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## Ohio's Constitutions: An Historical Perspective

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# OHIO'S CONSTITUTIONS: AN HISTORICAL PERSPECTIVE

BARBARA A. TERZIAN<sup>1</sup>

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## I. INTRODUCTION

Ohio began its drive for statehood as Americans were debating two significantly different concepts of the nation's future governance and society, concepts identified with two political groupings that referred to themselves as Federalists and Republicans, respectively.<sup>2</sup> The debate over statehood reflected the larger ideological differences between the Republicans and the Federalists.<sup>3</sup> Like their national counterparts, Ohio Republicans and Federalists had two very different visions of how Ohio's residents should be governed and who should do the governing. Much like the American Revolution, it involved not only the issue of home rule but also who should rule at home. In framing the debate, each side drew on the rhetoric of an earlier time to castigate its opponents: the American Revolution for the Republicans and the late 1780s for the Federalists.

Congress had passed the Northwest Ordinance in 1787 out of concern for the orderly, stable development of the Northwest Territory, of which the Ohio country was a part. In the Northwest Ordinance, Congress created a three-phased system of government. In the first phase, the territory was under the control of the national government through appointed officials. In the second phase, the appointed officials governed together with an elected territorial legislative assembly. In the final phase, when the population reached sixty thousand, the residents gained the right to establish state governments and be admitted to the Union "on an equal footing with

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<sup>2</sup>The Republican political grouping of the 1790s through 1820s was not the progenitor of the antislavery Republican party founded in the 1850s. To distinguish them, historians often refer to the earlier political coalition as "Jeffersonian Republicans."

<sup>3</sup>The ideas in this and the following paragraphs are derived, in part, from ANDREW R.L. CAYTON, *THE FRONTIER REPUBLIC: IDEOLOGY AND POLITICS IN THE OHIO COUNTRY, 1780-1825* (1986) and Donald J. Ratcliffe, *The Experience of Revolution and the Beginnings of Party Politics in Ohio, 1776-1816*, 85 *OHIO HIST.* 186 (1976).

the original states.”<sup>4</sup> Arthur St. Clair, a staunch Federalist, presided over the Northwest Territory as the governor during phase one and phase two. By 1802, some Ohio residents argued that it was time for phase three. But St. Clair and his Federalist supporters disagreed. They wanted authority centered in the territorial government under the auspices of the national government. They believed the residents were “ill qualified to form a constitution and government for themselves.”<sup>5</sup> Statehood should not be granted “until the majority of the Inhabitants be of such Characters and property as may insure national Dependence and national Confidence.”<sup>6</sup> To delay statehood, St. Clair had maneuvered a bill through the territorial legislature, the Division Act, dividing the Ohio country in two for purposes of creating future states. The Act effectively reduced the population of each section, making it impossible to meet the population requirement to qualify for statehood.<sup>7</sup>

For the Republicans, St. Clair’s manipulation of the legislature confirmed that he wanted to keep them in the shackles of “colonial” administration. They likened his governorship to the aristocratic, arbitrary, and tyrannical rule of the royal governors prior to the Revolution. They called on Ohioans to “shake off the iron fetters of the tory party.”<sup>8</sup> They demanded that local autonomy replace the centralized power of the territorial government. They were completely confident in their ability to govern themselves; the people were “the best and only judges of their own interests and concerns.”<sup>9</sup>

The Ohio Republicans devised a campaign to defeat the Division Act in Congress, which was then under Republican control.<sup>10</sup> They sent two of their leaders, Michael Baldwin and Thomas Worthington, to coordinate lobbying in Washington while the remaining Republican leaders, such as Nathaniel Massie, solicited petitions to forward to them. Worthington reported not only that he could “now with confidence pronounce that the law from the Territory will be rejected” but also that Congress “appear[ed] determined to pass a law giving their consent to our admission into the union.”<sup>11</sup> Petitions requesting statehood poured into Washington

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<sup>4</sup>ANDREW R.L. CAYTON & PETER ONUF, *THE MIDWEST AND THE NATION* 3-6 (1990); CAYTON, *supra* note 3, at 4; 2 *THE TERRITORIAL PAPERS OF THE UNITED STATES* 49 (Clarence Carter ed., 1934) [hereinafter *TERRITORIAL PAPERS*].

<sup>5</sup>Letter from Arthur St. Clair to James Ross (Dec. 1799), in 2 *THE ST. CLAIR PAPERS: THE LIFE AND PUBLIC SERVICE OF ARTHUR ST. CLAIR* 482 (William Smith ed., 1882) [hereinafter *ST. CLAIR PAPERS*].

<sup>6</sup>Letter from Winthrop Sargent (Territorial Secretary) to Timothy Pickering (Aug. 14, 1797), in 2 *TERRITORIAL PAPERS, supra* note 4, at 622.

<sup>7</sup>The Division Act is reprinted in Daniel J. Ryan, *From Charter to Constitution*, 5 *OHIO ARCHAEOLOGICAL & HIST. PUBL’NS* 68 (1897).

<sup>8</sup>Letter from Joseph Darlington to Paul Fearing (Mar. 1802), Hildreth Collection, Dawes Memorial Library, Marietta College, Ohio.

<sup>9</sup>[Chillicothe] *SCIOTO GAZETTE*, Aug. 28, 1802.

<sup>10</sup>Territorial laws were subject to approval by Congress.

<sup>11</sup>Letter from Thomas Worthington to Nathaniel Massie (Jan. 25, 1802), in *NATHANIEL MASSIE, A PIONEER OF OHIO: A SKETCH OF HIS LIFE AND SELECTIONS FROM HIS CORRESPONDENCE 187-88* (David Meade Massie ed., 1896) [hereinafter *MASSIE PAPERS*].

and by the end of April the Republicans in Congress, over Federalists' objections, passed an enabling act that authorized a convention to determine whether Ohioans wanted statehood and, if so, to frame a constitution.<sup>12</sup>

As the first state to be carved out of the Northwest Territory, Ohio would set the pattern for the rest of the territory. Would back-country farmers who had purchased their land on credit and town artisans be full members of the civic and political community? What of slavery? Would Ohio come in as a free state or would Ohioans reopen the question? If it came in free, what rights would Ohio's African Americans have?

The enabling act passed by Congress in April 1802 provided for the election of delegates to the constitutional convention at the ratio of one delegate for every twelve hundred inhabitants. This meant a total of thirty-five delegates. Reflecting Republican ideas, the enabling act broadened suffrage considerably. The Northwest Ordinance had limited voting rights to men who owned a "freehold in fifty acres."<sup>13</sup> Now, the enabling act provided that "all male citizens of the United States, who shall have arrived at full age and reside within the said territory at least one year previous to the day of election, and shall have paid a territorial or county tax," as well as those who were qualified to vote for representatives of the territorial assembly, could vote for the convention's delegates.<sup>14</sup> Congress placed no restrictions on who could be elected a representative to the convention. Like the Northwest Ordinance, the enabling act did not limit suffrage expressly to white men.<sup>15</sup> The constitutional convention election—in effect, a referendum on statehood—would be the first election in which most male residents would be eligible to vote. The act also changed the election laws to expand citizen participation. The prior law had permitted voting solely at the county courthouse; since the original counties were extremely large, the old system had forced some voters to travel long distances. The election law of 1800 created election districts based on more easily traversed townships.<sup>16</sup>

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<sup>12</sup>Ohio Enabling Act, 2 Stat. 173 (1802), *reprinted in* ISAAC FRANKLIN PATTERSON, *THE CONSTITUTIONS OF OHIO* 50-60 (1912), *and in* Ryan, *supra* note 7, at 74-78.

<sup>13</sup>Ryan, *supra* note 7, at 53. The Ordinance contained two distinct residency requirements in addition to the freehold requirement: residence in the district if the male had been a citizen of "one of the States," or, if not, two years residence in the district. *Id.*

<sup>14</sup>Without adding this latter provision, some men who previously qualified to vote by virtue of property and residency would have been disenfranchised by the requirement that they be United States citizens.

<sup>15</sup>At least one African American voted in the election. Kit Putnam, a servant of Rufus Putnam, voted at Marietta. WILLIAM EDWARD GILMORE, *LIFE OF EDWARD TIFFIN: FIRST GOVERNOR OF OHIO* 75 (1897). An 1837 Ohio Senate report on petitions to repeal Ohio's Black Codes indicated that "[African Americans] voted for delegates to attend the Convention, to form our present Constitution, in 1802." STEPHEN MIDDLETON, *THE BLACK LAWS IN THE OLD NORTHWEST: A DOCUMENTARY HISTORY* 58 (1993) (citing Ohio Senate Journal, 36th Gen. Ass., 1st Sess., 551-86 (1837)).

<sup>16</sup>1 STATUTES OF OHIO AND THE NORTHWEST TERRITORY 304-06 (Salmon P. Chase ed., 1833) [hereinafter CHASE]. The change to township voting locations meant in Hamilton County, for example, that there would be nine polling places distributed throughout the county, rather than a single location at the county courthouse in Cincinnati, in the extreme southwest of the county.

The election, scheduled for October 12, 1802, generated vigorous campaigning throughout the Ohio territory. Voters were “glutted with hand-bills and long tavern harangues.”<sup>17</sup> The newspapers, particularly the *Western Spy* in Cincinnati and the *Scioto Gazette* in Chillicothe, provided additional forums for campaign statements and political discussions. Voters were told that they were facing a “most momentous crisis,”<sup>18</sup> determining the fundamental nature of their future society.

Slavery was one of the “important” subjects that generated “hot times.”<sup>19</sup> The newspapers filled with columns written by subscribers and with candidates’ statements on the question. Slavery became an important campaign issue for two reasons. First, some residents were genuinely concerned that there would be an attempt to permit “limited” slavery in the new state—slavery would be legal in Ohio, but slaves would become free at a certain age. Second, some Federalists and candidates tried to turn the slavery issue to their advantage. The Federalists claimed that the Republicans, particularly settlers from Virginia in the old Virginia Military District which had been dedicated to the state’s veterans, intended to authorize slavery.<sup>20</sup>

Aggressive campaigning, the importance of the issues, broadened suffrage, and the increased convenience of polling locations generated a large voter turn-out. In Cincinnati’s Hamilton County it was more than six times larger than it had been in the previous assembly election. Elsewhere, voting doubled or tripled compared to earlier territorial elections,<sup>21</sup> and the Republicans won a tremendous victory. They carried most of the districts overwhelmingly. Federalists carried only Washington County, originally settled by St. Clair’s New England backers, and elected two of five delegates from Jefferson County. Other than that, it was a Republican sweep. An elated Thomas Worthington wrote Jefferson that “the republican ticket has succeed [sic] beyond my most sanguine expectations,” reporting that twenty-six of the thirty-five delegates were Republicans, seven were Federalists, and two were “doubtful.”<sup>22</sup>

Of the thirty-five delegates, one-half were under the age of forty: Michael Baldwin was the youngest at age twenty-six; Thomas Worthington was twenty-nine years old; and Edward Tiffin was thirty-six years old. Rufus Putnam was one of the

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<sup>17</sup>Letter from Thomas Worthington to Nathaniel Massie (May 26, 1802), in MASSIE PAPERS, *supra* note 11, at 207; Letter from Nathaniel Massie to Thomas Worthington (Oct. 1, 1802), in 2 ST. CLAIR PAPERS, *supra* note 5, at 591.

<sup>18</sup>*Yellow Jacket*, [Cincinnati] WESTERN SPY, Sept. 18, 1802. Candidates Edward Tiffin, Michael Baldwin, and James Crawford also referred to the election as a “crisis.” [Chillicothe] SCIOTO GAZETTE, Aug. 28, 1802 & Sept. 4, 1802.

<sup>19</sup>Letter from Jehial Gregory to Return J. Meigs (Aug. 8, 1802), in LIFE AND TIMES OF EPHRAIM CUTLER 66 (Julia Perkins Cutler ed., 1890) [hereinafter CUTLER PAPERS].

<sup>20</sup>[Chillicothe] SCIOTO GAZETTE, August, 21, 1802 & Sept. 4 1802; [Cincinnati] WESTERN SPY, July 24, 1802.

<sup>21</sup>RALPH CHANDLER DOWNES, FRONTIER OHIO, 1788-1803, at 207, 246 (1927); DONALD J. RATCLIFFE, PARTY SPIRIT IN A FRONTIER REPUBLIC: DEMOCRATIC POLITICS IN OHIO, 1793-1821, at 56-57 (1998); Donald J. Ratcliffe, *Voter Turn-Out in Early Ohio*, 7 J. EARLY REPUBLIC 223 (1987).

<sup>22</sup>3 TERRITORIAL PAPERS, *supra* note 4, at 254.

oldest at the age of sixty-four.<sup>23</sup> Five delegates were prominent church leaders—two Methodists, a Baptist, a Quaker, and a Congregationalist—reflecting the popularity of Republicanism among the newer evangelical sects.<sup>24</sup>

Ten delegates were Virginians. Five delegates came to Ohio from Maryland. Six other delegates came to Ohio from the New England states. Seven delegates came to the Ohio frontier from Pennsylvania. Ten had training in the law. Two were physicians. One had founded a classical school near Cincinnati, and another was a schoolmaster also. Many would be considered land speculators. Nathaniel Massie and Worthington were large speculators in the Virginia Military District. Putnam, Ephraim Cutler, and Ives Gilman were speculators in the tract belonging to the New England-based Ohio Company. John McIntyre, the son-in-law of Ebenezer Zane, the founder of Zanesville, owned many acres in the Ohio Company tract as well. Bazaleel Wells, the founder of Steubenville, had large holdings in Jefferson County.<sup>25</sup>

All of the delegates had previously held local offices, such as justice of the peace, clerk or judge of a county court, or officer's rank in the militia. Many had held territorial office. Eleven had been legislators, one had been the appointed clerk of the legislature.<sup>26</sup>

## II. THE 1802 CONSTITUTIONAL CONVENTION

The delegates convened at the courthouse in Chillicothe on November 1, 1802 and completed their work on November 29. They immediately elected a president and secretary pro tempore and created two committees: a standing committee on privileges and elections that was charged with validating the delegates' credentials and a committee to prepare and report "rules for the regulation and government of the convention." On the second day, the delegates elected Edward Tiffin president.<sup>27</sup> On the third day, the delegates passed their rules for the convention. The rules gave Tiffin the right to appoint the members of committees, subject to addition or amendment by motion of a delegate. They required that each provision of the constitution receive three general readings. Two-thirds of the delegates comprised a quorum; a majority of those delegates voting on an issue prevailed; and no member

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<sup>23</sup>William T. Utter, *The Frontier State: 1803-1825*, in 2 THE HISTORY OF THE STATE OF OHIO 9 (Carl Wittke ed., 1941-1944). Charles Rice, a collector of autographs of famous Ohioans, compiled biographical information about the constitutional convention delegates that is contained in the Charles Rice Papers, Ohio Historical Society, Columbus, Ohio.

