certification. He continued by stating “And, further, that it appears from official documents on file in this Department that the

¹¹⁹ New Mexico was admitted to the Union on January 26, 1912; Arizona was admitted on February 14, 1912. *See generally States in Order of Statehood*, IPL, <https://www.ipl.org/div/stateknow/dates.html> [<https://perma.cc/36AF-RJKP>].

¹²⁰ U.S. CONST. art. V (requiring the approval of three-quarters of the states for ratification of amendments to the Constitution).

¹²¹ Commentators occasionally are inaccurate in their reporting. *See, e.g.*, Jackson, *supra* note 1, at 305 (analysis evidently based on mistaken belief that the Sixteenth Amendment was ratified by thirty-eight, not forty-two states: “To prove the Sixteenth Amendment was improperly ratified, protesters need to show at least three states did not ratify the amendment.”); INTERNAL REVENUE SERV., *THE TRUTH ABOUT FRIVOLOUS TAX ARGUMENTS* 26 (2014), https://www.irs.gov/pub/irs-utl/friv_tax.pdf [<https://perma.cc/T8JT-9AKJ>] (“The Sixteenth Amendment was ratified by forty states, including Ohio . . . and issued by proclamation in 1913. Shortly thereafter, two other states also ratified the Amendment.”).

¹²² Certification of Philander C. Knox, Secretary of State, February 25, 1913, 61st Cong. (1st Sess. Feb. 25, 1913), 37 Stat. 1785, https://constitution.org/1-Activism/tax/us-ic/ratif/cert_16.htm [<https://perma.cc/W5PH-A83J>].

¹²³ *Id.*

Legislatures of New Jersey and New Mexico have passed Resolutions ratifying the said proposed Amendment.”¹²⁴ Secretary Knox concluded his certification:

Now therefore, be it known that I, Philander C. Knox, Secretary of State of the United States, by virtue and in pursuance of Section 205 of the Revised Statutes of the United States, do hereby certify that the Amendment aforesaid has become valid in all intents and purposes as part of the Constitution of the United States.¹²⁵

Four additional states—West Virginia, Vermont, Massachusetts, and New Hampshire—ratified the Sixteenth Amendment between January 31 and March 7 of 1913 and were not included in the Knox certification.¹²⁶ Thus the Sixteenth Amendment was ratified by forty-two states, six more than the number required, so the exclusion of Ohio’s ratification would not have changed the outcome.

But the fact that their argument about the effect of a defect in Ohio’s admission to the Union was not correct does not mean the tax protesters’ claims about Ohio’s admission were equally in error. The following discussion looks at fourteen tax protester cases in which litigants challenged the Sixteenth Amendment based in whole or in part on a failure of Ohio statehood.

In eight of the cases—*Ivey v. United States*,¹²⁷ *McMullen v. United States*,¹²⁸ *Lorre v. Alexander*,¹²⁹ *McCoy v. Alexander*,¹³⁰ *Selders v. Commissioner*,¹³¹ *United*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ U.S. Gov’t Printing Off., *Amendments to the Constitution of the United States of America*, in CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION (1992), <https://web.archive.org/web/20150119112756/http://www.gpo.gov/fdsys/pkg/GPO-CONAN-1992/html/GPO-CONAN-1992-7.htm> (ratifications by West Virginia on January 31, 1913; Vermont on February 19, 1913; Massachusetts on March 4, 1913; and New Hampshire on March 7, 1913).

¹²⁷ *Ivey v. United States*, 76-2 CCH P9682, 1976 U.S. Dist. LEXIS 13437 (E.D. Wis. 1976).

¹²⁸ *McMullen v. United States*, 76-2 CCH P9682, 1976 U.S. Dist. LEXIS 11952 (W.D. Tenn. 1976).

¹²⁹ *Lorre v. Alexander*, 77-2 CCH P9672, 1977 U.S. Dist. LEXIS 14588, at *1 (W.D. Tex. 1977).

¹³⁰ *McCoy v. Alexander*, 77-2 CCH P9504, 1977 U.S. Dist. LEXIS 15462, at *3 (S.D. Tex. 1977).

¹³¹ *Selders v. Comm’r*, 78-1 CCH P9295, 1978 U.S. Dist. LEXIS 19591, at *3 (W.D. Tex. 1978).

States v. Stahl,¹³² *United States v. Foster*,¹³³ and *United States v. O'Brien*¹³⁴—the taxpayers raised the Ohio-statehood argument, but the court rejected the attack on the Sixteenth Amendment without addressing it. In *Ivey*, the taxpayers made the Ohio-statehood argument.¹³⁵ The court dismissed based on sovereign immunity without addressing Ohio statehood, stating “those claims directed to the constitutionality of the sixteenth amendment, the internal revenue code and regulations, the operation of the internal revenue service, legal tender, and the tax court are frivolous and insubstantial.”¹³⁶ In *McMullen*, the taxpayer made the Ohio-statehood argument.¹³⁷ Without addressing Ohio statehood, the court found “Plaintiff’s arguments [were] without legal merit and the relief sought [was] barred by law.”¹³⁸ In *Lorre*, the taxpayers made the Ohio-statehood argument.¹³⁹ Without addressing Ohio statehood, the court dismissed the cause of action with prejudice.¹⁴⁰ In *McCoy*, the taxpayer made the Ohio-statehood argument.¹⁴¹ Without addressing

¹³² *United States v. Stahl*, 792 F.2d 1438, 1439 n.1 (9th Cir. 1986).

¹³³ *United States v. Foster*, 789 F.2d 457, 458–59 (7th Cir. 1986).

¹³⁴ *United States v. O'Brien*, 83 A.F.T.R.2d (RIA) 1999-2533, 1999 U.S. Dist. LEXIS 5971, at *5 (S.D. Ohio 1999).

¹³⁵ *Ivey v. United States*, 76-2 CCH P9682, 1976 U.S. Dist. LEXIS 13437, at *2 (E.D. Wis. 1976). The taxpayers argued “that the 16th amendment to the United States Constitution was not properly ratified because the state of Ohio was not legitimately part of the union and that therefore the sixteenth amendment and all tax statutes and regulations promulgated thereunder are unconstitutional . . .” *Id.*

¹³⁶ *Id.* at *7.

¹³⁷ *McMullen v. United States*, 77-1 CCH P9142, 1976 U.S. Dist. LEXIS 11952, at *4 (W.D. Tenn. 1976) (“Whether the Sixteenth Amendment to the United States Constitution is unconstitutional, null and void in that it was improperly ratified by Ohio, which was not a state at the time of ratification.”).

¹³⁸ *Id.*

¹³⁹ *Lorre v. Alexander*, 77-2 CCH P9672, 1977 U.S. Dist. LEXIS 14588, at *1 (W.D. Tex. 1977) (“ . . . that the State of Ohio is not legally a state of the Union and, hence, the Sixteenth Amendment is null and void because it was improperly ratified . . .”).

¹⁴⁰ *Id.* The court stated:

Having fully considered all of the contentions raised by plaintiffs in their complaint in the light most favorable to plaintiffs, and defendant’s motion and memorandum of law in support thereof, the Court finds and concludes that it lacks subject matter jurisdiction in this cause of action, and that plaintiffs fail to state a cause of action for which relief can be granted.

Id. at *2.

