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An Ohio Dilemma: Race, Equal Protection, and the Unfulfilled Promise of a State Bill of Rights

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AN OHIO DILEMMA: RACE, EQUAL PROTECTION, AND THE UNFULFILLED PROMISE OF A STATE BILL OF RIGHTS

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The year 2003 marks several notable anniversaries. Of most immediate significance, it is the bicentennial of Ohio statehood. But it is also the bicentennial of *Marbury v. Madison*,[2] the case that is commonly but inaccurately said to have established the United States Supreme Court's power of judicial review.[3] Moreover, it is the centennial of W.E.B. Du Bois's *The Souls of Black Folk*, which emphasized the centrality of race to American life.[4] These three anniversaries come together in an important way. Long before the United States adopted the Fourteenth Amendment

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[2]5 U.S. (1 Cranch) 137 (1803). I have a particular interest in this subject. One of my colleagues has accused me of spending ten weeks on this case in my Constitutional Law course. *See* Erik M. Jensen, *The Continuing Vitality of Tribal Sovereignty Under the Constitution*, 60 MONT. L. REV. 3, 11 n.39 (1999). This charge is wildly inaccurate, simultaneously both a gross exaggeration and a serious understatement. I have never devoted more than five hours to *Marbury* before moving on to the next case. At the same time, the issues raised by *Marbury* pervade the course. In that sense, *everything* is about *Marbury*.

[3]The Court's power to invalidate acts of Congress as inconsistent with the Constitution was widely assumed before *Marbury. See, e.g.,* United States v. Hylton, 3 U.S. (3 Dall.) 171, 172 (1796) (Chase, J.) (stating the question presented as "whether the law of Congress [at issue] is unconstitutional and void"); THE FEDERALIST No. 78 (A. Hamilton). *See also* United States v. Ferreira, 54 U.S. (13 How.) 40, 52-53 (1852) (note appended by Taney, C.J., discussing the unreported 1794 case of *United States v. Yale Todd*, in which the Court held that Congress could not impose nonjudicial duties on judges).

[4]There are, of course, other significant anniversaries this year. Among them: the bicentennial of the Louisiana Purchase, *see generally* JON KUKLA, A WILDERNESS SO IMMENSE: THE LOUISIANA PURCHASE AND THE FUTURE OF AMERICA (2003); the centennial of the Wright brothers' first flight, *see* PETER L. JAKAB, VISIONS OF A FLYING MACHINE: THE WRIGHT BROTHERS AND THE PROCESS OF INVENTION (1990); and the sixty-fifth anniversary of the NAACP's first Supreme Court case challenging segregated education, *see* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

with its guarantee of equal protection in 1868,[5] the Ohio Constitution contained a guarantee of equality that drew on the natural rights principles embodied in the Declaration of Independence. The Buckeye State's original constitution, adopted in 1802, declared that "all men are born equally free."[6] The current version of the Ohio Bill of Rights, adopted in 1851, provides for the people's "equal protection and benefit."[7] During the Nineteenth Century, the Ohio Supreme Court dealt with many cases involving racial issues. In the process, the court developed a jurisprudence that, although jarring to modern sensibilities, was in some respects surprisingly progressive for its time. The court consistently rejected the so-called one-drop rule and afforded unusual protection to many persons of mixed race.[8] Even when upholding racist laws, the court's reasoning was considerably less offensive than that of the U.S. Supreme Court in cases raising similar issues. By the end of the century, however, the Ohio Supreme Court had largely abandoned the quest for a distinctive jurisprudence of equality, deferring instead to the U.S. Supreme Court's approach under the Fourteenth Amendment.

The rise and decline of Buckeye equality doctrine is not merely a matter of historical interest. Understanding this story can also shed light on contemporary constitutional jurisprudence. Until the past decade or so, the Ohio Supreme Court hesitated to develop distinctive interpretations of the state's Bill of Rights despite the

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[5]U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[6]OHIO CONST. of 1802, art. VIII, § 1. The full provision read:

> That all men are born equally free and independent, and have certain natural, inherent and unalienable rights; amongst which are the [*sic*] enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety; and every free republican government, being founded on their sole authority, and organized for the great purpose of protecting their rights and liberties, and securing their independence: to effect these ends they have at all times a complete power to alter, reform or abolish their government, whenever they may deem it necessary.

The Declaration of Independence identified "certain unalienable rights," including "life, liberty, and the pursuit of happiness," and emphasized "the right of the people to alter or abolish" the government in appropriate circumstances. *See generally* CARL BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS (1922); PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE (1997).

[7]OHIO CONST. art. I, § 2. This provision also echoed themes in the Declaration of Independence. It reads in full:

> All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.

[8]This history is apparently unknown or has been forgotten. A recent study of the Shaker Heights public schools reports a seemingly widespread belief that Ohio did follow the one-drop rule. *See* JOHN U. OGBU, BLACK AMERICAN STUDENTS IN AN AFFLUENT SUBURB 176 (2003). Of course, the court's rejection of this rule did not prevent some whites from adhering to it. Also, as we shall see, some lower courts and an occasional justice did endorse the rule, but the Ohio Supreme Court as an institution never did so.

emergence of what has been called the New Judicial Federalism.[9] Even now, the court's approach has been halting and inconsistent at best.[10] Accordingly, this paper will suggest some parallels between the older racial equality cases and the recent effort to define the extent to which individual rights receive independent protection under the Ohio Constitution. Part I examines the Ohio Supreme Court's cases defining "white" in the contexts of legal disabilities and voting. Part II addresses the problem of segregation, especially in public schools. Part III focuses on the court's retreat from independent interpretation of the state constitution's equality guarantee and its general hesitancy to develop a distinctive approach to the Ohio Bill of Rights even in recent years.[11]

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[9]Chief Justice Abrahamson, the keynote speaker at this conference, has been a leading figure in this movement. *See, e.g.,* Shirley S. Abrahamson & Elizabeth A. Hartman, *Building a More Perfect Union: Wisconsin's Contribution to Constitutional Jurisprudence*, 1998 WIS. L. REV. 677; Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985); Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951 (1982).