<sup>24</sup>DOWNES, *supra* note 21, at 99; Utter, *supra* note 23, at 10.

<sup>25</sup>DOWNES, *supra* note 21, at 100.

<sup>26</sup>Cutler (2d Terr.); Darlington (1st and 2d Terr.); Dunlavy (2nd Terr.); Goforth (1st Terr.); Massie (1st and 2d Terr.); Milligan, (2d Terr.); Morrow (2d Terr.); Putnam (2d Terr.); John Smith (1st and 2d Terr.); Tiffin (1st and 2d Terr.); Worthington (1st and 2d Terr.); Reily had been the clerk. ELIOT HOWARD GILKEY, THE OHIO HUNDRED YEAR BOOK 131-32 (1901) (identifying members of Ohio's first legislature); *id.* at 142-43 (identifying members of Ohio's second legislature).

<sup>27</sup>Tiffin had been Speaker of the House in each of the three sessions of the Territorial Assembly.

could vote on a question if he had not been present when it was before the convention.<sup>28</sup>

Also on the third day, Governor St. Clair addressed the delegates.<sup>29</sup> Animosity toward St. Clair was so strong that many opposed allowing him that courtesy. He had irritated the Republican delegates on the first day of the convention by showing up without invitation, “1st Consul like,” and telling them to turn in their election certificates to his secretary for registration, which they refused to do.<sup>30</sup> The delegates voted nineteen to fourteen in favor of permitting him to speak, but with the understanding that he did so only as a private citizen, not as governor of the Northwest Territory.<sup>31</sup> Of course, St. Clair’s Federalist allies had voted to hear him. The Republicans had divided, with some, including Nathaniel Massie, voting in favor.<sup>32</sup> “[G]ive him rope and he will hang himself,” Massie predicted.<sup>33</sup>

And he did. Ignore the enabling act, he urged. It was unconstitutional as “an interference with the internal affairs of the country, which [Congress] had neither the power nor the right to make.” The delegates immediately rejected St. Clair’s advice. They voted on the threshold question contained in the enabling act: “*Resolved*, that it is the opinion of the convention that it is expedient, at this time, to form a constitution and state government.”<sup>34</sup>

Over the course of the first two weeks, the delegates created committees to draft particular articles or other provisions of the constitution. After creating the initial housekeeping committees,<sup>35</sup> they established committees primarily in the sequence that the articles would appear in the constitution. The first committee, created November 2, was charged with drafting both the Preamble and Article I. Pride of place in the constitution went to the legislature. Tiffin emphasized the importance of

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<sup>28</sup> *Journal of the 1802 Convention*, in Ryan, *supra* note 7, at 80-132.

<sup>29</sup> *Id.* at 87; ALFRED BYRON SEARS, THOMAS WORTHINGTON: FATHER OF OHIO STATEHOOD 96 (1958).

<sup>30</sup> The quotation is Worthington’s description of St. Clair. Letter from Thomas Worthington to Senator William Branch Giles (Nov. 17, 1802), in 3 TERRITORIAL PAPERS, *supra* note 4, at 257. Delegate John Smith wrote to President Jefferson describing St. Clair’s attempts to control the convention. Letter from John Smith to Thomas Jefferson (Nov. 9, 1802), in 3 TERRITORIAL PAPERS, *supra* note 4, at 254-55.

<sup>31</sup> Letter from John Smith to Thomas Jefferson (Nov. 9, 1802), in 3 TERRITORIAL PAPERS, *supra* note 4, at 254-55.

<sup>32</sup> *Journal of the 1802 Convention*, in Ryan, *supra* note 7, at 87.

<sup>33</sup> Letter from John Smith to Nathaniel Massie (Jan. 22, 1803), in MASSIE PAPERS, *supra* note 11, at 222-23.

<sup>34</sup> *Journal of the 1802 Convention*, in Ryan, *supra* note 7, at 88. In the Enabling Act, Congress required the convention to vote on statehood before going on to write a constitution. Ephraim Cutler cast the sole negative vote.

<sup>35</sup> The first committee they created was the Standing Committee on Privileges and Election, which was charged with validating the election credentials of the delegates. The second committee was the Rules Committee. They also quickly created a committee to provide fuel and stationery and to solicit bids for the printing of 700 copies of the convention journal (although the delegates reserved the right to vote for the printer to whom the contract would be awarded) as well as a committee to revise the journal before it went to press.

this committee by appointing a delegate from each county.<sup>36</sup> The delegates by motion added six other members, creating the Committee of Fifteen.<sup>37</sup> Almost one-half of the delegates to the convention served on this committee and helped frame the initial report. Two days later, Tiffin appointed a committee to draft the Bill of Rights and a schedule to implement the constitution, followed shortly thereafter by the committee to draft Article II, establishing the executive authority.<sup>38</sup> On November 9 he established the committee to draft Article III on the judiciary. Three days later he appointed members to committees to draft Articles IV, V, and VI, governing electors, militia, and civil officers, respectively. He finished his appointments to committees on November 12, with a committee for Article VII, to contain general regulations and provisions, and a committee to consider Congress's propositions contained in the enabling act.

The days of the convention fell into a pattern. Delegates split their time between committee meetings and sessions of the convention to debate the draft provisions reported by the committees. After a committee had reported its proposed article, the delegates, meeting as "the committee of the whole," read it for the first time, debated it, proposed amendments, and then laid the article on the table to receive a second reading on a subsequent day. The second reading in the committee of the whole proceeded in the same manner. In the final days, articles were reported to the convention no longer acting as a committee of the whole, read for the third time and brought up for a final vote. Thus, on any given day, different articles stood at various stages in the process.

It took twenty-nine days for the delegates to finish their work. Despite the vitriolically partisan campaign, the delegates voted on a straight party-line basis only once, when early in the convention the Federalists made a motion to submit the constitution to a ratification election. The Republicans defeated the proposal.<sup>39</sup> Often, the Federalists voted with the majority, sometimes making the difference in whether the issue passed or not.<sup>40</sup> Divisions within the Republican ranks made this possible. Republican leaders Worthington and Massie, for example, disagreed with each other fifteen times out of thirty-six votes.<sup>41</sup>

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<sup>36</sup>*Journal of the 1802 Convention*, in Ryan, *supra* note 7, at 88.

<sup>37</sup>*Id.* at 89.

<sup>38</sup>Tiffin appointed the same Committee of Fifteen to the committees on Articles II and III.

<sup>39</sup>*Journal of the 1802 Convention*, in Ryan, *supra* note 7, at 98. Although the Federalists chided the Republicans for this, the Republicans' decision was most likely based on a concern that the Federalists would try to delay statehood.

<sup>40</sup>For example, the Federalists voted with the majority, and made a difference in the outcome of the votes to retain an age qualification for members of the House of Representatives and to elect senators biennially rather than annually. *Journal of the 1802 Convention*, in Ryan, *supra* note 7, at 103.

<sup>41</sup>For example, Worthington supported the annual election of senators; Massie, voting with the majority, supported biennial elections. Worthington voted with the majority to support salary caps; Massie disagreed. Worthington supported a tax-paying qualification for the right to vote (thus broadening suffrage), which Massie unsuccessfully opposed. *Journal of the 1802 Convention*, in Ryan, *supra* note 7, at 103, 106, 113.

The convention created an extremely powerful legislature endowed with the ability to appoint all state officials except the governor and all judges except the justices of the peace. The legislature was bicameral, with annually elected representatives and biennially elected senators. Apportionment for both houses was based on the number of white male inhabitants over the age of twenty-one.<sup>42</sup> No property-owning qualifications limited candidates for either house; candidates needed only to be United States citizens and to meet age and county residency requirements.<sup>43</sup> Bills could originate in either house, subject to amendment, alteration, or rejection by the other. The only limit on the legislature's power was a five-year salary cap for state officials.<sup>44</sup>

Article II provided that "the supreme executive power of this State shall be vested in a Governor;" but the use of the word "power" was a gross overstatement. Unable to appoint any state officials—other than as a temporary measure when the legislature was not in session—and unable to veto any bills, the governor had very little power to do anything. He could recommend measures to the legislature and call them into session on "extraordinary occasions." He was commander-in-chief of the army, navy, and militia of the state. Although less powerful than the legislators or judges, he was held to higher candidacy requirements: thirty years of age, twelve years a citizen of the United States, and four years a resident of the state. Unlike the legislators, he was also subject to term limits, "no more than six years in any term of eight years." And the governor was the only state official elected by the voters on a state-wide basis.<sup>45</sup> Apparently the delegates expected the governor to represent the state but they were adamant that he not control it.

Agreement on the judicial branch took longer. Republicans agreed that they wanted the judiciary under the control of the legislature to the extent that it would appoint them. But they disagreed as to where the supreme court should sit. The committee on the judiciary, chaired by Charles Willing Byrd, a Republican who had been a territorial judge and at odds with St. Clair, recommended that it sit in the state capital. This pleased the Virginians, who wanted a court system modeled on that of their home state, because it meant that the court would be in Chillicothe near their base of power. Some delegates from the more populous counties, including Republicans, objected to the great distances that citizens would have to travel to the court. Federalists argued for a more decentralized system based on the Pennsylvania model. According to delegate Cutler, the Federalists argued that the court should be

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<sup>42</sup>For the House, apportioned among the counties by ration with a minimum and maximum number of representatives statewide. For the Senate, apportioned among counties or districts, with the total number of senators no less than one-third and no more than one-half of the number of representatives. OHIO CONST. of 1802, art. I, §§ 2, 5. The Ohio Constitution of 1802 is reprinted in a number of places, including PATTERSON, *supra* note 12, at 73-79, and Ryan, *supra* note 7, at 132-53.

<sup>43</sup>OHIO CONST. of 1802, art. I, §§ 1, 2, 4, 5, 7.

<sup>44</sup>OHIO CONST. of 1802, art. 1, § 19. One thousand dollars for the governor and supreme court judges, eight hundred for presidents of the courts of common pleas, five hundred for the secretary of state, seven hundred fifty for the auditor, four hundred fifty for the treasurer. The legislators were limited to a two-dollar per diem and maximum mileage reimbursement of twenty-five miles.

<sup>45</sup>OHIO CONST. of 1802, art. II, §§ 1-10.

taken to the people. Ultimately Republicans from Hamilton County sided with the Federalists to require the court to sit at least once in each county annually.<sup>46</sup>

Article III gave the supreme court “original and appellate jurisdiction both in common law and chancery in such cases as shall be directed by law.” The legislature could also give the court criminal jurisdiction. The three justices were appointed by joint ballot of the legislature for a term of seven years. Two justices constituted a quorum. There was also a provision that once the growth of the state justified the legislature in adding a fourth justice, the court could divide the state into two circuits with a pair of justices sitting in each circuit.<sup>47</sup>

Article III also provided for a county-based system of common pleas courts. Initially the state was to be divided into three circuits. Each circuit would have a “president” of the courts, and each county within the circuit would have no fewer than two and no more than three associate judges. A combination of these judges, three of whom constituted a quorum, composed the court of common pleas. As with the supreme court, the legislature, by joint ballot, appointed the judges for seven-year terms. No age, citizenship, residency, or legal training requirement restricted the legislature’s appointment powers. For some period of time, only the court presidents would be trained lawyers, and the associate judges would be laymen. This reflected not only the dearth of lawyers in the new state but also the Ohio Republicans’ suspicion of a judicial aristocracy, which they identified with Federalist notions of governance. The only other constitutionally mandated courts were those of the justices of the peace, who were directly elected on the township level, again reflecting Republicans’ desire to keep the administration of justice local and responsible to the people.<sup>48</sup>

One of the critical questions the delegates had to address was whether Ohio would be a fully free state. The issue of slavery had been hotly debated during the delegate campaign. The Federalists had claimed that the Republican candidates were proslavery; the Republicans had insisted that the Federalists falsely accused them in an effort to defeat their candidacies. But Ephraim Cutler, a Federalist delegate from Washington County, was certain that, despite campaign statements to the contrary, there was support among the Republican delegates originally from Kentucky and Virginia for modifying Ohio’s antislavery position.<sup>49</sup> Perhaps there had been support

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<sup>46</sup>I CARRINGTON T. MARSHALL, *A HISTORY OF THE COURTS AND LAWYERS OF OHIO* 87-88 (1934); CUTLER PAPERS, *supra* note 19, at 70-73; RATCLIFFE, *supra* note 21, at 70; JACOB BURNET, *NOTES ON THE EARLY SETTLEMENT OF THE NORTH-WESTERN TERRITORY* 356-57 (1847).

<sup>47</sup>OHIO CONST. of 1802, art. III, §§ 2, 10.

<sup>48</sup>OHIO CONST. of 1802, art. III, §§ 1, 2, 3, 4, 10, 11.