¹⁴¹ *McCoy v. Alexander*, 77-2 CCH P9504, 1977 U.S. Dist. LEXIS 15462, at *3 (S.D. Tex. 1977). The court noted claims by the plaintiff “that Ohio is not properly a state, that the XVIth Amendment to the

Ohio statehood the court dismissed based upon a failure to state a claim upon which relief might be granted.¹⁴² In *Selders*, the taxpayers made the Ohio-statehood argument.¹⁴³ Without addressing Ohio statehood the court found that it lacked jurisdiction and stated: “[e]ven if this Court were wrong concerning the jurisdictional questions presented, Plaintiffs’ complaint still would be subject to dismissal or a motion for summary judgment because all of their contentions have been rejected by the courts on many occasions.”¹⁴⁴ In *Stahl*, the taxpayer made a broad attack on the ratification of the Sixteenth Amendment, asserting that Ohio was not a state at the time it ratified and that Secretary of State Knox’s certification was incorrect.¹⁴⁵ The court found that the Secretary of State’s certification was conclusive upon the courts,¹⁴⁶ and that the issue constituted a political question.¹⁴⁷ In *Foster*, the taxpayer appealed his criminal conviction claiming the Sixteenth Amendment was not properly ratified.¹⁴⁸ Although the argument was apparently not well-developed, it

Constitution is unconstitutional, that the Internal Revenue Code of 1954 is unconstitutional, and that income taxes are immoral and in furtherance of the Communist Manifesto.” *Id.*

¹⁴² *Id.* The court stated:

The most liberal and favorable reading of Plaintiff’s complaint shows that under no circumstances can Plaintiff prevail or even present a cause of action raising any question cognizable in this Court under any theory of law The constitutionality of the Sixteenth Amendment and the Internal Revenue Code and system is not seriously in dispute, nor does it appear from Plaintiff’s complaint that this is intended as a serious cause of action.

Id. at *5.

¹⁴³ *Selders v. Comm’r*, 78-1 CCH P9295, 1978 U.S. Dist. LEXIS 19591, at *3 (W.D. Tex. 1978) (cited by the *Knoblauch* court as 41 A.F.T.R.2d 1088, 1089 (W.D. Tex. 1978)) (claiming the Sixteenth Amendment was “unconstitutional and invalid . . . because Ohio was not legally a state at the time of the ratification of this amendment[.]”).

¹⁴⁴ *Id.* at *5.

¹⁴⁵ *United States v. Stahl*, 792 F.2d 1438, 1439 n.1 (9th Cir. 1986) (“Ohio (not a state at the time)”). The appellant’s arguments appear to conform to more highly embellished variation of the Sixteenth Amendment argument based on a 1985 book. WILLIAM J. BENSON & MARTIN J. “RED” BECKMAN, *THE LAW THAT NEVER WAS: THE FRAUD OF THE 16TH AMENDMENT AND PERSONAL INCOME TAX* (1985).

¹⁴⁶ *Stahl*, 792 F.2d at 1439 (citing *United States v. Thomas*, 788 F.2d 1250, 1253–54 (7th Cir. 1986) and *Leser v. Garnett*, 258 U.S. 130, 137 (1922)).

¹⁴⁷ *Id.* at 1440-41 (citing *Field v. Clark*, 143 U.S. 649 (1892); *Leser v. Garnett*, 258 U.S. 130, 137 (1922); and *Baker v. Carr*, 369 U.S. 186, 215 (1962)).

¹⁴⁸ *United States v. Foster*, 789 F.2d 457, 458–59 (7th Cir. 1986).

seems to have included reference to the Ohio-statehood question.¹⁴⁹ The court concluded that the taxpayer had not carried the burden of proof, and noted:

[T]he Sixteenth Amendment has been in existence for 73 years and has been applied by the Supreme Court in countless cases. While this alone is not sufficient to bar judicial inquiry, it is very persuasive on the question of validity.¹⁵⁰

Finally, in *O'Brien*, the *pro se* defendants made a rather incoherent defense based in part on the Ohio-statehood question.¹⁵¹ The court did not address the Ohio-statehood issue, but simply found the Sixteenth Amendment was valid.¹⁵²

¹⁴⁹ *Id.* at 462.

[Appellant] merely cited to a brief in an unrelated case, prepared by a different attorney from his own—which itself does not explain why the Sixteenth Amendment is void beyond stating the conclusion that the required number of state legislatures never ratified the amendment and that then-Secretary of State Philander C. Knox falsified the certification record.

Id.

¹⁵⁰ *United States v. Foster*, 789 F.2d 457, 462 (7th Cir. 1986). “[W]e would require, at this late hour, an exceptionally strong showing of unconstitutional ratification. Foster has not made such a showing He clearly has not carried the burden of showing that this 73-year-old amendment was unconstitutionally ratified.” *Id.* at 463.

¹⁵¹ *United States v. O'Brien*, 83 A.F.T.R.2d (RIA) 1999-2533, 1999 U.S. Dist. LEXIS 5971, at *2 (S.D. Ohio 1999).

Q. You’re saying you don’t recognize the authority of the Internal Revenue Service?

[O’Brien] They may have relative authority that I’m not aware of, but from my studies, they have no authority in 50 Union States, and that’s beared out in Internal Revenue Code 7701A9. Ohio is not a state defined in the term United States Internal Revenue Code Title 26, and a state is the District of Columbia and/or territories thereon, et cetera.

Id.

¹⁵² *Id.* at 3 (“Defendant O’Brien’s theory that the IRS has no authority to assess income taxes has been repeatedly rejected by the courts.”).

In three of the cases—*Knoblauch v. Commissioner*,¹⁵³ *Tickel v. Commissioner*,¹⁵⁴ and *Sisk v. Commissioner*¹⁵⁵—the courts addressed the Ohio-statehood argument only to claim without further analysis that the argument had been rejected in other cases. In *Knoblauch*, the taxpayer challenged the Sixteenth Amendment based on the Ohio-statehood question.¹⁵⁶ The taxpayer also challenged the Taft Presidency.¹⁵⁷ The court did no analysis of the claims beyond the observation that “[e]very court that has considered this argument has rejected it . . . and Knoblauch has not brought to our attention any reason why we should rule differently.”¹⁵⁸ Without analysis, it found the plaintiff’s argument based on Ohio statehood to be “totally without merit.”¹⁵⁹ The Fifth Circuit affirmed the Tax Court decision, finding “Knoblauch’s contentions to be non-meritorious and frivolous,” and permitted “an award of extraordinary damages for frivolous appeal . . . to be based upon the Commissioner’s reasonable attorney’s fees.”¹⁶⁰ In *Tickel*, the taxpayer challenged the Sixteenth Amendment.¹⁶¹ The court granted the motion to dismiss on a political question analysis,¹⁶² cited the Ohio-statehood argument in *Knoblauch* and noted that “defendant’s argument has been uniformly rejected by every court considering it.”¹⁶³ In *Sisk* the taxpayers raised the Ohio-statehood

¹⁵³ *Knoblauch v. Comm’r*, 749 F.2d 200, 202 (5th Cir. 1984).

¹⁵⁴ *Tickel v. Comm’r*, 1985 WL 3340, No. CIV-1-85-307, at *1-2 (E.D. Tenn. Sept. 10, 1985).

¹⁵⁵ *Sisk v. Comm’r*, 791 F.2d 58, 60-61 (6th Cir. 1986).

¹⁵⁶ *Knoblauch*, 749 F.2d at 201 (noting plaintiff’s claim “that the Sixteenth Amendment was not constitutionally adopted and is thus a ‘nullity’” because “Ohio was not a state when it ratified the amendment . . .”).

¹⁵⁷ *Id.* (noting plaintiff’s claim that “William Howard Taft, being from Ohio, was thus not legally president at the time, and that all laws enacted during Taft’s administration are therefore void.”).

¹⁵⁸ *Id.* at 201-02 (citing *McKenney v. Blumenthal*, No. C78-1406A, 1979 WL 1342 (N.D. Ga. Feb. 23, 1979); *Selders v. Comm’r*, 78-1 CCH P9295, 1978 U.S. Dist. LEXIS 19591 (W.D. Tex. 1978); *McMullen v. United States*, 77-1 U.S. Tax Cas. (CCH) P9142, 1976 U.S. Dist. LEXIS 11952 (W.D. Tenn. 1976); and *Baker v. Comm’r*, 37 T.C.M. (CCH) 307 (T.C. 1978)).

¹⁵⁹ *Id.* at 202.

¹⁶⁰ *Id.* at 201.

¹⁶¹ *Tickel v. Comm’r*, 1985 WL 3340, No. CIV-1-85-307, at *1 (E.D. Tenn. Sept. 10, 1985).

¹⁶² *Id.* at *2 (finding “that the determination of whether an amendment has been ratified and becomes part of the Constitution is a political question and not one subject to review by the Courts.”).

¹⁶³ *Id.* at *1 (citing *Knoblauch*, 749 F.2d at 201).

question.¹⁶⁴ The court did no analysis of the statehood claim beyond the observation, citing only *Knoblauch*, that “Appellant’s argument that Ohio was not a state when the amendment was ratified has been rejected by every court considering it.”¹⁶⁵ *Knoblauch* is hardly strong support for the position of the courts in *Tickel* and *Sisk*.

In three of the cases—*Baker v. Commissioner*,¹⁶⁶ *McKenney v. Blumenthal*,¹⁶⁷ and *Bowman v. United States*¹⁶⁸—the courts at least addressed the Ohio-statehood argument, although none of the analyses were anything more than superficial.

In *Baker*, the taxpayers challenged the ratification of the Sixteenth Amendment based solely on the Ohio-statehood question.¹⁶⁹ In rejecting plaintiffs’ Ohio-statehood argument, the court characterized the 1953 Act of Admission in terms which are at best questionable:

Petitioners’ theory is based on the enactment of [the 1953 Act of Admission] relating to Ohio’s Admission into the Union. As the legislative history of this Act makes clear, its purpose was to settle a burning debate as to the precise date upon which Ohio became one of the United States.”¹⁷⁰

Despite the *Baker* court’s rather condescending comment, the *date* of Ohio’s admission to the Union is simply a proxy for the *mechanism* of Ohio’s admission. In rejecting the petitioners’ Ohio statehood-based argument, the court noted four prior cases about which it stated: “Every case in which this issue has been presented has

¹⁶⁴ *Sisk v. Comm’r*, 791 F.2d 58, 60–61 (6th Cir. 1986). The taxpayers claimed, “that the Sixteenth Amendment was not actually ratified because: (1) Ohio was not an enrolled state at the time it ratified the amendment and yet the Secretary of State counted Ohio as a ratifying state” *Id.* The taxpayer also claimed that “(2) many of the other states’ resolutions ratifying the amendment contained typographical and punctuation errors.” *Id.*

¹⁶⁵ *Id.* (citing *Knoblauch*, 749 F.2d at 201).

¹⁶⁶ *Baker v. Comm’r*, 37 T.C.M. (CCH) 307 (T.C. 1978).

¹⁶⁷ *McKenney v. Blumenthal*, No. C78-1406A, 1979 WL 1342 (N.D. Ga. Feb. 23, 1979).

¹⁶⁸ *Bowman v. United States*, 920 F. Supp. 623 (E.D. Pa. 1995).

¹⁶⁹ *Baker*, 37 T.C.M. (CCH) 307. The court noted “Petitioners have advanced numerous arguments challenging the legality of the income tax in the instant case, many of which are part of the standard litany of the so-called ‘tax-protester’ cases.” *Id.* As to “whether the Sixteenth Amendment was properly ratified . . .” the argument was “premised solely on the theory that Ohio was not a State until 1953.” *Id.*

¹⁷⁰ *Id.*

been decided against the taxpayer.”¹⁷¹ But the court was at best imprecise in its analysis. The *Baker* court cited *Lorre*, *McCoy*, *McMullen*, and *Ivey* for the proposition that “this issue” was “decided against the taxpayer.”¹⁷² But none of the cases cited by the *Baker* court addressed the Ohio-statehood issue; the reference must have been to the distinguishable Sixteenth Amendment issue.¹⁷³

In *McKenney*, the taxpayer challenged the Sixteenth Amendment on two grounds related to the Ohio-statehood question.¹⁷⁴ First, that because Ohio was not a state, the ratification of the Sixteenth Amendment was invalid.¹⁷⁵ Second, that because Ohio was not a state, William Howard Taft, an Ohioan, was ineligible to serve as President and that the revenue statutes passed during his administration were invalid.¹⁷⁶ In finding that the taxpayer failed to state a claim upon which relief might be granted the court did not analyze the Ohio-statehood claims.¹⁷⁷ It merely took judicial notice of Ohio’s 1803 admission and declared that too much time had passed to deal with plaintiff’s claims.¹⁷⁸

The court takes note that Ohio was admitted to the union on March 1, 1803, has participated in all presidential elections and ratification procedures since that time, and has been generally afforded all rights and privileges to which a state is entitled. At such a late date this court will not entertain an action seeking to void the actions of and benefits accruing to the state of Ohio when it has been receiving those

¹⁷¹ *Id.* (citing *Lorre v. Alexander*, 77-2 CCH P9672, 1977 U.S. Dist. LEXIS 14588 (W.D. Tex. 1977); *McCoy v. Alexander*, 77-2 CCH P9504, 1977 U.S. Dist. LEXIS 15462, at *3 (S.D. Tex. 1977); *McMullen v. United States*, 77-1 U.S. Tax Cas. (CCH) P9142, 1976 U.S. Dist. LEXIS 11952 (W.D. Tenn. 1976); and *Ivey v. United States*, 76-2 CCH P9682, 1976 U.S. Dist. LEXIS 13437 (E.D. Wis. 1976)).

¹⁷² *Id.*

¹⁷³ As to *Lorre*, see *supra* text accompanying note 139; as to *McCoy*, see *supra* text accompanying notes 141–42; as to *McMullen*, see *supra* text accompanying notes 137–38; and as to *Ivey*, see *supra* text accompanying notes 135–36.

¹⁷⁴ *McKenney v. Blumenthal*, 1979 WL 1342, No. C78-1406A (N.D. Ga. Feb. 23, 1979).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* (“Plaintiff also seeks to have the sixteenth amendment declared void on the grounds that Ohio was not a state when it ratified that amendment; that William Howard Taft, being from Ohio, was not legally President and all laws enacted during his administration are void.”).

¹⁷⁷ *Id.* (cited by the *Knoblauch* court as 43 A.F.T.R.2d 960, 961 (N.D. Ga.1979)).

¹⁷⁸ *Id.*

benefits and exercising those rights unfettered for over 175 years. Plaintiff's claims on the above-stated grounds are hereby dismissed.¹⁷⁹

In *Bowman*, the taxpayer challenged the Federal income tax based on the Ohio-statehood issue.¹⁸⁰ The court declined to rule on the taxpayers' claim, which it found to be a political question.¹⁸¹ Having found it could not rule, the court nevertheless commented on the taxpayer's claims.¹⁸² With the disclaimer that it did so "[p]urely as a matter of historical interest," the court reproduced a 1993 newspaper article which characterized the 1953 Act of Admission as having been a "hurriedly drafted" resolution that was "purely ceremonial," and "more or less a publicity stunt."¹⁸³ The same article egregiously misstated the record on the central question of whether or not Congress approved Ohio's constitution and state government.¹⁸⁴

¹⁷⁹ *Id.*

¹⁸⁰ *Bowman v. United States*, 920 F. Supp. 623, 624 (E.D. Pa. 1995).

The complaint's first group of claims all derive from Mr. Bowman's assertion that Ohio's admission to the Union in 1803 was performed illegally. The complaint asserts that this flaw rendered ineffective the admission of all subsequent states into the Union, and rendered invalid most of the acts of the present (and, in the complaint's view, purported) federal government—including, *inter alia*, its imposition of an income tax.