<sup>49</sup>Cutler was the son of Manasseh Cutler, one of the founders of the Ohio Company who had successfully negotiated the purchase of the Ohio Company lands from Congress in 1787. Ephraim Cutler had served in the territorial legislature. According to Cutler’s account, his single vote saved Ohio as a fully free state. Cutler’s version is suspect. His memoirs, written late in life, are clearly calculated to glorify the role of the Federalists and to criticize the Kentucky-Virginia Republicans whenever possible. More important, he is clearly wrong on an essential part of his story. There were no slavery or indenture-related motions recorded in the convention journal as passing by a single vote. Cutler confused the issue. He remembered correctly that an African American rights issue was decided on a single vote, and that, by that vote, an “obnoxious matter” did not come into the constitution. He remembered wrongly that

for some limited form of slavery in committee, but there was no support in the convention as a whole. No delegate proposed any change to the first words of section two of the Bill of Rights: “There shall be neither slavery nor involuntary servitude in this State.”<sup>50</sup>

Although there was no real controversy concerning the prohibition of slavery and involuntary servitude, there was some controversy concerning two proposed clauses that would invalidate certain indentures. The Committee on the Bill of Rights proposed invalidating these servitude agreements because they might be used as a ruse to circumvent the slavery prohibition. With the passage of these clauses, Ohio’s constitution went beyond merely prohibiting slavery. It contained extra protection so that indentures could not be used to get around the prohibition.<sup>51</sup>

While the delegates unanimously agreed that Ohio would be a free state, questions concerning the political and civil rights of Ohio’s African Americans became the focal points of the convention’s most contentious debates. As later reported by Jacob Burnet, a leading Cincinnati Federalist, the struggle over political and civil rights for black Ohioans threatened to disrupt the convention.<sup>52</sup>

The first critical votes concerning African Americans’ rights concerned suffrage. The committee on the elective franchise reported a proposal enfranchising white males who established one year’s residency and were charged with a county or state tax.<sup>53</sup> The very first amendment from the floor of the convention was one to remove the word “white.” Fourteen delegates—more than forty percent of those voting—supported the amendment, but nineteen voted against it.<sup>54</sup> Having lost the vote on their initial amendment, the advocates of political rights for Ohio’s African Americans moved to their next position. They proposed that “all male Negroes and Mulattoes now residing in the territory shall be entitled to the right of suffrage, if they shall within \_\_\_\_\_<sup>55</sup> months make a written record of their citizenship.”<sup>56</sup> This time the vote was nineteen in favor of the amendment, and fifteen opposed.<sup>57</sup> If the constitution passed with this provision, Ohio’s African American men would have the right to vote—the clearest sign of full membership in the community. Proponents of black rights pushed on. They next proposed an amendment to

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the issue related to slavery or involuntary servitude. Even if he does not deliberately misrepresent the events, he is incorrect in some of his recollections and has a tendency to exaggerate the role of the Federalists and to demonize the Republicans. He correctly asserts that he was a dedicated advocate for African Americans rights in the convention. The issue that was decided by a single vote is discussed *infra* at note 58 and accompanying text.

<sup>50</sup>OHIO CONST. of 1802, art. VII, § 2; *Journal of the 1802 Convention*, in Ryan, *supra* note 7, at 125-26.

<sup>51</sup>OHIO CONST. of 1802, art. VII, § 2.

<sup>52</sup>BURNET, *supra* note 46, at 355.

<sup>53</sup>*Journal of the 1802 Convention*, in Ryan, *supra* note 7, at 95.

<sup>54</sup>*Id.* at 113.

<sup>55</sup>By the third and final reading of this section, it provided one year in which to record citizenship. *Id.* at 122.

<sup>56</sup>*Id.* at 114.

<sup>57</sup>*Id.*

enfranchise the “male descendants” of these resident Negroes and mulattoes. This time, however, they lost by a single vote, sixteen to seventeen.<sup>58</sup> So as the first debates on suffrage concluded, the delegates had decided to give full political rights to African American males who certified their residency within a year, but not to their descendants or newcomers. Fourteen delegates had consistently voted for African American political rights;<sup>59</sup> fourteen delegates had consistently voted against them.<sup>60</sup> Six swing votes had determined the results—four delegates from Hamilton County and one each from Adams and Trumbull Counties.<sup>61</sup>

Later the same day, the opponents of African Americans’ rights launched a counterattack, reaching well beyond political rights. They proposed inserting a new section into the omnibus regulations article (Article VIII)<sup>62</sup> of the constitution:

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<sup>58</sup>*Id.*

<sup>59</sup>The advocates for equal rights included five of the seven Federalists. Of the nine Republicans in the group, six came from Hamilton County. Both delegates from Clermont County voted in this group, as did a lone Republican from Ross County. It is particularly remarkable that James Grubb, the Ross County delegate, consistently voted with the advocates of political equality in this group. The other three Ross County delegates voted consistently with the anti-black-rights group. Tiffin, the president, was the fifth Ross County delegate, and he rarely voted. Apparently, Grubb cast his votes for political rights in the face of stiff opposition from his colleagues. Support for these measures came from southwest Ohio and the Marietta area. Support from the Federalists in Marietta was not very surprising, given their New England backgrounds. However, the fact that Marietta was across the Ohio River from slave-owning Virginia and that Hamilton and Clermont counties were across the river from slave-owning Kentucky did not dampen their support for equal political rights. I include Browne in this group even though he voted against suffrage for resident African Americans. He voted in favor of removing the word “white” in its entirety and in favor of enfranchising the male descendants of African Americans; his vote against enfranchisement of African American residents was either a mistake or a protest vote.

<sup>60</sup>The core group of opponents of black political rights included one Federalist from Marietta, John McIntire. The Republicans came from Fairfield, Jefferson, Belmont, Trumbull, and Adams counties, in addition to Ross County. These included the counties of the Virginia tract, the area of the territory that had been reserved for Virginians as part of the land cessions to the national government. This Virginia connection was critical to the outcome of the rights issues. McIntire, the lone Federalist in this group, did not come from New England as had the other Federalists. He came from Virginia. The Virginians had grown up in a slave culture. It had repelled them, but it also left them unable to conceive of free blacks as equals. Notably, delegates from the counties with the largest African American populations tended to vote against black rights.

<sup>61</sup>The swing votes from Hamilton County were Byrd, Morrow, Reily, and Smith; from Adams County, Darlinton; and from Trumbull County, Abbott. Five were Republicans, and one, Reily, was the lone Federalist from Hamilton County. When either faction picked up four votes, they won—either by passing their own amendment or by defeating that of their opponents.

<sup>62</sup>Article VII contained a variety of provisions, including the official oath for state offices, a definition of and prohibition against bribery at election, creation of future counties, established the state capital, provided for future amendments to the constitution, and set the boundaries of the state.

No negro or mulatto shall ever be eligible to any office, civil or military, or give their oath in any court of justice against a white person, be subject to do military duty, or pay a poll-tax in this State; provided always, and it is fully understood and declared, that all negroes and mulattoes now in, or who may hereafter reside in, this State, shall be entitled to all the privileges of citizens of this State, not excepted by this constitution.<sup>63</sup>

They succeeded. Nineteen delegates voted for the rights restriction, and sixteen voted against it.<sup>64</sup> The opponents of African American rights had picked up four of the swing votes. Their nineteenth vote came from convention president Edward Tiffin, who voted with them even though there was no tie—the only time he did so in the convention.

The delegates revisited both the suffrage amendment and the anti-civil rights amendment at the end of the convention when both issues came up for final passage. Reconsidering the section permitting resident African American males to vote, the delegates tied, and Tiffin now cast the tie-breaking vote against the pro-civil rights position.<sup>65</sup> His biographer tells us he did so because he was concerned “[t]hat the immediate neighborhood of two slave-holding States made it impolitic to offer such an inducement for the influx of an undesirable class to the new State.”<sup>66</sup> Although defeated on the suffrage issue, the civil rights proponents succeeded, by a vote of seventeen to sixteen, in removing the restrictions agreed to earlier on other rights.<sup>67</sup> So the convention refused political rights to African Americans but accorded them other rights of citizenship.

Ohio’s new constitution established a Republican paradise for white men. After one year’s residency, a young white man became fully vested in the polity—a full member of the community. He did not even have to own his land outright or have made his fortune. As long as he showed his commitment to his new home through residency and by either paying a state or county tax, or even just by working on his local roads as was expected of every able-bodied man, he could vote.<sup>68</sup> He could elect his state representative and his state senator. He could be assured that his

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<sup>63</sup>*Journal of the 1802 Convention*, in Ryan, *supra* note 7, at 115-16.

<sup>64</sup>*Id.* at 116.

<sup>65</sup>*Id.* at 122. What happened to produce a tie? James Grubb, the anomalous Ross County delegate who had previously voted in favor of political rights, again defected from the pro-black political rights group. Fellow Ross County Republicans Worthington, Massie, Baldwin, and Tiffin all opposed black rights; Grubb’s continued support for political rights probably became more and more difficult. The convention was being held in Chillicothe, his county seat, and the public attended the sessions. His previous votes were known. He most likely had come under pressure from his constituents. Joseph Darlinton, a Republican from Adams County—the adjoining county and part of the Virginia tract—also defected from the pro-black-rights group. He, too, had voted contrary to the other delegates from his county and must have come under tremendous pressure to switch.

<sup>66</sup>GILMORE, *supra* note 15, at 76.

<sup>67</sup>*Journal of the 1802 Convention*, in Ryan, *supra* note 7, at 124-25.

<sup>68</sup>OHIO CONST. of 1802, art. IV, §§ 1, 5. Territorial law required every able-bodied man between the ages of eighteen and fifty-five to work two days per year on the roads. 1 CHASE, *supra* note 16, at 262-63, 338-39.

representatives in the general assembly would look out for his and his neighbors' interests or be quickly replaced, since they came up for reelection annually or biennially.<sup>69</sup> If he had political aspirations himself, he need only meet the age requirement to qualify to hold office.<sup>70</sup> No property qualifications stood in his way. He could vote for the governor and feel confident that the successful candidate could not build up a corrupt and oppressive patronage system since the constitution gave the governor little power.<sup>71</sup> Although his elected legislators selected the state and county judges,<sup>72</sup> he could elect his local justice of the peace, who could handle the minor criminal and civil disputes of daily life.<sup>73</sup> He could elect all of his county and township officials.<sup>74</sup> He could even serve in the militia and elect his own officers.<sup>75</sup>

The Bill of Rights was a monument to his "rights and liberties."<sup>76</sup> It assured him that he was free to worship God according to his own conscience.<sup>77</sup> It protected him from searches and seizures without a warrant, and a warrant could be issued only if based on probable cause. His right to jury trial was "inviolable." If he was criminally prosecuted, he had the right to know the charges against him, to receive bail in noncapital offenses, to testify on his own behalf, to face witnesses testifying against him, to compel witnesses to testify, and to obtain a speedy trial. If convicted, he had the right to receive a penalty that was proportionate to his offense, since the "true design of all punishment [was] to reform."<sup>78</sup>

The constitution protected his right to speak, to assemble, and to petition the government as well as the rights of a free press. If prosecuted for statements made about a public official, he could offer truth in his defense.<sup>79</sup> He had the right to bear arms.<sup>80</sup> The Bill of Rights also protected his property, his right to rely on contracts, his access to the courts for a remedy for all injuries to either his property or his reputation, and his right to incorporate.<sup>81</sup> If he fell on hard times, he could not be imprisoned for his debts once he offered his property to his creditors, and the schools

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<sup>69</sup>OHIO CONST. of 1802, art. I, §§ 3, 5.

<sup>70</sup>*Id.* art. I, §§ 4, 7.

<sup>71</sup>*Id.* art. II.

<sup>72</sup>*Id.* art. III, § 8.

<sup>73</sup>*Id.* art. III, § 11.

<sup>74</sup>*Id.* art. VI, §§ 1, 3.

<sup>75</sup>*Id.* art. V.

<sup>76</sup>*Id.* art. VIII, § 1.

<sup>77</sup>*Id.* art. VIII, § 3.

<sup>78</sup>*Id.* art. VIII, §§ 5, 8, 11, 12, 14.

<sup>79</sup>*Id.* art. VII, §§ 6, 19.

<sup>80</sup>*Id.* art. VIII, § 20.

<sup>81</sup>*Id.* art. VIII, §§ 4, 16, 7, 27.

remained open to his children, no matter how poor he became.<sup>82</sup> The constitution protected his right to vote, for the legislature could never pass a poll tax.<sup>83</sup>

### III. THE 1850-1851 CONSTITUTIONAL CONVENTION

The provision of the statehood constitution that received the earliest criticism was Article III, which created the judiciary. As early as the 1810s, Ohio governors had suggested that the constitution needed amendment. The supreme court, having both original and appellate jurisdiction and required to sit in each county at least once a year, had fallen behind on its docket. The legislature called a referendum on holding a convention in 1819, but a majority of the voters did not agree, defeating the proposal 29,315 to 6,987.<sup>84</sup>

Ohio's population explosion exacerbated the problem. What might have been adequate for a frontier state with a population of less than sixty thousand no longer sufficed by the 1840s as the population approached two million. The decision to require the supreme court to sit annually in each county had made some sense when there were only eight counties. But by the late 1840s, Ohio had eighty-four counties, which meant that the judges spent most of the year traveling from county to county. In his annual address to the legislature in 1847, Governor Shannon advised lawmakers that the "defective organization of our judicial system" made it impossible for the supreme court "to transact the mass of business before it." Democrat Clement L. Vallandigham described the court as a "flying express running a tilt against the wind on a trial of speed."<sup>85</sup>

Impetus for a convention came from other issues as well. Democrats argued for limitations on the legislature's ability to incur public debt, which had exceeded \$20 million by 1849, and restrictions on its authority to grant exclusive charters of incorporation. Some argued that the legislature should meet biennially instead of annually and that all state officials, including judges, should be elected.

Whether to hold a new convention had been a political bone of contention between the Democrats and the Whigs for a number of years. The Whigs had repeatedly blocked efforts to hold a convention, but a Democratic-Free-Soil legislative coalition in 1849 made it possible to pass legislation to place a referendum on the ballot. On March 23, the legislature passed an act providing for a referendum at the next state elections to be held October 5.<sup>86</sup>

Samuel Medary, the editor of the *Ohio Statesman* (an influential Democratic newspaper in Columbus) and longtime advocate of constitutional change, led the way in promoting the convention. In May he established the *New Constitution*, with its motto that "power is always stealing from the many to the few," to generate voter support for the convention and clarify the constitutional changes he believed were

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<sup>82</sup>*Id.* art. VIII, §§ 15, 25.

<sup>83</sup>*Id.* art. VIII, § 23.

<sup>84</sup>2 CHARLES B. GALBREATH, HISTORY OF OHIO 38 (1925).

<sup>85</sup>*Id.* at 38-39. See MARSHALL, *supra* note 46, at 98.

<sup>86</sup>The Federalist Party had dissolved in the aftermath of the War of 1812. By the 1830s, the Republicans had split, creating the second two-party system: the Democrats and the Whigs. Also starting in the 1830s, third parties arose concerned about the expansion of slavery. In the 1840s, the Free Soil Party was one of these third parties.

needed. The prospectus for the *New Constitution* contained the “leading and more prominent features” in need of change:

A total reform in our Judiciary system and the practice of our Courts.

The election of ALL OFFICERS BY THE PEOPLE!

No increase of the state debt, except by a vote of the people themselves.

A system of common schools and of education, worthy the age and the state.

No legislation but what the people can reform or annul, when found injurious.<sup>87</sup>

Five months and twenty-six issues later, Medary delightedly reported the “Grand Result” of the referendum: Ohio’s white male electorate had overwhelmingly endorsed the proposal to hold a constitutional convention by a vote of 145,698 in favor and 51,161 opposed, exceeding the required majority by 56,026 votes.<sup>88</sup> A few key issues had emerged from the voting, Medary averred. Unsurprisingly, his catalogue reflected the democratic, small-government principles of Jacksonian Democracy. “[F]irst in importance and first for the future well being of the state,” the legislature should be restricted from incurring debt. The legislature should be restricted in other ways as well: by increasing authority at the level of the counties and townships and by requiring general laws of incorporation, to limit the legislature’s involvement in “local legislation” and “to confine its duties to . . . general laws, and thus to shorten its session and to curtail its annual expenses.” All state officers, including judges, should be elected. The judiciary needed reform, although “the details seem[ed] not to be well settled.” The public schools and the banking system should also be reformed.<sup>89</sup>

Despite Medary’s confidence that he had identified the salient issues Ohioans wanted to address at the constitutional convention, many Ohioans had other agendas for constitutional change that had nothing to do with those of the politicians and lawyers. To them, a constitutional convention provided the opportunity to promote social reform: African Americans’ rights, women’s rights, and temperance.

The legislation for the convention election called for a delegate from each district that sent a representative to the state legislature and permitted a candidate to designate his partisan affiliation. Of the 108 men elected in May 1850, sixty-eight were Democrats, forty-one were Whigs, and three were members of the Free-Soil Party.<sup>90</sup> Ironically, Medary, the passionate promoter of the convention, had been defeated by his Whig opponent. Medary’s Democratic friends in the convention consoled him with the printing contract for the convention records, but the disappointed Medary could only hope to influence decisions from his editorial offices.

Lawyers led the listed occupations of the delegates, with a total of forty-three, followed by farmers who totaled thirty. Included in both counts are three delegates who described themselves as “lawyer-farmer.” No other occupation accounted for more than eight delegates. There were eight physicians. Only a very few members

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<sup>87</sup>SAMUEL MEDARY, *THE NEW CONSTITUTION* 1-2 (1849) (reprinting the May 5, 1849 issue).

<sup>88</sup>*Id.* at 402 (reprinting the Nov. 17, 1849 issue). To pass, the vote needed to equal a majority of those voting for state representatives, which totaled 235,370.

<sup>89</sup>*Id.*

<sup>90</sup>2 GALBREATH, *supra* note 84, at 49.

could be considered artisans—three carpenters and two blacksmiths. Somewhat less than thirty percent of the delegates had been born in Ohio, followed closely by the approximately twenty-five percent born in Pennsylvania. Almost seventy-five percent were over the age of forty.<sup>91</sup>

The constitutional convention delegates gathered in Columbus on May 6, 1850. The convention had hardly begun to organize and appointments to the standing committees had not yet been made, when Benjamin Stanton, a delegate from Logan County, rose to present a memorial from citizens of central Ohio's Logan and Hardin counties "[t]o Extradite the Negro Population of Ohio."<sup>92</sup> James Loudon, a delegate of Brown County, echoed Stanton. The petition addressed a subject of great concern to his constituents. Indeed, their feelings on the matter "outweigh[ed] perhaps all other feelings with regards to the doings of this Ohio convention."<sup>93</sup> Following the discussion and vote on whether to print and distribute the memorial, delegate Joseph Thompson of Stark County announced that he, too, had a memorial to present. His constituents, in contrast to Stanton's, urged the delegates to rewrite the constitution so that "equal rights to the whole people, without regard to color or sex, may be engrafted as a provision of the new Constitution."<sup>94</sup> The memorials reflected the efforts of people outside the convention to influence the work of the delegates. For members of the Ohio Colonization Society the constitutional convention offered an opportunity to effect their goal of relocating Ohio's African Americans to Africa. For black Ohioans the 1850 constitutional convention afforded an opportunity to remove the word "white" from the state's constitution. For a number of Ohio women, it provided the chance to seek, for the first time, the elimination of the word "male" from the state's constitutional provisions.

The mere submission of these petitions prompted vigorous debates among the delegates.<sup>95</sup> James Loudon approved Stanton's memorial, insisting that his constituents, whether Whig or Democrat, "believe[d] with the fathers of this State—the pioneers of 1802, when they drew up the constitution under which we are now assembled, that this should be a State for the white man, and the white man only."<sup>96</sup> Reuben Hitchcock contradicted him, pointing out that the votes in the 1802 convention on the status of Ohio's black residents indicated that many were "in favor of extending equal rights and privileges to them."<sup>97</sup>

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<sup>91</sup>1 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO 3-6 (1851) [hereinafter DEBATES OF THE 1850-1851 CONVENTION].

<sup>92</sup>1 *id.* at 28.

<sup>93</sup>1 *id.* at 29. Brown County is across the Ohio River from Kentucky.

<sup>94</sup>1 *id.* at 31.

<sup>95</sup>The practice at the convention was for a delegate to present petitions from his constituents, then the petitions were referred to the appropriate standing committee. Unfortunately for historians, the actual petitions, with a few exceptions, were not made a part of the record. The delegates explained the subject of the petition and sometimes included the name of one citizen associated with it and the number of signatures.

<sup>96</sup>1 DEBATES OF THE 1850-1851 CONVENTION, *supra* note 91, at 29.

<sup>97</sup>1 *id.* at 29.

The petitions asking for “equal rights and privileges” without regard to race or sex generated the most opposition. Suffragist Frances Dana Gage noted that the women’s petitions were “perhaps the 1st that ever were presented to a deliberative body of Constitution maker [sic] for the Equality of Women and Negroes.”<sup>98</sup> One delegate referred to the petitions as “effusions of folly and fanaticism.”<sup>99</sup>

On July 5, 1850 the standing committee issued its report on the elective franchise. It proposed that “every white male citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state one year” have the right to vote. The first proposed amendment was to remove the word “white.” Norton Townshend, a Free-Soiler who a year earlier had played the pivotal role in repealing the “Black Laws” that had restricted African American immigration and court testimony, led the argument on behalf of African Americans, insisting that to limit political rights to whites was unjust, antidemocratic, impolitic, and ambiguous because of the difficulty of defining whiteness.<sup>100</sup>

William Sawyer, an outspoken Democrat who opposed conceding any rights for African Americans, responded bluntly: “We citizens are white men, and we have acquired this country, (whether by fair, or foul means,) and it belongs to us.” Simeon Nash urged practicality. He could not vote for African American suffrage because he did “not believe it would be in accordance with public opinion.” If the convention disregarded public opinion, it would be “send[ing] forth the constitution with its death warrant written in it.”<sup>101</sup>

Sixty-six delegates voted against enfranchising Ohio’s African American men and only twelve voted for it. The next day, ten delegates who had been absent asked permission to have their votes read into the record. One added his name to those who had voted for African Americans’ rights, while nine voted against. The additions made the final vote seventy-five to thirteen.<sup>102</sup> The numbers indicated the degree to which racism had hardened in Ohio (and in most of the country) since the turn of the nineteenth century, when Ohio’s first constitutional convention had defeated equal political rights for African American residents by only one vote. Now, all of the supporting votes came from the counties of the Western Reserve.

After the motion to remove the word “white” had failed, delegate E.B. Woodbury<sup>103</sup> proposed an amendment to remove the word “male.” Townshend again

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<sup>98</sup>Letter from Frances Dana Gage to R.A.S. Janney (Nov. 16, 1876), in Janney Family Papers, Ohio Historical Society, Columbus, Ohio [hereinafter Janney Papers]. Gage was an early women’s rights activist in Ohio. She wrote her recollections of the 1850-51 effort to obtain the vote to Rebecca Janney for inclusion in HISTORY OF WOMAN SUFFRAGE (Elizabeth Cady Stanton, Susan B. Anthony & Matilda Joslyn Gage eds., 1889-1922).

<sup>99</sup>1 DEBATES OF THE 1850-1851 CONVENTION, *supra* note 91, at 76.

<sup>100</sup>2 *id.* at 550. Townshend was thirty-four years old, one of the youngest delegates. After the convention he was elected to the United States Congress, then the Ohio Senate. In 1873 he was appointed one of the original trustees of Ohio State University and later helped to found the Ohio Historical Society. THE BIOGRAPHICAL ENCYCLOPEDIA OF OHIO OF THE NINETEENTH CENTURY 472 (1876).

<sup>101</sup>2 DEBATES OF THE 1850-1851 CONVENTION, *supra* note 91, at 553.

<sup>102</sup>2 *id.* at 554, 556.

<sup>103</sup>Woodbury, born in New Hampshire, had lived in Ohio since he was six years old. He was a delegate from Ashtabula County, was married, and practiced law. 1 *id.* at 6.

led the speakers in favor of the motion. Women had equal rights with men, an equal interest in government, and were equal to men in intelligence and virtue, he argued. Moreover, just government depended on the consent of the governed.<sup>104</sup>

The records of the convention contain no reference to any argument in opposition to the amendment. For all other issues, the record includes statements of proponents and opponents. In 1876, Gage recalled a report that the “discussion of these memorials . . . was so low and obscene and that it was voted it be ‘dropped out of the record.’”<sup>105</sup> The amendment to remove the word “male” failed by a vote of seventy-two to seven.<sup>106</sup> As with the vote for African American suffrage, all the amendment’s supporters represented counties in the Western Reserve.

While discussing the powers of the legislature, the delegates debated proposals to use state funds to support colonization of black Ohioans in Africa and to ban black immigration. A delegate proposed to empower the legislature to appropriate money for consensual colonization to Africa “whenever in the opinion of the General Assembly it can be done without causing an immigration of such persons from adjoining States.”<sup>107</sup> Advocates of African American rights objected that the use of state funds for colonization violated the limits on the government’s right to tax. David Chambers, of Muskingum County, disagreed. Colonization “was thought by many to be the grandest scheme now in existence, to build up a nation and erect a free government in Africa.” It was “a great and worthy object” to move the African American population to Africa, and he believed “it was perfectly justifiable to tax all the people of Ohio” for such a “great measure.”<sup>108</sup> But D.P. Leadbetter, of Holmes County, warned the delegates they were “beginning in the wrong place—if you desire to remedy the evil, you must first shut down the gate and prevent any more from coming in.” Funding colonization without preventing further immigration would make Ohio “the great lazar house for all runaway and emancipated negroes from the Slave States,” for the southern states would “thrust upon [Ohio] their worthless emancipated slaves.”<sup>109</sup>

Delegates opposed to the ban on immigration countered with a variety of arguments. Most opponents based part of their objections on the intrinsic inhumanity of the proposal. Opponents also argued the ban would be unconstitutional, for it would “come directly into conflict with a provision in the Federal constitution, by which the citizens of each state, have the broad shield of National protection thrown over their rights in immigrating from one state to another.”<sup>110</sup> Opponents also warned that the proposal would “array a great many

<sup>104</sup>2 *id.* at 555.

<sup>105</sup>Letter from Frances Dana Gage to R.A.S. Janney (Nov. 16, 1876), in Janney Papers, *supra* note 98. There is no record of a vote to expunge part of the Convention’s record and I have been unable to locate the reference in the *State Journal*. Gage wrote a pseudonymous column for the *State Journal* and may have been referring to a conversation she had with a reporter.

<sup>106</sup>2 DEBATES OF THE 1850-1851 CONVENTION, *supra* note 91, at 555.

<sup>107</sup>Jacob Blickensderfer, a delegate from Tuscarawas County. 2 *id.* at 597.

<sup>108</sup>*Id.*

<sup>109</sup>2 *id.* at 598.

<sup>110</sup>2 *id.* at 600.

votes against” the new constitution.<sup>111</sup> Moreover, the state had already tried to prevent immigration with the Black Laws and had found that it simply could not be done.<sup>112</sup>

Of the eight delegates who spoke vehemently against the ban, four came from the Western Reserve and were known to be supporters of African American rights. The other four had not supported African American rights, and three of them came from southern counties with significant African American populations. Strong support for the ban came from Hamilton County, the county with the largest African American population. With pronounced opposition coming from other southern border counties and in the face of arguments that the ban was unenforceable, unconstitutional, and would defeat ratification of the new constitution, the sponsor withdrew his amendment.<sup>113</sup>

That the constitutionality of the ban concerned a number of delegates is clear from the proposition of Elijah Vance of Butler County that “the General Assembly shall by such appropriate legislation as may be consistent with the Constitution of the United States, discourage the emigration of the free black population of other States, and territories, of the Union, into this State.”<sup>114</sup> Without further debate, the delegates defeated Vance’s amendment by a vote of thirty-nine in favor to fifty-eight opposed. It had failed to satisfy the proponents of an absolute ban, and all of the opponents of immigration restriction had voted against it. The original proposal for state-financed colonization met with even less success, defeated by a vote of twenty-six to seventy-one, as some delegates were unwilling to support it without some restraint on future immigration.<sup>115</sup>

Although the black-rights issues were more bitterly debated, the largest number of petitions to the constitutional convention concerned alcohol. The delegates received 301 petitions signed by 23,784 people.<sup>116</sup> Although not constituted as one of the original standing committees, a special committee was created at a delegate’s instance to report on the “subject of the retail of ardent spirits, and all matters connected therewith.”<sup>117</sup> The special committee recommended that “the General Assembly shall not license traffic in intoxicating liquors, but may, by laws, provide against the evils resulting therefrom.”<sup>118</sup> Most advocates of temperance supported this measure. They viewed licensing as a stamp of approval by the state government.