Id.

¹⁸¹ *Id.* at 625 ("This court finds that it cannot decide the question of the legality of the process by which Ohio was admitted to the Union, because doing so would entail an impermissible encroachment upon the authority of the political branches of the Government.").

¹⁸² *Id.*

¹⁸³ *Id.* at 624 nn.1, 3 (quoting John Switzer, *Yes, Virginia, Ohio is a State*, COLUMBUS DISPATCH, Feb. 23, 1993 at 8B).

¹⁸⁴ *Id.*

Back in the early days of the republic, the process for admitting states was still primitive. An enabling act had been passed and signed by Jefferson that spelled out what Ohio had to do to become a state. Ohio had to have a required population, elect a legislature and draft a constitution. The state complied with all that and submitted its constitution to the Congress for review. *Approval was written in a bill, and Jefferson signed it.* Ohio was legally a state, according to the process back then

Id. (emphasis added).

In five non-tax cases—*Holton v. Celeste*,¹⁸⁵ *Ohio v. Cheers*,¹⁸⁶ *Walton v. Beck*,¹⁸⁷ *Ohio v. Bob Manashian Painting*,¹⁸⁸ and *Raines v. Ashcroft*¹⁸⁹—parties also raised the issue of Ohio statehood. They parallel the tax protester cases in that the parties seeking to invoke the Ohio-statehood argument lost every time, and their arguments based on Ohio statehood did not receive serious consideration by the courts.

Holton was a 1986 Sixth Circuit case in which the plaintiff appealed the grant of defendant's motion to dismiss his *pro se* civil rights claim.¹⁹⁰ Plaintiff, the president of Georgia Christian College of Theology, Inc., was arrested for violating Ohio's pyramid sales statute.¹⁹¹ The plaintiff "filed several motions which sought, inter alia, to have Ohio's statehood declared null and void on grounds Ohio had never been admitted to the Union."¹⁹² The Sixth Circuit approved the district court's ruling and rejected plaintiff's argument that the Eleventh Amendment was not applicable because Ohio was not a state. The Sixth Circuit, without analysis but citing *Knoblauch*, found: "The plaintiff's arguments pertaining to Ohio's statehood are without merit."¹⁹³

Cheers was a 1987 Ohio case in which the appellant appealed his convictions for aggravated murder, kidnapping, and theft under \$150.¹⁹⁴ On appeal, he filed an assignment of error based on Ohio's statehood:

Ohio is not a state of the U.S. by reason of the absence of Congressional admission in 1803 and Ohio's 1953 admission is invalid and unconstitutional as being violative of U.S. Constitution Article I section 7 and section 9 clause 3; inclusive

¹⁸⁵ *Holton v. Celeste*, 786 F.2d 1164 (6th Cir. 1986) (unpublished opinion).

¹⁸⁶ *Ohio v. Cheers*, No. OT-87-10, 1987 WL 20432 (Ohio App. Nov. 27, 1987).

¹⁸⁷ *Walton v. Beck*, No. 9-89-63, 1991 WL 30642 (Ohio App. Feb. 26, 1991).

¹⁸⁸ *Ohio v. Bob Manashian Painting*, 782 N.E.2d 701 (Cleveland Mun. Ct. 2002).

¹⁸⁹ *Raines v. Ashcroft*, 70 Fed. App'x 300, 301 (6th Cir. 2003) (unpublished opinion).

¹⁹⁰ *Holton v. Celeste*, 786 F.2d 1164 (6th Cir. 1986) (unpublished opinion).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* (citing *Knoblauch v. Commissioner*, 749 F.2d 200, 201-02 (5th Cir. 1984)). As to *Knoblauch*, see *supra* text accompanying notes 155–59.

¹⁹⁴ *Ohio v. Cheers*, No. OT-87-10, 1987 WL 20432 (Ohio App. Nov. 27, 1987).

of, and directly related to the unconstitutionality of U.S. Constitution amendment 17; resulting in the defendant-appellants [*sic*] imprisonment and deprivation of liberty being a gross violation of his constitutional rights under amendments 4, 5, 6, 8 & 14 and a disgusting miscarriage of justice.¹⁹⁵

The Ohio Court of Appeals efficiently rejected appellant's claims, citing *Knoblauch* and *Sisk*:¹⁹⁶

Initially, appellant contends that Ohio is not a state. Several federal cases have discussed this issue and found that Ohio was properly admitted to the union Similarly, this court finds that Ohio was properly admitted into the union.¹⁹⁷

Walton was a 1991 Ohio case in which the plaintiff appealed *pro se* the trial court's dismissal of his petition in ejectment.¹⁹⁸ The plaintiff's claimed interest in the property grew out of a "Notice and Memorandum of Freehold Lease" which was filed after a bank foreclosed on property owned by the plaintiff's parents and sold the property at a foreclosure sale confirmed by the court.¹⁹⁹ Plaintiff advanced two theories based on Ohio statehood: ". . . that, because Ohio is not a state, the trial court lacked jurisdiction to enter judgment in the case," and "that because Ohio is not a state, the statutes to which the trial court referred in dismissing the complaint are invalid."²⁰⁰ In affirming the trial court and rejecting plaintiff's assignments of error, the *Walton* court did no analysis but simply relied on the authority of *State ex rel. Walton v. Hunter*.²⁰¹ That case, in turn, simply declared without analysis that "[t]he

¹⁹⁵ *Id.*

¹⁹⁶ As to *Knoblauch*, see *supra* text accompanying notes 156–57; as to *Sisk*, see *supra* text accompanying note 164.

¹⁹⁷ *Ohio v. Cheers*, No. OT-87-10, 1987 WL 20432 (Ohio App. Nov. 27, 1987) (citing *Knoblauch v. Commissioner*, 749 F.2d 700, 701 (5th Cir. 1984) and *Sisk v. Commissioner*, 791 F.2d 58, 61 (6th Cir. 1986)).

¹⁹⁸ *Walton v. Beck*, No. 9-89-63, 1991 WL 30642 (Ohio App. Feb 26, 1991) ("Stephan Walton, in propria persona").

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* (citing *State ex rel. Walton v. Hunter*, 559 N.E.2d 1362 (Ohio 1990)).

Ordinance of 1787 was superseded by the constitution of the State of Ohio when Ohio was admitted to the Union.”²⁰²

Manashian was a 2002 case out of Ohio in which a *pro se* defendant attempted to get a \$482.10 judgment against him dismissed based in part on an allegation relating to Ohio statehood.²⁰³ Faced with what it termed the “virtually impenetrable wall of legalistic gibberish which defendant has erected,” the court suggested “a brief review of Ohio history may be in order.”²⁰⁴ The court’s review of Ohio history included the enabling act of April 30, 1802,²⁰⁵ the state constitutional convention of November, 1802 in Chillicothe.²⁰⁶ The historical review by the court concludes with a completely inaccurate description of the 1803 Due Execution Act:

Congress *accepted the constitution and approved statehood* for the new state of Ohio. On February 19, 1803, President Jefferson signed the bill into law. It provided that Ohio “had become one of the United States of America,” and that all the laws of the United States “shall have the same force and effect within the

²⁰² State *ex rel.* Walton v. Hunter, 559 N.E.2d 1362 (Ohio 1990) (citing Sands v. Manistee River Improvement Co., 123 U.S. 288 (1887) and State *ex rel.* Donahey, v. Edmondson, 105 N.E. 269 (Ohio 1913)). *Sands*, it should be noted, is a case wholly arising out of Michigan, which stands for the proposition that the Northwest Ordinance of 1787 provisions on navigable waters do not apply once a state is created out of the Northwest Territory. Thus, *Sands* has no relevance as to whether Ohio was admitted to the Union. As to *Donahey*, it is sufficient to note that the *Hunter* court cites to “paragraph three of the syllabus,” and not to the decision itself. The third paragraph of the syllabus notes that the Northwest Ordinance was superseded when Ohio became a state, it is not an analysis of *whether* and *how* Ohio was admitted to the Union.