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<sup>111</sup>2 *id.* at 604.

<sup>112</sup>Charles Reemelin expressed his personal opinion that a ban would be ineffectual but “knowing [removal and a ban on immigration] to be the will of nine-tenths of his constituents he had to obey.” 2 *id.* at 601.

<sup>113</sup>2 *id.* at 604.

<sup>114</sup>*Id.*

<sup>115</sup>2 *id.* at 605.

<sup>116</sup>Robert Gaskill Earl, *Social Reform Movements in the Ohio Constitutional Convention of 1850-1851*, at 41 (1931) (unpublished master’s thesis, Ohio State University).

<sup>117</sup>*Id.*; 1 DEBATES OF THE 1850-1851 CONVENTION, *supra* note 91, at 313.

<sup>118</sup>2 DEBATES OF THE 1850-1851 CONVENTION, *supra* note 91, at 362.

As one delegate argued, licensing would make the “gigantic evil . . . honorable and respectable, so far as the law can give it that character.”<sup>119</sup>

The proposal followed a somewhat tortuous path through the convention. After an initial round of debates, the proposal was sent back to committee for further consideration. The special committee confirmed its position and resubmitted the proposal as originally reported. After an attempt to table the measure failed, it passed by a vote of forty-five to thirty-nine.<sup>120</sup> The very next day, opponents of the resolution managed to defeat it on reconsideration, forty-nine to forty-three.<sup>121</sup> Nonetheless, the proposal later appeared on the ratification ballot. By the end of the convention the delegates had decided to submit it to the voters, but only as a separate amendment so that the liquor issue would not jeopardize the passage of the constitution in its entirety. It was the only separate amendment submitted to the electorate.<sup>122</sup>

The demand for judicial reform had been a major impetus for the convention, and the delegates spent considerable time debating proposed changes. The Committee on the Judicial Department was unable to reach an agreement and instead submitted both a majority and a minority report. The majority report recommended a supreme court composed of four justices with very limited original jurisdiction. The associate justices would be elected from districts while the chief justice would be elected from the state at large. The proposal also created a new intermediate court—the district court—also with primarily appellate jurisdiction, composed of a supreme court judge and two judges of courts of common pleas. Three-judge courts of common pleas in each of nine districts, county courts with probate and other jurisdiction to be decided by the legislature, and the traditional township-based justices of the peace completed the system.

The minority report, prepared by Ohio Supreme Court Justice Rufus P. Ranney, kept many of the features of the existing system but enlarged it to accommodate the overload. Under his proposal, the state would be divided into ten districts. Twenty supreme court judges, two per district, would hold court at the county seat. The court of “final resort” would be five of the supreme court judges sitting “in bank.” Courts of common pleas and justices of the peace would complete the judicial structure. Ranney’s measure resisted the tendency toward a hierarchical and centralized court system; it would have kept the judges of the supreme court more closely tied to the local community and avoided the addition of a new layer of courts. But the majority report became the basis for the new judiciary. Debate centered on whether the supreme court judges should be elected statewide rather than from districts, again raising the issue of an elite versus a locally oriented judiciary. Proponents of district elections demanded regional balance among the judges; opponents decried sectionalization of the judiciary. Implicitly, proponents of district elections indicated that judges’ backgrounds might affect their decisions; opponents thought such a contention undermined the whole idea of law, introducing

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<sup>119</sup>2 *id.* at 444.

<sup>120</sup>Earl, *supra* note 116, at 44; 2 DEBATES OF THE 1850-1851 CONVENTION, *supra* note 91, at 694.

<sup>121</sup>2 DEBATES OF THE 1850-1851 CONVENTION, *supra* note 91, at 723.

<sup>122</sup>OHIO CONST. of 1851, sched., § 18.

“corruption.” The proposal to elect the judges on a state-wide basis initially failed in a tie vote, but it was revived when a proponent realized a quorum had not been present. The proposal for statewide elections passed on a second try, forty-seven to thirty-three.<sup>123</sup>

The delegates also debated the size of the supreme court. Proponents of the four-judge bench argued that under the new system the court would be an appellate court. This smaller court would require three votes to change a lower court decision, leaving room for at most a single dissent. The majority decision would thus carry more “weight of authority” than a decision that generated more dissents, as would be possible on a larger court. Opponents argued for an odd number of judges so that the court would not evenly divide, as it had on occasion in the past.<sup>124</sup> The convention finally established a five-judge supreme court.<sup>125</sup>

The proposal to create an intermediate appellate district court generated significant debate. Proponents argued that the requirement that the supreme court sit in circuit in each county had been the main reason it was so overworked, resulting in long delays. The new district court would be “a breakwater to prevent the flow of business into the supreme court.”<sup>126</sup> The beauty of the plan, they insisted, was that it provided for a new court that would intervene between the common pleas courts and the supreme court without the expense of any additional judges.<sup>127</sup> Ranney and other critics of the report insisted that the district courts be constitutionally required to sit in each county, rather than in locations specified by the legislature. They argued that if the district courts were permitted to sit in only one or two locations in a district, they would create an “aristocracy of the bar.” Country lawyers would have to work up cases only to turn them over to prominent lawyers of the district-court bar, who would take most of the fees. “The country lawyers will shake the bush and the city attorneys will catch the bird,” critics warned.<sup>128</sup> The convention did accept the district court system, but Ranney and his supporters succeeded in requiring that the courts sit in each county.<sup>129</sup>

In the view of those lawyer-delegates who wanted to professionalize the bar and rationalize the court system, the objections of those concerned about “aristocracy” amounted to the exaltation of ignorance. When one Democrat proposed that the constitution use English instead of Latin to describe the supreme court’s original jurisdiction, an exasperated delegate suggested that they substitute “why do you do it” for *quo warranto*, “do it, damn you” for *mandamus*, “have his carcass” for *habeas corpus*, and “go a head” for *procedendo*. The latter might be further “americanize[d]” by calling it “Davy Crockett.” After the laughter subsided, the delegates defeated the original proposal.<sup>130</sup>

<sup>123</sup>1 DEBATES OF THE 1850-1851 CONVENTION, *supra* note 91, at 585-86.

<sup>124</sup>1 *id.* at 586-87.

<sup>125</sup>OHIO CONST. of 1851, art. IV, § 2.

<sup>126</sup>1 DEBATES OF THE 1850-1851 CONVENTION, *supra* note 91, at 592.

<sup>127</sup>1 *id.* at 594.

<sup>128</sup>1 *id.* at 601.

<sup>129</sup>OHIO CONST. of 1851, art. IV, § 3.

<sup>130</sup>1 DEBATES OF THE 1850-1851 CONVENTION, *supra* note 91, at 590.

The final draft of the judiciary article provided for a supreme court, district courts, courts of common pleas, probate courts, justices of the peace, and “such other inferior courts” as the legislature deemed necessary. The supreme court included five judges, elected for five-year terms, with a simple majority required to comprise a quorum or to issue a decision. It had original jurisdiction in quo warranto, mandamus, habeas corpus, and procedendo matters and “such appellate jurisdiction as may be provided by law.” The court was required to sit in the capital at least once a year and other locations “as provided by law.” The judges were to be elected in statewide elections.<sup>131</sup>

The new constitution required the creation of nine common pleas districts, each district containing three or more counties, with the exception of Hamilton County, which would comprise a single district. The voters in the subdivisions of the districts would elect common pleas judges, and the jurisdiction of these courts was to be “fixed by law.”<sup>132</sup> District courts made up of common pleas judges and a judge of the supreme court were to meet in every county each year. These courts had the same original jurisdiction as the supreme court and appellate jurisdiction “as provided by law.”<sup>133</sup> Each county received a probate court with a single judge, elected for a three-year term. He had jurisdiction over probate matters as well as habeas corpus, marriage licenses, guardianships, and other jurisdiction “as may be provided by law.”<sup>134</sup> The justices of the peace remained constitutionally mandated courts elected in each township for three-year terms.<sup>135</sup>

Section 15 of the judiciary article gave the legislature the power to change the number of justices, the number of common pleas districts, the number of judges per district, to alter the boundaries of the districts or their subdivisions, and to establish other courts if two-thirds of each house agreed.<sup>136</sup> The clerk of courts also became an elected office, instead of appointive as it had been under the 1802 constitution.<sup>137</sup>

Finishing their work on March 10, 1851, the delegates scheduled the ratification election for June 17, 1851. The Whig Party approved of the election of all state officials, the judicial reform, and the provision for future amendment of the constitution, but they decried the “violation of the faith of the state” concerning the taxing of state bonds, limits on internal improvements, and the apportionment plan.<sup>138</sup> In contrast, Democrat Samuel Medary was ecstatic about the new constitution. It contained all of the provisions he had argued for in the *New Constitution*: elected state officials, a limit on the legislature’s ability to incur debt beyond \$750,000, limits on the legislature’s ability to grant special charters with the advent of general laws of incorporation, judicial reform, educational reform, and

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<sup>131</sup>OHIO CONST. of 1851, art. IV, § 2.

<sup>132</sup>*Id.* art. IV, §§ 3, 4, 12.

<sup>133</sup>*Id.* art. IV, § 6.

<sup>134</sup>*Id.* art. IV, §§ 7, 8.

<sup>135</sup>*Id.* art. IV, § 9.

<sup>136</sup>*Id.* art. IV, § 15. The legislature could not vacate the office of a judge.

<sup>137</sup>*Id.* art. IV, § 16.

<sup>138</sup>[Columbus] OHIO STATE JOURNAL, June 16, 1851.

apportionment that favored his political party. For Medary, it was “a liberal, progressive document” that “strikes a death blow at the bloated arrogance of wealth and places the means of prosperity in the hands of labor.” It was “the ‘People’s constitution.’”<sup>139</sup>

Enough of Ohio’s white male electorate agreed with Medary to ratify the new constitution by a vote of 125,464 to 109,276. The temperance provision barring the state from licensing the sale of alcohol passed also, by a vote of 113,237 to 104, 255.

#### IV. THE 1873-1874 CONSTITUTIONAL CONVENTION

The 1851 constitution required the legislature to place the question of whether to hold a constitutional convention on the ballot in 1871, and every twenty years thereafter. The intervening years had shown that it was difficult to receive the requisite number of votes to pass a constitutional amendment by referendum. In 1857, for example, five proposed amendments won a majority from those voting on the specific issues but failed to receive the constitutionally required majority of all those voting in the general election.<sup>140</sup>

By 1871 a number of groups, each with its own separate interests, pushed for a constitutional convention. Leading the way were lawyers and judges who wanted to revise the 1851 court system; it had failed to take any pressure off the supreme court, now four years in arrears on its docket. Economic change also spurred sentiment to hold a convention. The Civil War had contributed to tremendous commercial and manufacturing growth in Ohio as elsewhere in the North, and many called for greater legislative power to control corporations, and especially railroads. The alcohol groups squared off against each other again. The antilicensing provision of the 1851 constitution had passed by only a small margin. Advocates of licensing thought they could secure the measure in a new convention, or at least get the issue placed on the ballot as a separate amendment. Ohio women again raised the issue of suffrage. Women’s rights advocates had reorganized after the hiatus caused by the Civil War. In 1869 they had created the Toledo Woman Suffrage Association, recreated the Ohio Woman Suffrage Association, and hosted the founding convention of the American Woman Suffrage Convention in Cleveland. Both political parties endorsed calling a convention and the voters agreed.<sup>141</sup>

Of the 105 delegates, sixty-two listed their occupation as lawyers and the convention would later become known as the “lawyers’ convention.” The next largest group was farmers, with twenty listed, and a sprinkling of physicians, merchants, and bankers. Most had been born in Ohio, no delegates had been born in a state south of Virginia or Kentucky or west of Ohio, and only a handful had been born outside of the United States. Most were members of the Republican Party.<sup>142</sup>

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<sup>139</sup>2 GALBREATH, *supra* note 84, at 68.

<sup>140</sup>The amendments concerned: annual legislative sessions, revisions to the district court system, bank taxation, regulation of corporations, and election districting. 2 *id* at 69.

<sup>141</sup>The vote was 264,970 in favor and 104,231 opposed. The number of votes required to pass the issue was 229,996. 2 *id*. at 71.

<sup>142</sup>Six merchants, five physicians (including one who listed himself as a physician and banker), and two other bankers. The foreign-born delegates came from Wales, Ireland, Switzerland, and Germany but had each been in Ohio at least twenty years. 2 *id*. at 86-90.

The delegates convened in Columbus on May 13, 1873, adjourned temporarily on August 8, reconvened in Cincinnati on December 2, and completed their work on May 15, 1874. During their 188 working days, they agreed to present an entirely new constitution to the voters but also decided to present three issues as separate amendments—minority representation on the supreme court, licensing of alcoholic beverages, and aid to railroads. The voters had the choice to adopt or reject the new constitution and to adopt or reject each of the separate amendments. However, if a separate amendment were to pass, but the voters rejected the constitution itself, the amendment would fail also.<sup>143</sup>

Problems with the court system had been a major reason for calling the convention, so it is not surprising that the proposed constitution changed the judiciary in a number of ways. The supreme court judges would hold office for ten years rather than five. Circuit courts, with original and appellate jurisdiction similar to the supreme court, replaced the district courts. To help clear the backlog of cases, sections four and five of Article IV provided that the supreme court judges in office at the time that their replacements were elected under the new constitution would become a commission to handle the cases in arrears. The supreme court could request the establishment of other such commissions in the future. To avoid partisan domination of the circuit courts and the supreme court, the delegates proposed an innovative idea for the voters to consider separately: the individual voter could cast ballots for no more than a majority of the judicial offices to be filled. That is, if there were three openings, a voter could vote for no more than two candidates. If voters ratified the new constitution, all five supreme court positions would be open. If they also agreed to the separate amendment, each voter could cast ballots for three candidates.

Delegates also had debated taxation reform. Reformers urged that, in a more complex economy, the old idea of uniform taxation of all property was inappropriate. The constitution must permit the general assembly to classify property and then levy uniform taxes on property within the classifications, they insisted. But despite extensive debate, the delegates ultimately adopted a provision that did not substantially change the existing uniform-taxation requirement.

Debate on the alcohol question centered once again on permitting the legislature to license the “traffic” in alcohol, with delegates from the cities tending to favor licensing. Some advocated licensing as a way to raise tax revenues. Others argued that under the existing no-licensing system “intemperance has greatly increased” and that they “had liberty without license.” Instead, they “should have license with liberty.” The delegates settled on giving the voters a choice between two proposals to be submitted as separate amendments: one proposal, “for license,” gave the legislature the power to grant licenses as well as the right to restrict the traffic; the other proposal, “against license,” prohibited the legislature from granting licenses and authorized it “to restrain or prohibit such traffic.”<sup>144</sup>

On the issue of woman suffrage, the delegates agreed to a “careful and exhaustive argument on the subject,” even suspending the rules to permit the chief advocate for women’s suffrage to speak for three hours before a packed gallery of spectators. Although the delegates voted in favor of the suffrage amendment by a

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<sup>143</sup>1 MARSHALL, *supra* note 46, at 132.

<sup>144</sup>2 GALBREATH, *supra* note 84, at 74-75.

margin of forty-nine to forty-one, the vote fell short of the fifty-three-vote absolute majority of delegates that the convention rules required to adopt a proposal. A provision permitting women to hold under the school laws, except for the office of state commissioner of education, did secure the necessary number of votes.<sup>145</sup>

The new constitution had provisions for switching from annual to biennial elections, giving the governor veto power subject to being overridden by a three-fifths vote of the legislature, and requiring fixed salaries for county officials rather than payment from fees. The new constitution placed limits on municipal debt, required railroads to charge the same rates for short and long hauls, gave greater power to the legislature to regulate corporations, and permitted a legislator to force a separate vote on any item in an appropriations bill.<sup>146</sup>

Both political parties and most of the state's newspapers endorsed the new constitution as necessary and beneficial. But opponents claimed it was antirepublican and undemocratic, objecting to the long terms for judges and the additional year between elections. Rather than a people's convention, it had been "the lawyers' convention," reflecting the views of a professional elite distrustful of ordinary Ohioans. Temperance activists opposed the separate amendment to license trade in alcoholic beverages, and their leaders urged voters to defeat the entire constitution as a hedge against the passage of the separate licensing proposal. On August 18, 1874, the voters overwhelmingly defeated the constitution by a vote of 250,169 to 102,885, rejecting all three amendments as well. Observers attributed the constitution's defeat primarily to the temperance activists, to resentment against domination by lawyers, and to a general waning of interest in so lengthy a process.<sup>147</sup>

#### V. THE 1912 CONSTITUTIONAL CONVENTION

Having rejected a proposed new constitution in 1874, Ohioans voted against holding a convention at all when the issue came up in 1891. By 1909, the agitation for social and political reform associated with Progressivism had reached such a peak that the general assembly submitted a referendum on holding a constitutional convention to the voters a year earlier than required. The Ohio State Board of Commerce (OSBC), hoping to reform taxation, was a major supporter of a convention. Other reform groups—organized labor, woman suffragists, prohibitionists, and political reformers—wanted a convention to achieve their own goals.<sup>148</sup>

For a decade, Progressives, led by Tom Johnson, the mayor of Cleveland, had been trying to open the political system. Johnson and other Progressives, such as Cincinnati clergyman Herbert Bigelow, were strong supporters of governmental

<sup>145</sup>2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE 1873-1874 OHIO CONSTITUTIONAL CONVENTION 1816, 1870 (1874).

<sup>146</sup>2 GALBREATH, *supra* note 84, at 76-77.

<sup>147</sup>2 *id.* at 78-79.

<sup>148</sup>Descriptions of the 1912 Constitutional Convention are contained in 2 GALBREATH, *supra* note 84, at 97-112; Royal D. Frey, *The Ohio Constitutional Convention of 1912* (1950) (unpublished master's thesis, Ohio State University); Lloyd Luther Sponholtz, *Progressivism in Microcosm: An Analysis of the Political Forces at Work in the Ohio Constitutional Convention of 1912* (1969) (unpublished Ph.D. dissertation, University of Pittsburgh); HOYT LANDON WARNER, *PROGRESSIVISM IN OHIO 1897-1917*, at 312-53 (1964).

reforms such as the initiative and referendum and municipal home rule. For years, Bigelow's Direct Legislation League had been trying to persuade the legislature to put constitutional amendments effecting such reforms on the ballot. Frustrated by their failure, they decided to generate public support for a new constitutional convention. They viewed a constitutional convention as a means to incorporate their reforms into Ohio's fundamental law, beyond the power of political party bosses to repeal or subvert.<sup>149</sup>

For many business people, the first priority was reform of the tax system. The Ohio constitution required a uniform system of taxation whereby all property, regardless of its nature, was taxed at the same rate.<sup>150</sup> Modern economists and tax experts decried such an old-fashioned and inefficient system. The OSBC had tried to pass amendments changing the tax system via referenda in 1903 and 1908. Although garnering a majority of the votes cast on the specific issue, both times the amendments failed to receive the absolute majority of all votes cast in the general election that was required to amend the constitution.<sup>151</sup>

Willing to negotiate with reform-oriented business people, organized labor formed an important element in the Progressive coalition pressing for constitutional reform. Having secured pro-labor legislation from the state legislature, they had been frustrated by court interpretations restricting its application or ruling it unconstitutional altogether. They wanted to establish clear constitutional authority for labor legislation and to restrict the courts' power to inhibit it.

Allied with other Progressive reformers, Ohio women's rights activists wanted to assure the passage of a woman suffrage amendment. The Ohio Woman Suffrage Association (OWSA), reorganized in 1885, had operated continuously ever since. By 1910 it had very strong ties with the national women's rights organization, the National American Woman Suffrage Association. Harriet Taylor Upton, the leader of the state association, was also NAWSA's treasurer and located its headquarters in the Warren County courthouse from 1903 to 1910.<sup>152</sup> OWSA coordinated activities for major suffrage campaigns, although some other women's organizations, such as the Woman's Taxpayers League and the College Equal Suffrage League, remained independent of it.<sup>153</sup>

Prohibitionists also linked their reform to Progressive notions of using the state to promote social well-being. Because most observers believed women to be more inclined toward prohibition than men, that particular reform was linked, at least in

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<sup>149</sup>For a discussion of Progressive reform efforts in the decades preceding the 1912 convention, see WARNER, *supra* note 148, at 3-311.

<sup>150</sup>OHIO CONST. of 1851, art. XII, § 2.

<sup>151</sup>The 1903 vote was 326,622 in favor to 43,563 opposed, but the question needed 438,602 votes (more than one-half of the 877,203 votes cast in the previous gubernatorial election) in order to pass. The vote in 1908 was 339,747 in favor to 95,867 opposed, but the measure did not receive the 561,500 votes (more than one-half of the 1,123,198 votes cast in the previous gubernatorial election) required for passage. 2 GALBREATH, *supra* note 84, at 96.

<sup>152</sup>FLORENCE ALLEN & MARY WELLES, THE OHIO WOMAN SUFFRAGE MOVEMENT: "A CERTAIN UNALIENABLE RIGHT": WHAT OHIO WOMEN DID TO SECURE IT 39-40 (1952).

<sup>153</sup>Kathryn Mary Smith, The 1912 Constitutional Campaign and Women's Suffrage in Columbus, Ohio 11-12 (1980) (unpublished master's thesis, Ohio State University).

people's minds, to the woman-suffrage movement. The leading state and national organization advocating prohibition was the Anti-Saloon League (ASL), founded by Ohioans in the 1880s. The ASL had been so successful in passing local-option laws that sixty-three of Ohio's eighty-eight counties prohibited the sale of alcohol as of mid-1909. The alcohol industry had tried to counter the ASL with its own public relations campaign aimed at convincing people that regulated saloons rather than prohibition were the solution to alcohol-related problems. The Ohio Brewers Association developed a program of driving saloons connected with gambling and prostitution out of business. As part of the campaign, the association had supported legislation that defined the appropriate "character" of a person owning a saloon. By 1911, its campaign seemed to be yielding success; eighteen counties had reverted to "wet" status. The constitutional convention would provide Ohio's liquor interests with an opportunity to build upon their success. The "drys," in contrast, hoped to promote statewide prohibition.<sup>154</sup>

The proponents of the convention were helped significantly when the legislature decided to permit political parties to place the issue on the party ticket, so that a straight party vote meant a vote for the convention. With so many different reform groups supporting a convention and with both parties endorsing it, the proposal passed handily in the referendum 693,263 to 67,718, far surpassing the required majority of 466,132.<sup>155</sup>

Attention then turned to the election of delegates, scheduled to take place along with the municipal elections in the fall of 1911. Districting for representation at the convention would mirror the elections for the lower house of the general assembly. The election would be nonpartisan, although candidates could formally declare whether they supported submitting the liquor-license question to the voters.<sup>156</sup>

Political reformers formed the Ohio Progressive Constitutional League to advocate on behalf of candidates who would support the initiative, referendum, recall, and municipal home rule. In Cincinnati, representatives from businesses, clubs, trade associations, and trade unions joined to organize a slate of reform candidates. In Columbus, the Franklin County Progressive League sponsored a slate composed of representatives of farmers, business, and labor. In Cleveland, organized labor played a major role, throwing its support to the Cuyahoga branch of the Progressive Constitutional League rather than the business-oriented Municipal Association. In the less urban areas, some Granger-labor alliances formed; in other areas, local Progressive Constitutional leagues led the effort to elect pro-reform candidates.<sup>157</sup> The Ohio Woman Suffrage Association voted to petition the convention to submit a woman suffrage proposition separately from the rest of the new constitution. It formed a campaign committee, opened campaign headquarters

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<sup>154</sup>The state local-option law required a revote every three years. In 1911 the first round of these revotes occurred. Eighteen of the twenty-seven counties holding the elections reverted to "wet" status. Lloyd Sponholtz, *The Politics of Temperance in Ohio, 1880-1912*, 85 OHIO HIST. 5, 9, 15-18 (1976).

<sup>155</sup>2 GALBREATH, *supra* note 84, at 94.

<sup>156</sup>Frey, *supra* note 148, at 3; Sponholtz, *supra* note 148, at 22.

<sup>157</sup>Sponholtz, *supra* note 148, at 23-36.

in Toledo, conducted field work, and tried to encourage the election of sympathetic delegates.<sup>158</sup>

With such an array of Progressive forces enlisted in the campaign to elect delegates, the resulting convention had a distinctively Progressive character. There were 119 delegates: fifty-nine from rural areas, thirty-two from towns, and twenty-eight from urban areas. Sixty-two of the delegates were affiliated with the Democratic Party, fifty-two were Republicans, three were Independents, and two were Socialists. According to historian Lloyd Sponholtz, the typical delegate was a white, Anglo-Saxon, Protestant, college-educated professional from a small town. Once again, law and farming were the most common occupations among delegates, with a smaller number of laborers, bankers, and teachers. Most delegates could be identified as Republicans or Democrats, but, in a rebuke to political “bossism,” fewer than a third had previously held office.<sup>159</sup> The Ohio Woman Suffrage Association estimated that fifty-six of the 119 elected delegates supported submitting a woman-suffrage amendment to the electorate.<sup>160</sup>

Progressive leader Herbert Bigelow was elected president of the convention on the eleventh ballot, receiving more support from Democrats than from Republicans, an indication that the former were more sympathetic to reform than the latter. The convention created twenty-five committees to which proposals and petitions were sent for consideration. The delegates adopted rules similar to those of the Ohio House of Representatives, except that debate occurred on the second rather than the third reading of a proposal and that the author of any proposal could force it to the floor if it languished in committee for more than two weeks. Those committees deemed most important received twenty-one members, each representing a congressional district. The delegates worked in committees on Mondays and Fridays; the full convention met during the rest of the week.<sup>161</sup> Early in the proceedings, the delegates decided to amend the Constitution of 1851 rather than to write a completely new one—perhaps with the fiasco of 1873-1874 in mind.<sup>162</sup>

As one of the leading advocates of the initiative and referendum, Bigelow naturally created a committee that was strongly sympathetic to it. Robert Crosser, who had submitted a home rule bill in the legislature in 1911, chaired the committee that had charge of it. Bigelow also caucused with sixty Progressive delegates to assure a favorable response once a proposal came to the convention floor. This process produced a recommendation for what the sponsoring committee called direct and indirect initiatives for legislation and constitutional amendments, each with different technical requirements. An indirect initiative was a proposal that first went to the legislature for action; a direct initiative went straight to the voters. The committee proposal made it more difficult to initiate directly a law or an amendment

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<sup>158</sup>Smith, *supra* note 153, at 27-29.

<sup>159</sup>1 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF OHIO 1-2 (1912) [hereinafter DEBATES OF THE 1912 CONVENTION]; Frey, *supra* note 148, at 3-4; Sponholtz, *supra* note 148, at 6, 37-49.

<sup>160</sup>Smith, *supra* note 153, at 28.

<sup>161</sup>1 DEBATES OF THE 1912 CONVENTION, *supra* note 159, at 28-32; Frey, *supra* note 148, at 6-9, 13; Sponholtz, *supra* note 148, at 51-55.