²⁰³ Ohio v. Bob Manashian Painting, 782 N.E.2d 701, 702–03 (Cleveland Mun. Ct. 2002). The nature of the pleadings is evidenced by the court’s recitation of the procedural posture of the case:

The court now has before it a “Certified Demand for Proof of Jurisdiction,” “Nunc Pro Tunc Estoppel at Law and Public Notice Rescission Affidavit,” and other documents prepared by Robert Z. Manashian, apparently a principal of defendant . . . Manashian . . . asserts, among other things, that he is a “state citizen and principal . . . and not a sub class U.S. citizen [but] a Sovereign American Citizen ‘only’ [and] no longer a 14th Amendment citizen.”

Id.

²⁰⁴ *Id.* at 703.

²⁰⁵ *Id.* at 704.

²⁰⁶ *Id.*

said State of Ohio, as elsewhere within the United States.” . . . Ohio was the seventeenth state to join the union.²⁰⁷

Raines was a 2003 Sixth Circuit prisoner case out of Ohio in which the court addressed a claim “. . . that Ohio was not properly admitted to the Union and is ‘not legally a State’ because Congress ‘failed to ratify Ohio’s State Constitution.’”²⁰⁸ The prisoners’ allegations continued:

[F]or “approximately two hundred years, Ohio has operated as an Independent State, without authority, or congressional approval from congress, and without consequence or federal intervention.” As a result of Ohio’s alleged defective statehood, the plaintiffs alleged that they, as well as the citizens of Ohio, have been subjected to an “illegal State government, illegal taxation, illegal seizures of property, illegal marriages, and an illegal judicial system.”²⁰⁹

Relying on *Sisk*, *Holton*, and *Knoblauch*, and without any independent analysis, the *Raines* court found that “Ohio was properly admitted to the Union” and summarily rejected the prisoners’ claims:

Upon review, we conclude that the district court properly dismissed the plaintiffs’ complaint, as it lacks an arguable basis in law or fact. Contrary to the plaintiffs’ position, Ohio was properly admitted to the Union and is legally a state. *See Sisk v. Comm’r*, 791 F.2d 58, 60–61 (6th Cir. 1986) (finding that Ohio was a state when the Sixteenth Amendment to the United States Constitution was ratified in 1913); *Holton v. Celeste*, No. 84-3697, 1986 WL 16543, at *1 (6th Cir. Feb. 12, 1986) (unpublished order) (finding without merit claim that Ohio’s statehood is null and void because Ohio has never been admitted to the Union); *see also Knoblauch v. Comm’r*, 749 F.2d 200, 201–02 (5th Cir. 1984) (finding that Ohio was legally a state when the Sixteenth Amendment to the United States Constitution was ratified). Therefore, the plaintiffs’ complaint is frivolous.²¹⁰

²⁰⁷ *Id.* (emphasis added).

²⁰⁸ *Raines v. Ashcroft*, 70 Fed. App’x 300, 301 (6th Cir. 2003) (unpublished opinion).

²⁰⁹ *Id.* (“The plaintiffs also alleged that, as prisoners, they have been ‘restrained of their liberty illegally, without valid, State due process’ and subjected to cruel and unusual punishment ‘when they spoke out about Ohio not possessing Statehood.’”).

²¹⁰ *Id.*

The reliance of the *Raines* court on the cited cases was based on rather misleading characterizations of the three cases. It cited *Sisk* as “finding that Ohio was a state when the Sixteenth Amendment to the United States Constitution was ratified in 1913.”²¹¹ The *Sisk* court did no analysis of the statehood claim beyond the observation, citing only *Knoblauch*, that “Appellant’s argument that Ohio was not a state when the amendment was ratified has been rejected by every court considering it.”²¹² It cited *Holton* as “finding without merit claim that Ohio’s statehood is null and void because Ohio has never been admitted to the Union.”²¹³ The *Holton* court did no analysis of the Ohio-statehood claim beyond the conclusion, citing only *Knoblauch*, that “[t]he plaintiff’s arguments pertaining to Ohio’s statehood are without merit.”²¹⁴ Finally, the *Raines* court characterized *Knoblauch* as “finding that Ohio was legally a state when the Sixteenth Amendment to the United States Constitution was ratified.”²¹⁵ The *Knoblauch* court did no analysis of the Ohio-statehood argument beyond the observation that “[e]very court that has considered this argument has rejected it”²¹⁶

The courts never seriously considered the Ohio-statehood argument of the tax protesters and other litigants. Although it would not have changed the outcome with respect to the Sixteenth Amendment,²¹⁷ it is interesting to consider the ways in which our history might have unfolded had Ohio not been a state. We discuss this next in Part IV.

²¹¹ *Id.*

²¹² *Sisk v. Comm’r*, 791 F.2d 58, 60–61 (6th Cir. 1986) (citing *Knoblauch v. Comm’r*, 749 F.2d 200, 201 (5th Cir. 1984)).

²¹³ *Raines*, 70 Fed. App’x at 301.

²¹⁴ *Holton v. Celeste*, 786 F.2d 1164 (6th Cir. 1986) (citing *Knoblauch*, 749 F.2d at 201–02).

²¹⁵ *Raines*, 70 Fed. App’x at 301.

²¹⁶ *Knoblauch*, 749 at 200–01 (citing *McKenney v. Blumenthal*, No. C78-1406A, 1979 WL 1342 (N.D. Ga. Feb. 23, 1979); *Selders v. Comm’r*, 78-1 CCH P9295, 1978 U.S. Dist. LEXIS 19591 (W.D. Tex. 1978); *McMullen v. United States*, 77-1 U.S. Tax Cas. (CCH) P9142, 1976 U.S. Dist. LEXIS 11952 (W.D. Tenn. 1976); and *Baker v. Comm’r*, 37 T.C.M. (CCH) 307 (T.C. 1978)). As to *McKenney*, see *supra* text accompanying notes 172–75; as to *Selders*, see *supra* text accompanying notes 142–43; and as to *McMullen*, see *supra* text accompanying notes 136–37.

²¹⁷ See *supra* discussion Part III.

IV. HISTORY AND THE OHIO STATEHOOD QUESTION

The tax protester cases raised two ways in which a failure of Ohio statehood might have changed our history. First, they raised the possibility that without Ohio, the ratification of the Constitutional amendments might have been reversed. Second, several of the cases raised the possibility that without Ohio, the course of the Presidency might have been different.

As to the Constitution, the tax protesters were simply wrong about the Sixteenth Amendment. Might the failure of Ohio statehood have impacted other amendments to the Constitution? Between 1803 and 1953, eleven Constitutional amendments were passed by Congress and ratified by the states.²¹⁸ As to each of the eleven amendments, Ohio voted to ratify the amendment, but enough states voted to ratify that the approval of Ohio was not necessary to the ratification by the states.²¹⁹

As to the course of the Presidency, the tax protesters touched on an interesting set of questions. Several of the tax protester cases made the argument that if Ohio was not a state, individuals born in Ohio were ineligible to serve as President. The taxpayer's specific argument was that President William Howard Taft was ineligible to serve, and therefore, tax statutes passed during his administration were ineffective.²²⁰ Might a failure of Ohio statehood have impacted other Presidents?

²¹⁸ They were: the Twelfth Amendment on the election of the President and Vice President; the Thirteenth Amendment on the abolition of slavery; the Fourteenth Amendment on citizenship rights, equal protection, apportionment, and debts from the Rebellion; the Fifteenth Amendment on denials of the right to vote based on race; the Sixteenth Amendment on the establishment of an income tax; the Seventeenth Amendment on the election of Senators; the Eighteenth Amendment on prohibition; the Nineteenth Amendment on women's suffrage; the Twentieth Amendment on Presidential terms and succession; the Twenty-first Amendment on the repeal of prohibition; and the Twenty-second Amendment on Presidential term limits.

²¹⁹ The Twelfth Amendment was ratified by Ohio and fourteen other states. U.S. Gov't Printing Off., *supra* note 126, at 28 n.4. The Thirteenth Amendment was ratified by Ohio and thirty-three other states. *Id.* at 30 n.5. The Fourteenth Amendment was ratified by Ohio and thirty-five other states. *Id.* at 30 n.6. The Fifteenth Amendment was ratified by Ohio and thirty-three other states. *Id.* at 33 n.7. The Sixteenth Amendment was ratified by Ohio and forty-one other states. *Id.* at 33 n.8. The Seventeenth Amendment was ratified by Ohio and thirty-six other states. *Id.* at 34 n.9. The Eighteenth Amendment was ratified by Ohio and forty-six other states. *Id.* at 35 n.10. The Nineteenth Amendment was ratified by Ohio and thirty-nine other states. *Id.* at 36 n.11. The Twentieth Amendment was ratified by Ohio and forty-seven other states. *Id.* at 36 n.12. The Twenty-first Amendment was ratified by Ohio and thirty-seven other states. *Id.* at 38 n.13. The Twenty-second Amendment was ratified by Ohio and forty other states. *Id.* at 39 n.14.

²²⁰ *McKenney v. Blumenthal*, No. C78-1406A, 1979 WL 1342 (N.D. Ga. 1979); *Knoblauch*, 749 F.2d at 201.

The failure of Ohio statehood from 1803 to 1953 might have influenced the American Presidency in several ways. One way is through the effect on the electoral votes for President.²²¹ In two elections, the absence of Ohio's electoral votes would have changed the outcome. In the Presidential election of 1876, Democratic nominee and New York Governor Samuel J. Tilden won the popular vote over Republican nominee Rutherford B. Hayes.²²² However, the electoral votes of Florida, Louisiana, Oregon, and South Carolina were disputed. After the infamous Compromise of 1877, Hayes emerged with a one-vote electoral margin.²²³ Without the twenty-two electoral votes of Ohio, however, Hayes would have lost by at least twenty-one electoral votes, and Samuel J. Tilden would have been the 19th President of the United States.²²⁴

In the Presidential election of 1916, Democratic incumbent Woodrow Wilson won the popular vote over Republican nominee and former Associate Supreme Court Justice Charles Evans Hughes.²²⁵ The electoral vote was undisputed; Wilson beat Hughes by a margin of 277 to 254.²²⁶ Without the twenty-four electoral votes of Ohio, however, Wilson would have lost by one vote, and Charles Evans Hughes would have been the 29th President of the United States.²²⁷

²²¹ For any election, one can simply eliminate Ohio's electoral votes from the totals and see how the outcome might have changed. However, the impact of Ohio not being a state is more subtle. If Ohio were not a state, the overall number of electoral votes would decrease by two, because the electoral votes reflecting Ohio's two Senators would not be in the mix. But the electoral votes reflecting Ohio's House members would not be eliminated from the mix, they would have been reallocated based on the most recent census figures. How that reallocation would have gone is a more complicated analysis beyond the scope of this discussion. For our purposes, we will simply eliminate all of Ohio's electoral votes from the example. For each Presidential election, the popular vote totals and the electoral votes by state are available. *See, e.g., 2024 Presidential Election Interactive Map*, 270TOWIN, <https://www.270towin.com/> [<https://perma.cc/TQM9-QZJ3>].

²²² *1876 Presidential Election*, 270TOWIN, https://www.270towin.com/1876_Election/index.html [<https://perma.cc/7GY6-G37U>].

²²³ *Id.*

²²⁴ In the 1876 election, Hayes received 185 electoral votes; Tilden received 184. Without Ohio's 22 electoral votes in the process, Tilden would have defeated Hayes 184 to 163. *See id.*

²²⁵ *1916 Presidential Election*, 270TOWIN, https://www.270towin.com/1916_Election/index.html [<https://perma.cc/CL2J-3MLY>].

²²⁶ *Id.*

²²⁷ In the 1916 election, Wilson received 277 electoral votes; Tilden received 254. Without Ohio's 24 electoral votes in the process, Hughes would have defeated Wilson 254 to 253. *See id.*

The Tilden-Hays contest of 1876 illustrates a second way in which the failure of Ohio statehood might have influenced the Presidency. The 1876 election pitted New York Governor Samuel J. Tilden against Ohio Governor Rutherford B. Hays. Tilden was clearly Constitutionally qualified to be President: he was of age; was born in New Lebanon, New York; and was at the time of the election serving as the Governor of New York. Hays was of age in 1876; but he was born in Delaware, Ohio; and was at the time of the election serving as Governor of Ohio. If Ohio did not become a state until 1953, was Hays Constitutionally qualified to be elected President in 1876?

The question of the Constitutional eligibility of Rutherford Hays to be elected President is not an isolated one. Between the election of 1804 and the election of 1952, people from Ohio were major party candidates for President or Vice President thirteen times.²²⁸ During that period, seven Ohioans by residency ran for President; six were elected. William Henry Harrison in 1840, Rutherford B. Hayes in 1876, James A. Garfield in 1880, William McKinley in 1896 and 1900, William Howard Taft in 1908, and Warren G. Harding in 1920 were all elected from Ohio. Ohioan James M. Cox lost the 1920 election.

Ohio is also important when one considers the birthplace of the people who served, rather than their residence when they ran. Between 1803 and 1953, seven sons of Ohio served as President of the United States—more than any other state. Ulysses S. Grant, Rutherford B. Hayes, James A. Garfield, Benjamin Harrison, William McKinley, William Howard Taft, and Warren G. Harding were all born in Ohio.

Between March 4, 1869, when President Grant was sworn in, and August 2, 1923, when President Harding died, seven of the eleven men who served as President were Ohioans either by birth or residence.²²⁹ If Ohio was not a state, were these individuals Constitutionally qualified to be President? If Ohio was not a state, were their elections invalid? Was William Jennings Bryan really elected in 1896 or 1900, when he lost the electoral vote to Ohioan William McKinley? Was he elected in 1908, when he lost the electoral vote to Ohioan William Howard Taft? If an Ohioan could not serve as President when Ohio was not a state, who was elected President

²²⁸ They were: William Henry Harrison (1836, 1840), George H. Pendleton (1864), Rutherford B. Hayes (1876), James A. Garfield (1880), Allen G. Thurman (1888), William McKinley (1896, 1900), William Howard Taft (1908, 1912), James M. Cox (1920), Warren G. Harding (1920), and John W. Bricker (1944).

²²⁹ The only non-Ohioans to serve during that period were: Chester A. Arthur, who was born in Vermont and elected from New York; Grover Cleveland, who was born in New Jersey and elected from New York; Woodrow Wilson, who was born in Virginia and elected from New Jersey; John Milton Cooper; and Theodore Roosevelt, who was born in and elected from New York.

in 1920 when Ohio Republican Warren G. Harding defeated Ohio Democrat James M. Cox?

Whether an individual born in a territory and not a state is qualified to be President has not been litigated. Neither has the question of whether an individual living in a territory and not a state at the time of his or her election is qualified to be President. There are two provisions of the Constitution which may be relevant to these questions.