<sup>162</sup>1 DEBATES OF THE 1912 CONVENTION, *supra* note 159, at 116, 650-52.

than to initiate them indirectly. A petition for direct initiation of legislation had to contain a number of signatures of electors equaling eight percent of the votes cast for the office of governor in the preceding election. Direct initiation of a constitutional amendment required a number of signatures equaling twelve per cent of the votes cast in the preceding gubernatorial election. An indirect initiative for legislation or a constitutional amendment required only half as many signatures. In all cases, the signatures had to come from at least one half of the counties in the state. The committee also proposed a referendum process by which voters could challenge a law passed by the general assembly and have the electorate vote whether to approve or reject the law. Those petitions required a number of signatures equaling six percent of the votes cast in the preceding gubernatorial election.<sup>163</sup>

The debate in convention centered on the number of signatures required to initiate the process and on whether to eliminate direct initiatives and to permit only the indirect method. The debates manifested a concern that the initiative would be used to pass taxation measures. The final proposal permitted direct initiation of constitutional amendments only, and required a number of signatures equal to ten per cent of the votes cast in the previous gubernatorial election to place the amendment on the ballot.<sup>164</sup> Indirect initiation of laws would require a number of signatures equaling only three percent of the number of votes cast in the previous gubernatorial election. If the general assembly rejected the proposal, amended it, or failed to act on it within four months, its proponents could force a vote by the electorate by filing a supplementary petition with a number of signatures equaling an additional three percent of the votes cast at the previous gubernatorial election.<sup>165</sup> Electors could also force a referendum on an ordinary bill initiated and passed by the general assembly by obtaining a number of signatures equaling six percent of the votes cast in the previous election.<sup>166</sup> All petitions had to include signatures from at least one-half of Ohio's counties.<sup>167</sup> The provision explicitly prohibited using the initiative process to secure either a single tax or tax classification.<sup>168</sup>

Sponholtz's roll-call analysis indicates that opposition to the initiative and referendum came from rural and small-town Republicans. Democrats uniformly supported the initiative and referendum, with the greatest support coming from urban

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<sup>163</sup> *Id.* at 672-74, 681-83, 687, 733, 921, 951, 942-45. See Frey, *supra* note 148, at 35-47; Sponholtz, *supra* note 148, at 143-51.

<sup>164</sup> OHIO CONST. of 1851 (as amended), art. I, § 1a.

<sup>165</sup> If the general assembly amended the original proposal, the proponents could force the original version onto the ballot by filing the supplementary petition. If both versions passed, the version receiving the highest affirmative vote became law. *Id.* art. II, § 1b.

<sup>166</sup> *Id.* art. II, § 1c.

<sup>167</sup> *Id.* art. II, § 1g.

<sup>168</sup> *Id.* art. II, § 1c. "A single tax" would tax the value of land to the exclusion of other property taxes. Some of the delegates at the convention, including Bigelow, were single taxers. They had been influenced by Henry George, a Nineteenth Century economist and philosopher, who started the single tax movement. In a best selling book, George theorized that taxing the full value of land would prevent a grossly unequal distribution of wealth and poverty. HENRY GEORGE, *PROGRESS AND POVERTY* (1879). Rural delegates at the convention strongly opposed the idea of a single tax system.

Democrats. Unable to prevent the proposal of an amendment to institute the initiative and referendum, conservatives still achieved a number of their goals by restricting the initiative process to the indirect method for legislation and by securing the concession that it could not be used to institute the single-tax idea.<sup>169</sup>

Conservatives even more vigorously opposed the recall process, whereby voters could terminate an elected official's term prior to its expiration. Some argued that the terms of office were short enough to make recall unnecessary. Others worried that it could threaten the independence of the judiciary unless judicial officers were excluded from its provisions. Although an advocate of the recall was able to persuade the committee to endorse and report the measure to the convention, the delegates tabled the matter indefinitely. Instead, they proposed a fairly weak amendment to the constitution that authorized the legislature to pass laws to remove any officer guilty of moral turpitude or other offenses. Hostility to the recall was evenly spread across the political parties. More Democrats than Republicans supported the proposal; even so, only a minority of Democrats supported the stronger version. Even urban Democrats—the strongest supporters of the initiative and referendum—split on the issue.<sup>170</sup>

Urban home rule also proved divisive. The 1851 Constitution required the legislature to provide for the organization of cities and the incorporation of villages. Another part of the constitution required that all laws be uniform.<sup>171</sup> The supreme court had sustained legislation that had classified cities according to population and then treated them differently on that basis. This approach resulted in a range of types of city organization even for cities with similar populations. For example, Cleveland had a strong mayor, while Cincinnati had a figurehead mayor with a powerful city council and board of administration. In a suit instigated by traditional political leaders to clip the wings of Progressive mayors—especially Cleveland's Tom Johnson—the Ohio Supreme Court in 1902 had invalidated all city charters for violating the constitutional requirement of uniformity of laws. The court then had delayed execution of its order to give the boss-dominated legislature time to pass a new municipal code. Progressives, who predominated in some cities, especially Cleveland, now pushed hard for home rule to reverse their earlier defeat.<sup>172</sup>

The "liquor question" figured into the debates. "Drys" did not want home rule to be used by cities to overturn state laws permitting subdivisions to ban the sale of alcoholic beverages. They were able to pass a proviso that no municipal laws could conflict with the general laws of the state. Both Republicans and Democrats generally supported home rule; it was primarily the rural delegates who expressed concern over its effect on local option.<sup>173</sup>

In the end, the constitutional convention passed a proposal that allowed local governments to choose among three alternatives: (1) to operate under the general laws of the state; (2) to amend a current charter; or (3) to call a charter commission to change or revise a charter. The amendment also provided that a municipality

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<sup>169</sup>Sponholtz, *supra* note 148, at 143-51.

<sup>170</sup>*Id.* at 151-56.

<sup>171</sup>OHIO CONST. of 1851, art. II, § 26.

<sup>172</sup>Sponholtz, *supra* note 148, at 157-60.

<sup>173</sup>*Id.* at 156-69.

could own its own public utilities, a proposition that passed over the strenuous opposition of the public utility companies. The state legislature retained some control over localities through the operation of general laws and through some financial oversight. The convention delegates further reformed the political system by giving the governor a veto and establishing rules to govern the appointments to the civil service.<sup>174</sup>

Reformers and labor leaders had criticized the state courts for overturning labor legislation and maintaining common-law doctrines that advantaged employers at the expense of workers. The main criticism of the judiciary from lawyers and judges, on the other hand, was that the circuit court system was not working. When the circuit court heard appeals from lower courts, the losing party received a trial *de novo* there. Critics opposed this “two trial, one review” system. Lawyers and judges also criticized the requirement that each circuit court sit in every county seat in its district twice a year. The largest circuit included sixteen counties, forcing its judges to spend a lot of time on the road, and some other circuits were not much better. Two delegates led the judicial reform efforts in the convention: Judge Hiram Peck, who chaired the Judiciary and Bill of Rights Committee, and former Judge William Worthington, who also served on it. Peck’s proposal became the majority report; Worthington’s became the minority report.<sup>175</sup>

Both Peck and Worthington agreed that there should be a “one trial, one review;” that the jurisdiction of circuit courts should be limited to appellate review; and that the jurisdiction of the supreme court should be limited to constitutional cases, cases of conflict among the circuits, and cases the court deemed to be of “great public interest.”<sup>176</sup> But Peck and Worthington also disagreed on significant matters. Peck proposed that the supreme court remain at six justices with a three-to-three vote affirming lower court rulings. Responding to criticism of the court’s anti-Progressive activism, Peck’s proposal required a unanimous supreme court vote to reverse a lower court decision or to declare a law unconstitutional. Worthington’s conservative alternative proposed expanding the court to seven judges by the addition of a chief justice, a position that previously had simply rotated among the six judges. Worthington’s proposal eschewed the obstacles that Peck’s put in the way of judicial review and gave the court direct jurisdiction over appeals of state administrative regulations. He included this last provision at the particular behest of the Railroad Commission, which had complained that its regulations routinely

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<sup>174</sup>In 1903 Ohioans had given the governor a general veto power. The 1912 proposal gave him a line-item veto as well. Another proposed amendment limited the legislature, when called into special session by the governor, to consideration of only those issues specified in the governor’s call. WARNER, *supra* note 148, at 327. On the other hand, the 1912 convention reform reduced the margin needed to override a veto from two-thirds of the legislature to three-fifths of each house. 1 DEBATES OF THE 1912 CONVENTION, *supra* note 159, at 1496-97; Frey, *supra* note 148, at 59-60; Sponholtz, *supra* note 148, at 177-79. Civil Service reform passed with very little opposition. WARNER, *supra* note 148, at 326; 2 DEBATES OF THE 1912 CONVENTION, *supra* note 159, at 1380, 1793.

<sup>175</sup>Frey, *supra* note 148, at 58; Sponholtz, *supra* note 148, at 190-92.

<sup>176</sup>Sponholtz, *supra* note 148, at 191.

became embroiled in litigation. The Ohio State Bar Association endorsed Worthington's more conservative proposal over Peck's.<sup>177</sup>

The debates concentrated on whether to require a minimum number of justices to declare a law unconstitutional and on the "one trial, one review" system, with the most time spent on the latter. The delegates compromised, but nonetheless gave labor and other Progressive groups a big victory. They proposed adding a chief justice and provided a complex rule for determining the constitutionality of legislation. If a circuit court sustained the constitutionality of a law, it would require the votes of all but one of the supreme court judges to reverse the decision and find the law unconstitutional. If the circuit court overturned a law, a simple majority of the supreme court judges could either reverse or sustain the decision. The supreme court would continue to have original jurisdiction in writs of prohibition, procedendo, and habeas corpus, and would be able to bring cases up on appeal through writs of certiorari.<sup>178</sup>

Under the adopted proposal, the circuit courts would provide appellate review of lower court decisions, with a trial de novo only in chancery cases. The circuit court's decision was final except in constitutional questions, felonies, cases of original jurisdiction, and cases certified to the supreme court. A circuit court could reverse on the weight of the evidence only with a unanimous decision; on any other basis, a simple majority would suffice. Conflicting decisions among the circuits would be certified to the supreme court.<sup>179</sup>

Tax reformers, beaten down by the opposition of rural delegates to the most important elements of their program, were less successful in securing changes they wanted. Ohio's 1851 Constitution required that real and personal property be taxed at the same rate. The OSBC urged the convention to propose an amendment permitting classifications of subjects of taxation and requiring uniform taxation only within the classifications, exempting federal and state bonds from taxation entirely. The OSBC succeeded in having its proposal reported from committee, supported by urban delegates who were worried about revenues keeping up with urban growth. Rural delegates disagreed, and their minority report mandated a uniform rule of taxation, with public bonds included.<sup>180</sup>

The convention roundly defeated the majority report by a vote of ninety-seven to nineteen and adopted the minority report as the basis for discussion. Debate centered on the rural delegates' desire to provide constitutional sanction for the existing law's cap on taxation.<sup>181</sup> Rural delegates also opposed giving the legislature the power to classify property for taxation at different rates. Urban delegates tried, but failed, to give the voters a choice between a uniform tax provision and one authorizing classification. The third area of debate centered on exempting municipal bonds. Municipal bonds had been taxed as personal property prior to 1905 when voters

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<sup>177</sup>*Id.* at 192-93; 1 DEBATES OF THE 1912 CONVENTION, *supra* note 159, at 1025-80.

<sup>178</sup>2 DEBATES OF THE 1912 CONVENTION, *supra* note 159, at 1833-34; Frey, *supra* note 148, at 58-59; Sponholtz, *supra* note 148, at 192-93.

<sup>179</sup>Sponholtz, *supra* note 148, at 193-94.

<sup>180</sup>Frey, *supra* note 148, at 53; Sponholtz, *supra* note 148, at 84, 93-95.

<sup>181</sup>Frey, *supra* note 148, at 54; Sponholtz, *supra* note 148, at 95-97.

ratified a constitutional amendment exempting them. Rural delegates did not like the exemption and wanted the constitution to eliminate it.<sup>182</sup>

The delegates finally compromised to some extent. Taxation would be uniform, and state and municipal bonds would be subject to taxation. The legislature could choose either a uniform or graduated income tax. The proposed amendment permitted franchise and excise taxes; taxes on coal, gas, and other minerals; required a sinking fund to pay the principle and interest on any indebtedness; and forbade the state from incurring debts for internal improvements other than road construction. In an "attempt to salvage as much as possible by surrendering the principle of classification," urban delegates persuaded the convention to drop the proposal for a constitutionally mandated limit on taxation. In its final form, the amendment "pleased no one." The OSBC did not get classification; rural delegates did not get a tax limit; and urban delegates, still worried about revenue keeping up with growth, lamented the lack of municipal control over revenues.<sup>183</sup>

In addition to its success in restricting the supreme court's power of judicial review, organized labor also obtained seven amendments embodying much of its constitutional reform program: a maximum eight-hour work day on public works; the abolition of prison contract labor; a "welfare of employees" amendment authorizing the legislature to pass laws regulating hours, wages, and safety and health conditions; damages for wrongful death; limits on contempt proceedings and injunctions; workers' compensation; and mechanics' liens. There was little resistance to any of the proposals except those abolishing prison contract labor and limiting court injunctions.<sup>184</sup> Because domestic and farm labor were exempted, the "welfare of employees" amendment drew little opposition except from a few employer delegates.<sup>185</sup> The final prison-labor proposal abolished the existing system but permitted prisoner-made products to be sold to the state and its political subdivisions, and encouraged convict road gangs.<sup>186</sup>

The proposal to limit court injunctions produced heated discussion. Organized labor particularly wanted an amendment that would bar courts from issuing injunctions in strike situations and also sought the right to a jury trial in the contempt proceedings that often followed when strike leaders violated the injunctions. The Committee on the Judiciary and Bill of Rights reported a proposal favorable to labor, but the delegates voted it down on the floor of the convention. Nonetheless, labor supporters were able to pass a proposal that an injunction could be issued only "to preserve physical property from injury or destruction."<sup>187</sup>

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<sup>182</sup>Frey, *supra* note 148, at 54-56; Sponholtz, *supra* note 148, at 96-97.

<sup>183</sup>Frey, *supra* note 148, at 57, 72; Sponholtz, *supra* note 148, at 99-101.

<sup>184</sup>Sponholtz, *supra* note 148, at 127-40.

<sup>185</sup>*Id.* at 132.

<sup>186</sup>This may have been a concession on the part of organized labor to rural delegates. *Id.* at 131.

<sup>187</sup>Frey, *supra* note 148, at 62; Sponholtz, *supra* note 148, at 133-38. There were labor supporters in all of the sectors, and urban delegates voted strongly as a bloc. Democrats supported labor fairly consistently. Republicans had problems with the injunction amendment, and there was a rural/urban split on it.