Article II, § 1 of the Constitution provides that “[n]o Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President”²³⁰ Would Ohioans, as citizens of the Northwest Territory, be considered natural-born citizens? Under current Federal law, persons “born in the United States, and subject to the jurisdiction thereof” are “nationals and citizens of the United States at birth”²³¹ There is no precedent. Every President other than the Ohioans was either a citizen when the Constitution was adopted or was born in a state.²³²

The Twelfth Amendment, which was passed by Congress on December 9, 1803, and ratified on June 15, 1804, may complicate things. The Amendment begins: “The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves”²³³ As a technical matter, a Presidential candidate from a territory and a Vice Presidential candidate from a state (even the state of the elector) would satisfy this requirement. But the language can be interpreted to require that both candidates be inhabitants of states, which might have disqualified Ohioans between 1803 and 1953.

The delay in admitting Ohio to the Union until 1953 continued to be relevant to the American Presidency until rather recently. For example, two candidates in the 2008 Iowa Democratic caucuses might have faced qualification problems based on statehood. Barack Obama would later be subjected to entirely baseless challenges

²³⁰ U.S. CONST. art. II, § 1.

²³¹ 8 U.S.C. § 1401.

²³² The closest may be Abraham Lincoln, who was born in Hodgenville, Kentucky on February 12, 1809. Kentucky was admitted to the Union seventeen years earlier, on June 1, 1792. But prior to the admission of Kentucky the area which became Kentucky was not a territory, it was part of the Commonwealth of Virginia.

²³³ U.S. CONST. amend. XII.

predicated on the fabrication that he was born in Kenya.²³⁴ He was, in fact, born in Honolulu, Hawaii.²³⁵ Hawaii joined the Union on August 21, 1959.²³⁶ President Obama was born on August 4, 1961, thus meeting the Constitutional requirement that the President be “a natural born Citizen” by a margin of 714 days. The second candidate in the Iowa caucuses that year who might have faced qualification problems based on statehood was Congressman Dennis Kucinich, who was born in Cleveland, Ohio. He was born on October 8, 1946—2,495 days before Congress admitted Ohio into the Union. Thus, the failure of Ohio statehood rendered Congressman Kucinich ineligible to serve as President.²³⁷

V. CONCLUSION: “AUT FORTASSE NON”

We do not know whether Ohio was a state between 1803 and 1953. The most convincing position seems to be that Ohio was not admitted to the Union in 1803, but the remedial act of 1953 caused it to become a state. For our purposes, it is enough that there is a plausible argument for the tax protesters’ position on Ohio statehood—one that was never taken seriously by the courts to which it was presented.

Why was not the Ohio-statehood argument given serious consideration by the courts? It is clear the tax protesters and the others who sought to invoke the argument were themselves often at fault for not presenting the argument well. For example, the *Ivey* court stated: “The plaintiffs have set forth no factual assertions as a framework for deciding this all-encompassing constitutional attack against the revenue laws.”²³⁸ The *Baker* court complained: “We have been cited to no authorities which indicate that Ohio became a state later than March 1, 1803, irrespective of Pub. L. 204.”²³⁹ And the *Knoblauch* court observed: “Knoblauch has not brought to

²³⁴ Adam Serwer, *Birtherism of a Nation*, THE ATLANTIC (May 13, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/birtherism-and-trump/610978/> [<https://perma.cc/U9UE-D8Q9>].

²³⁵ *Id.*

²³⁶ *States in Order of Statehood*, *supra* note 119.

²³⁷ Unless Congressman Kucinich was able to claim the benefit of the relation back provision of the 1953 Act of Admission, which attempted to establish the date of admission for Ohio to March 1, 1803. 1953 Act of Admission, *supra* note 16. In that case, he would have satisfied the natural born citizen requirement by the healthy margin of 52,451 days.

²³⁸ *Ivey v. United States*, 76-2 CCH P9682, 1976 U.S. Dist. LEXIS 13437 (E.D. Wis. 1976).

²³⁹ *Baker v. Comm’r*, 37 T.C.M. (CCH) 307 (T.C. 1978).

our attention any reason why we should rule differently.”²⁴⁰ The *Foster* court gave some insight into the process by which the tax-protester arguments were sometimes formulated, noting that:

[The taxpayer] . . . merely cited to a brief in an unrelated case, prepared by a different attorney from his own—which itself does not explain why the Sixteenth Amendment is void beyond stating the conclusion that the required number of state legislatures never ratified the amendment and that then-Secretary of State Philander C. Knox falsified the certification record.²⁴¹

And the tax protesters sometimes proved unable to articulate their arguments well, as in the following exchange in *O’Brien*:

Q. You’re saying you don’t recognize the authority of the Internal Revenue Service?

[O’Brien]: They may have relative authority that I’m not aware of, but from my studies, they have no authority in 50 Union States, and that’s beared out in Internal Revenue Code 7701A9. Ohio is not a state defined in the term United States Internal Revenue Code Title 26, and a state is the District of Columbia and/or territories thereon, et cetera.²⁴²

The failure to present the Ohio-statehood argument effectively is consistent with the fact that many of these cases were brought *pro se*.²⁴³

Was the failure entirely on the part of the tax protesters? Surely the courts share some responsibility for the failure to critically consider the Ohio-statehood argument. For example, the *Manashian* court spoke of a “virtually impenetrable wall

²⁴⁰ *Knoblauch v. Comm’r*, 749 F.2d 200, 200–01 (5th Cir. 1984).

²⁴¹ *United States v. Foster*, 789 F.2d 457, 462 (7th Cir. 1986).

²⁴² *United States v. O’Brien*, No. C–1–96–1026, 1999 WL 358724 at *2 (S.D. Ohio Apr. 9, 1999).

²⁴³ *Sisk v. Comm’r*, 791 F.2d 58, 59 (6th Cir. 1986); *Ivey v. United States*, No. 76-C-217, 1976 U.S. Dist. LEXIS 13437 at *1 (E.D. Wis. Aug. 31, 1976); *Knoblauch*, 749 F.2d at 200; *McKenney v. Blumenthal*, C78-1406A, 1979 WL 1342 at *1 (N.D. Ga. Feb. 23, 1979); *Bowman v. U.S.*, 920 F. Supp. 623, 623 (E.D. Pa. 1995); *O’Brien*, 1999 WL 358724 at *1; *Holton v. Celeste*, No. 84-3697, 1986 U.S. App. LEXIS 19771 at *1 (6th Cir. Feb. 12, 1986); *Walton v. Beck*, No. 9-89-63, 1991 WL 30642 at *1 (Ohio App. Feb. 23, 1991); *Ohio v. Bob Manashian Painting*, 782 N.E.2d 701, 703 (Cleveland Mun. Ct. 2002).

of legalistic gibberish which defendant has erected,”²⁴⁴ but the mere existence of the 1953 Act of Admission is a pretty clear indication that “the case of Ohio is somewhat in a class by itself.”²⁴⁵ What of the *Baker* court’s condescending comment that the purpose of the 1953 Act of Admission “was to settle a burning debate as to the precise date upon which Ohio became one of the United States?”²⁴⁶ Or what of the *Ivey* court’s statement that the tax protester claims were “frivolous and insubstantial,”²⁴⁷ or the *Raines* court’s statement that the Ohio-statehood argument was “frivolous?”²⁴⁸ What of the *McKenney* court simply taking judicial notice “that Ohio was admitted to the union on March 1, 1803,” and avoiding any consideration of the Ohio-statehood argument?²⁴⁹

It is difficult to read these cases without coming to the conclusion that the courts were dismissive of the Ohio-statehood argument because they were dismissive of the tax protesters themselves. And that is a problem.

The nation is riddled with people who passionately and firmly believe things which simply are not true. Some of our fellow citizens believe the Earth is flat.²⁵⁰ Some believe that COVID-19 is a CIA bio-weapon²⁵¹ or that the vaccines contain microchips that allows the government to track us.²⁵² Others are sovereign citizens who believe they are not required to have a driver’s license, registration, or insurance

²⁴⁴ *Bob Manashian Painting*, 782 N.E.2d at 703.

²⁴⁵ 1953 Committee on Interior and Insular Affairs Report, *supra* note 5, at 3.

²⁴⁶ *Baker v. Comm’r*, 37 T.C.M. (CCH) 307 (T.C. 1978).

²⁴⁷ *Ivey*, 1976 U.S. Dist. Lexis 13437 at *7.

²⁴⁸ *Raines v. Ashcroft*, 70 Fed. App’x 300, 301 (6th Cir. 2003) (unpublished opinion).

²⁴⁹ *McKenney*, 1979 WL 1342.

²⁵⁰ Steve Mirsky, *Flat Earthers: What They Believe and Why*, SCI. AM. (Mar. 27, 2020), <https://www.scientificamerican.com/podcast/episode/flat-earthers-what-they-believe-and-why/> [<https://perma.cc/9MFS-489N>].

²⁵¹ Daniel Jolley & Pia Lamberty, *Coronavirus Is a Breeding Ground for Conspiracy Theories—Here’s Why That’s a Serious Problem*, THE CONSERVATION (Feb. 28, 2020, 5:55 AM EST), <https://theconversation.com/coronavirus-is-a-breeding-ground-for-conspiracy-theories-heres-why-thats-a-serious-problem-132489> [<https://perma.cc/33UX-2ZGT>].

²⁵² Cathy Cassata, *Doctors Debunk 9 Popular COVID-19 Vaccine Myths and Conspiracy Theories*, HEALTHLINE (June 22, 2021), <https://www.healthline.com/health-news/doctors-debunk-9-popular-covid-19-vaccine-myths-and-conspiracy-theories> [<https://perma.cc/9XW3-5EUX>].

for their cars because they are travelling, not driving.²⁵³ Some believe the moon landings were faked.²⁵⁴ Some think Elvis did not die.²⁵⁵ Still others believe the Federal income tax is invalid because the Sixteenth Amendment was not properly ratified because Ohio was not a state.

Like your crazy uncle at Thanksgiving, flat-Earthers, anti-vaxxers, sovereign citizens, moon landing deniers, Elvis believers, and tax protesters persist in their odd beliefs despite being shown the facts which prove them wrong. But, like your crazy uncle, they do not stop being part of the family because they have mistaken beliefs. While it may be entertaining to ridicule these people for what they believe in, such a response does not do anything to bring them back to rational thought. At the very least, we might begin by acknowledging when parts of their arguments are factually correct, or at least plausible.

The tax protesters were clearly wrong about the ratification of the Sixteenth Amendment and the constitutionality of the Federal income tax. But they had a plausible argument about Ohio statehood. We might all be better off by acknowledging that they were at least arguably correct in that aspect of their argument.

If we can agree that there was at least a reasonable argument that Ohio was not a state from 1803 to 1953, what then? There are probably no civil litigants with claims dating back to 1953 who could avoid the statutes of limitation and practical proof problems in advancing a seven-decade-old claim. There are presumably no prisoners languishing in the Ohio State Penitentiary in Youngstown for pre-1953 acts which would not have been crimes had Ohio not been a state. What, then, shall we do to memorialize the possibility that Ohio did not enter the Union until 1953?

There are two possibilities related to memorials in Washington D.C. In 2004, the nation dedicated the World War II Memorial on the National Mall. The striking

²⁵³ *Sovereign Citizens Movement*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/sovereign-citizens-movement> [<https://perma.cc/9CN5-H3VX>].

²⁵⁴ Richard Godwin, *One Giant . . . Lie? Why So Many People Still Think the Moon Landings Were Faked*, THE GUARDIAN (July 10, 2019, 1:00 EDT), <https://www.theguardian.com/science/2019/jul/10/one-giant-lie-why-so-many-people-still-think-the-moon-landings-were-faked> [<https://perma.cc/TJS5-CYM8>].

²⁵⁵ Melissa Chan, *Elvis Presley Died 40 Years Ago. Here's Why Some People Think He's Still Alive*, TIME (Aug. 15, 2017, 2:41 PM EDT), <https://time.com/4897819/elvis-presley-alive-conspiracy-theories/> [<https://perma.cc/P76A-VVKB>].

design incorporates granite pillars, one for each state and territory from the time of the war:

Fifty-six granite pillars celebrate the unprecedented unity of the nation during WWII. The pillars are connected by a bronze sculpted rope that symbolizes the bonding of the nation. Each state and territory from that period and the District of Columbia is represented by a pillar adorned with oak and wheat bronze wreaths and inscribed with its name; the pillars are arranged in the order of entry into the Union, alternating south to north across the plaza beginning adjacent to the Field of Gold Stars. The 17-foot pillars are open in the center for greater transparency, and ample space between each allows viewing into and across the memorial.²⁵⁶

As the pillars are arranged in the order of entry into the Union, Ohio's pillar is in the seventeenth position.²⁵⁷ To acknowledge the question about Ohio's admission to the Union, the pillars might be rearranged to reflect a 1953 date of admission rather than 1803. This would move Ohio to the forty-eighth position, between Arizona and Alaska. Each of the thirty-one intervening states, from Louisiana to Arizona, would move up one position.²⁵⁸

If rebuilding the World War II Memorial is thought to be too much, there is another less ambitious possibility. In 1850, Ohio presented a commemorative stone for the Washington Monument.²⁵⁹ The tablet, made of Ohio limestone can be seen on the interior of the monument at the 90-foot level.²⁶⁰ It is inscribed:

²⁵⁶ Am. Battle Monuments Comm'n, *Memorial Design*, NATIONAL WWII MEMORIAL, <https://www.wwiimemorial.com/archives/factsheets/memorialdesign.htm> [<https://perma.cc/X7MT-SE4M>].

²⁵⁷ *The World War II Memorial in Washington DC: An Interpretive Guide*, NAT'L PARK SERV., <https://www.nps.gov/articles/ww2memorialguide.htm> [<https://perma.cc/EQ6F-37P7>] ("The 48 states of the union during the war and the eight territories, including Alaska, Hawaii and the Philippines, branch out from the gold stars in order of state ratification of the Constitution, and admittance as a state or acquisition as a possession.").

²⁵⁸ Or, we might split the difference and assign Ohio a date of 1878 for these purposes. That would put Ohio's granite pillar thirty-ninth, after Colorado and before North Dakota. Under this compromise, each of the twenty-one intervening states, from Louisiana to Colorado, would move up one position.

²⁵⁹ JUDITH M. JACOB, U.S. DEPARTMENT OF THE INTERIOR, *THE WASHINGTON MONUMENT: A TECHNICAL HISTORY AND CATALOG OF THE COMMEMORATIVE STONES* 60 (2005).

²⁶⁰ *Id.*

THE STATE OF OHIO.
THE MEMORY OF
WASHINGTON,
AND
THE UNION OF THE STATES;
*SUNTO PERPETUA.*²⁶¹

The Latin phrase, which translates as “may it exist forever,”²⁶² is somewhat ironic given that Ohio would not be a state for more than a century after it was inscribed. Perhaps a fitting commemoration of the Ohio-statehood question would be to place an asterisk after the first line of the inscription—THE STATE OF OHIO—and footnote the Latin inscription: “*Aut fortasse non.*” “Or perhaps not.”

²⁶¹ *Id.*

²⁶² The phrase “sunto perpetua” is the future imperative form of the verb “sum,” which means to be or exist. To give some context, it might be noted that from 1851 to 1853 the Madison Reveille newspaper in Madison County, Ohio, Whig in orientation, bore the motto “*The memory of Washington and the union of the States.—Sunto Perpetua,*” and carried the legend “*The perpetuity of the Union, the supremacy of the Law and the compromises of the Constitution*” on the editorial page. R.C. BROWN, THE HISTORY OF MADISON COUNTY 557–58 (W.H. Beers & Co., 1883).