Woman suffragists also had a good deal of success at the convention. Harriet Upton and other OWSA representatives successfully lobbied the president of the convention to appoint sympathetic members to the Suffrage Committee. When the convention met in Columbus in January 1912, suffrage organizers opened headquarters there.<sup>188</sup> Suffragists registered as official convention lobbyists and worked to influence members of the Elective Franchise Committee, drafting a suffrage proposal for the committee's consideration.<sup>189</sup> The suffragists also testified, discussing the differences between men and women and insisting that men could not fairly represent women. Advocates argued that women were needed in politics to work for better roads and against impure food and high living costs.<sup>190</sup>

Other women organized to oppose the proposed amendment. They, too, testified before the Suffrage Committee and held a rally. The antisuffragist witnesses favored limiting suffrage to exclude working people and those of foreign birth. They argued that granting universal suffrage would permit undesirable women to vote. On February 14, 1912, the committee issued its report, rejecting the antisuffrage arguments and proposing an amendment to Ohio's constitution that would remove the words "white male." Newspapers nicknamed the committee report the "Con-Con's valentine" to Ohio's women.<sup>191</sup>

The male delegates speaking in favor of woman suffrage echoed the arguments the women had made in committee. They consistently argued that women were the equals of men and that the right to vote was a natural, inalienable right.<sup>192</sup> Delegates who supported the initiative and referendum must, to be consistent, also support submission of the woman suffrage proposal.<sup>193</sup> Some supporters urged support of woman suffrage to promote the chances of prohibition.<sup>194</sup> Opponents argued vociferously that voting was not a right, but a privilege, which carried duties and responsibilities. It was unfair, they reasoned, to place this burden on women when a majority of them did not want it.<sup>195</sup> Three times opponents of suffrage attempted to pass a proposal that would have required a preliminary referendum among Ohio women. Only if a majority of them voted in favor of suffrage would the amendment be presented to the male electorate for ratification. Each time the proponents of woman suffrage tabled the proposal.<sup>196</sup>

At the close of debate, the delegates voted in favor of the amendment by a margin of seventy-four to thirty-seven. They also voted seventy-six to thirty-four in

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<sup>188</sup>Smith, *supra* note 153, at 27-29.

<sup>189</sup>*Id.* at 30.

<sup>190</sup>[Columbus] CITIZEN, Feb. 9, 1912.

<sup>191</sup>*Id.*, Feb. 14 & 15, 1912.

<sup>192</sup>1 DEBATES OF THE 1912 CONVENTION, *supra* note 159, at 600, 603, 612.

<sup>193</sup>1 *id.* at 602, 616, 623.

<sup>194</sup>1 *id.* at 612, 618.

<sup>195</sup>1 *id.* at 607.

<sup>196</sup>1 *id.* at 626-29.

favor of submitting the amendment to the electorate as a separate proposal.<sup>197</sup> The convention subsequently decided to submit every proposed amendment as a separate item. The suffrage amendment appeared as the twenty-fourth of forty-two proposed amendments.<sup>198</sup>

After losing the vote on the amendment, opponents of woman suffrage turned to one last tactic that they hoped would defeat the amendment in the ratification election. They proposed an amendment that would remove only “white” rather than “white male” from the qualifications of electors, hoping to divert African American men from supporting the proposed universal-suffrage amendment by providing a male-only alternative.

Prohibitionists won support from a broad range of delegates, from Progressive reformers to rural conservatives. But the liquor industry had expended great energy in an effort to protect its interests, as well. Moreover, some urban Progressives and labor-oriented delegates worried that prohibition was aimed at their constituents. The liquor issue was couched in terms of licensing as opposed to no licensing because of the quirky language placed in Ohio’s constitution in 1851: “No license to traffic in intoxicating liquors shall be hereafter granted in this state; but the general assembly may, by law, provide against the evils resulting therefrom.”<sup>199</sup> Thus, the liquor industry wanted to authorize licensing, while the advocates of prohibition opposed it. The Liquor Traffic Committee considered a number of proposals, with prohibition at one extreme and licensing, the details of which would be left to the general assembly, at the other. The committee issued both a majority report and a minority report. The majority report, sponsored by the known “wet,” Judge Edmund King of Sandusky, called for licensing without constitutionally imposed restrictions, while at the same time permitting local option laws. The minority report, advocated by the “drys,” contained strict restrictions on licensing.

After two weeks of intensive debate, the delegates rejected both versions. It became clear that the “wets” would be unable to get a licensing amendment without restrictions; the debate now centered on “no licensing,” which maintained the status quo, versus permitting licensing with severe constitutional restrictions. Delegates debated such issues as the number of saloons per capita, the number of infractions that would result in license revocation, how much home rule cities would have, and what “good character” limitations would be placed on licensees. Finally, the delegates decided to give the voters the choice of no license or restricted license. The restrictions included licensing no more than one saloon per five hundred inhabitants, the requirement that a licensee be a citizen of the United States of good

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<sup>197</sup>The third reading passed seventy-four to thirty-seven, and final passage came on May 31 with a vote of sixty-three to twenty-five.

<sup>198</sup>The liquor interests had attempted to have the suffrage proposition set off with the liquor license provision and away from the other propositions, believing that this would aid in the defeat of the suffrage amendment, but the delegates at the Constitutional Convention supported the position advocated by the suffragists.

<sup>199</sup>OHIO CONST. of 1851, art. XV, § 9; *see also* OHIO CONST. of 1851, sched., § 18.

moral character holding no other liquor interests, and that he reside in the county where the license was issued or the adjacent county.<sup>200</sup>

The delegates decided to have the ratification ballots list each amendment separately, to be voted on separately with a majority of the votes cast on each amendment sufficient for its passage. The delegates also voted that the president should appoint a committee to prepare a pamphlet for distribution to the public with a short explanation of each amendment. The entire pamphlet was also to be published in newspapers—at least two in each county and of opposite political party affiliation—for five weeks preceding the election.<sup>201</sup>

The convention had proposed forty-two amendments to the state constitution. The Progressive delegates, led by Bigelow's New Constitution League of Ohio, campaigned for passage. The Democratic state convention endorsed all of the amendments and organized labor pushed for ratification as well. Most of the urban newspapers, with the exception of a few conservative publications in Columbus and Cincinnati, gave the amendments favorable coverage.<sup>202</sup> Formal opposition came from the Ohio State Board of Commerce, which had failed to achieve its tax reform and opposed the initiative and labor amendments. The OSBC distributed tens of thousands of pamphlets attacking the convention's work and urging voters, "[W]hen in doubt, vote no."<sup>203</sup>

A handful of the amendments generated the most controversy, among them the initiative and referendum, liquor licensing, woman suffrage, and some of the labor amendments. The woman suffrage amendment was extensively debated, in part because of the suffragists' efforts to generate support and in part because of vigorous opposition by the OSBC and the liquor interests. Local and national suffragists considered Ohio a crucial test for the extension of woman suffrage. Five other states had woman suffrage referenda scheduled after Ohio's election, and suffragists hoped a positive outcome in Ohio would create momentum in those states. The OWSA established campaign centers in Cleveland, Columbus, Cincinnati, Toledo, Akron, Springfield, Canton, Dayton, Warren, and Youngstown. They organized 103 suffrage societies in 78 counties. The OSBC and the liquor interests, on the other hand, viewed women voters as potential temperance voters, warning Ohio's male voters that a vote for woman suffrage was a vote to make Ohio dry.<sup>204</sup>

On September 3, 1912, Ohio's male voters went to the polls. Urban voters favored almost all of the amendments. Voters in the northern part of the state, where Progressive mayors had been encouraging reform for years, supported the amendments more than those in the southern part of the state. Voters in seven rural counties voted against all of the amendments, voters in nine additional rural counties

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<sup>200</sup>This last requirement was intended to prevent a brewer or distiller from owning the saloon. Brewers owned an estimated seventy percent of the saloons in the United States. Frey, *supra* note 148, at 23-24; Sponholtz, *supra* note 154, at 20-24.

<sup>201</sup>2 DEBATES OF THE 1912 CONVENTION, *supra* note 159, at 1923, 1981-84, 1998, 1999-2011; WARNER, *supra* note 148, at 338.

<sup>202</sup>WARNER, *supra* note 148, at 339. The Republican newspapers were the Columbus *Dispatch* and the Cincinnati *Enquirer* and *Times-Star*.

<sup>203</sup>*Id.* at 340.

<sup>204</sup>Smith, *supra* note 153, at 43, 53.

voted against all but the temperance amendment, and the urban vote made a difference in the passage of nineteen amendments that would have otherwise failed. Only eight of the forty-two amendments failed to pass, and the vote in each of those was relatively close.<sup>205</sup>

Herbert Bigelow was delighted with the outcome. The initiative and referendum, the passage of which he had been working for more than a decade, would now be a part of Ohio's constitution. For the most part, organized labor was pleased. All of its amendments, with the exception of the anti-strike injunction provision, had passed. Women suffragists, on the other hand, were disappointed. Despite receiving the most favorable votes of any of the forty-two amendments, and the most cast ever in favor of woman suffrage in the nation, the woman suffrage amendment was defeated by a vote of 336,875 to 249,420.<sup>206</sup>

#### VI. OHIO'S CONSTITUTION, 1913-2003

Although little debated in the convention or in the ratification campaign, one of the amendments the voters passed would prove to be very important in shaping Ohio's constitutional course for the rest of the Twentieth Century and into the Twenty-first Century. The delegates to the 1912 convention had proposed that Ohio's constitution be made more easily amendable. The voters had agreed, and article XVI now provided that the general assembly could propose an amendment by a vote of three-fifths of each house, reduced from the two-thirds previously required. More important, article XVI now provided that a proposed amendment would pass if it received "a majority of the electors voting on the same" rather than an absolute majority of the votes cast in the general election.

The effect was dramatic. Of the thirty-four amendments proposed by the general assembly between 1851 and 1912, only nine passed. Most of the amendments had received a majority of the votes cast on the issue but had failed to receive the requisite constitutional majority. Only when the legislature gave a proposed amendment a boost by permitting the political parties to place it on the party ballots did proposed amendments seem to have a chance. With this legislative assistance and the endorsement of both political parties, an amendment could pass.<sup>207</sup>

Since 1912, 200 amendments have been proposed to Ohio's constitution, fifty-eight through the initiative process and 142 by the general assembly. Most amendments still fail, whether they have been proposed through the initiative process or by the legislature. But the general assembly has a higher passage rate than does the initiative process. Of the fifty-eight amendments proposed by initiative, fourteen have passed and forty-four have failed, a twenty-four percent approval rate. Of the 142 proposed by the general assembly, forty-eight have passed and ninety-four have failed, a thirty-four percent passage rate. No more than four initiative-sponsored

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<sup>205</sup>The amendments that failed to pass included elimination of the word "white," the use of voting machines, the anti-strike injunction, woman suffrage and a separate amendment permitting women to hold certain offices, a ban on capital punishment, bonds for "good roads," and restrictions on billboard advertising. WARNER, *supra* note 148, at 342.

<sup>206</sup>*Id.* at 341.

<sup>207</sup>A table of all proposed amendments since 1851 and whether the amendment passed or failed is contained in OHIO REV. CODE ANN., OHIO CONST. at 587-607 (West 1994 & Supp. 2003)

amendments have been proposed in any year, while on two occasions the general assembly has proposed eleven in a single year.<sup>208</sup>

In the first few years following the 1912 amendments, the initiative process was the preferred method; initiative-proposed amendments exceeded the general-assembly-proposed amendments in number until 1949. In the 1950s, the general assembly engaged in a burst of amendment-writing, placing twenty-two amendments on the ballot between 1953 and 1960. The legislature broke that record in a four-year span in the 1970s, when it proposed thirty-three amendments.<sup>209</sup>

As the constitution mandates, every twenty years since 1912 the legislature has placed on the ballot a referendum on whether to hold a new constitutional convention. Each time, Ohio voters have answered “no.” Will Ohioans vote for a convention in 2012, when it is next placed on the ballot? The 1912 changes in the amendment process make it unlikely that Ohioans will vote for another convention. The pattern of Ohio’s constitutional conventions reveals that it was not only the politicians, judges, and lawyers who wanted conventions; ordinary Ohioans saw them as an arena in which they could promote social reform and contest competing visions of what Ohio should be. Before 1912, pressure for a convention built from a variety of groups who wanted particular constitutional change so that every couple of generations, Ohioans would vote for a constitutional convention. Since 1912, Ohioans have had a direct method to propose constitutional change, with a simple majority of the voters able to approve it. Although most amendments fail, the ability to use the amending process to propose constitutional change makes it unlikely that any particular interest group would prefer a convention. After all, any changes proposed by a convention would still need to be ratified by the electorate.

Has Ohio’s constitution been made too easy to amend? Is the constitution in danger of losing its standing as higher law, becoming more and more like normal legislation? Political scientist Donald Lutz has examined the amendment process for state constitutions. Among his findings are that a moderate amendment rate (the total number of amendments divided by the constitution’s age in years) of between .75 and 1.00 “is associated with the longest-lived constitutions and thus with the lowest rate of constitutional replacement.”<sup>210</sup> Applying Lutz’s findings to Ohio, in the period between the ratification of the constitution in 1851 to the 1912 constitutional convention, Ohio’s amendment rate was only .15, suggesting the constitution was likely to be replaced. And indeed widespread demand for reform in 1912 led to the adoption of thirty-four new amendments. Since 1913, the amendment rate has averaged 1.2. Although a rate between .75 and 1.0 suggests regular modification and no need to replace a constitution, according to Lutz, a higher rate suggests that a constitution is becoming overloaded with amendments, and the likelihood that the constitution will be replaced increases. If Ohio’s constitution becomes too “encrusted,” perhaps Ohioans will decide to start anew.<sup>211</sup>

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<sup>208</sup>Analysis based on OHIO SECRETARY OF STATE, AMENDMENT AND LEGISLATION: PROPOSED CONSTITUTIONAL AMENDMENTS, INITIATED LEGISLATION, AND LAWS CHALLENGED THROUGH REFERENDUM, SUBMITTED TO THE ELECTORS (2003).

<sup>209</sup>*Id.*

<sup>210</sup>Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 360 (1994).

<sup>211</sup>*Id.* at 358.