[10]*See* Richard A. Saphire, *Ohio Constitutional Interpretation*, 51 CLEV. ST. L. REV. 437 (2003); Marianna Brown Bettman, *Ohio Joins the New Judicial Federalism Movement: A Little To-ing and a Little Fro-ing*, 51 CLEV. ST. L. REV. _491 (2003).

[11]Before the Civil War the Ohio Supreme Court also dealt with slavery in a number of cases. Comprehensive attention to the court's slavery jurisprudence is beyond the scope of this article. Nevertheless, a few cases deserve brief mention here.

The Ohio Supreme Court took antislavery positions in *Tom v. Daily*, 4 Ohio 368 (1831), which held that a black boy born in Kentucky and sent to Cincinnati was free because the man who had purchased his slave mother had done so for the stated purpose of setting her free and could not thereafter claim that she was still a slave; in *Birney v. State*, 8 Ohio 230 (1837), which held that a defendant could not be convicted of harboring a fugitive slave without proof of knowledge that the person harbored was in fact a slave; and in *Anderson v. Poindexter*, 6 Ohio St. 622 (1857), which rejected the concept of sojourning and held that a Kentucky slave brought into Ohio by his owner had become free by virtue of the owner's voluntary entry into the Buckeye State. *Birney* was the last installment of a highly publicized controversy that helped to establish Salmon P. Chase as a leading opponent of slavery. Chase unsuccessfully represented the alleged fugitive slave Matilda, who lost at trial and was immediately hustled out of the courtroom by slave hunters before an appeal could be filed, and successfully appealed the conviction of abolitionist James G. Birney, who had been charged with harboring her. *See* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 164-65, 172 (1975); 2 CHARLES B. GALBREATH, HISTORY OF OHIO 203-04 (1925). On the importance of the *Anderson* decision, which was handed down barely two months after *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), see DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 444, 692 n.89 (1978).

The Ohio Supreme Court also issued some proslavery rulings. Among them were *Richardson v. Beebee*, 1 Ohio Dec. Reprint 197 (1846), which followed *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), and invalidated an Ohio law forbidding the removal of any "black or mulatto person" from the state without first proving to a judicial officer that the removed person was in fact a fugitive slave; and *Ex parte Bushnell*, 9 Ohio St. 77 (1859), which refused to issue writs of habeas corpus to Oberlin residents who had been convicted in federal court of forcibly rescuing a fugitive slave. *Richardson* was issued by two justices on circuit, not by the full court. *Bushnell* was a 3-2 ruling that provoked a 97-page dissenting opinion by Justice Sutliff, who has been described as "a pronounced Abolitionist." 1 A HISTORY OF THE COURTS AND LAWYERS OF OHIO 250 (Carrington T. Marshall ed., 1934). For further discussion of *Bushnell* and its relationship to *Ableman v. Booth*, 62 U.S. (21 How.)

I. DEFINING "WHITE"

Race was a pervasive issue in the events leading to Ohio statehood. Two questions predominated: whether Ohio would be a slave state and whether blacks would enjoy civil rights. The 1802 constitutional convention, which adopted the state's first charter, had little difficulty in deciding that Ohio would forbid slavery, although the delegates debated extensively before endorsing two additional clauses that were designed to prohibit certain forms of indenture that might have been used to circumvent the ban on slavery.[12] The civil rights question proved to be much more problematic. After extensive debate, the convention by a one-vote margin adopted a voting rights provision that limited the franchise to white males while rejecting, by a similar margin, a more extreme proposal that would have precluded African Americans from holding office or testifying in court against a white person.[13] The racial restriction on suffrage would be continued in the 1851 constitution and remain on the books until 1923.[14] Although the other restrictions were kept out of

506 (1859), which dealt with a similar controversy that arose in Wisconsin, see COVER, *supra*, at 188-89, 253-54.

[12]The antislavery provision read as follows:

> There shall be neither slavery nor involuntary servitude in this state, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted; nor shall any male person, arrived at the age of twenty-one years, or female person arrived at the age of eighteen years, be held to serve any person as a servant, under the pretense of indenture or otherwise, unless such person shall enter into such indenture while in a state of perfect freedom, and on condition of a bona fide consideration received, or to be received, for their service, except as before excepted. Nor shall any indenture of any negro [*sic*] or mulatto, hereafter made and executed out of state, or if made in the state, where the term of service exceeds one year, be of the least validity, except those given in the case of apprenticeships.

OHIO CONST. of 1802, art. VIII, § 2. For further details about the adoption of this provision, see Helen M. Thurston, *The 1802 Constitutional Convention and the Status of the Negro*, 81 OHIO HIST. 14, 15-21 (1972); Barbara A. Terzian, "Effusions of Folly and Fanaticism": Race, Gender, and Constitution-Making in Ohio, 1802-1923, at 59-70, 93-102 (unpublished Ph.D. dissertation, Ohio State University, 1999).

[13]*See* Thurston, *supra* note 12, at 21-26; Terzian, *supra* note 12, at 102-12.

[14]*See* OHIO CONST. art. V, § 1 (amended 1923). For discussion of the retention of the racial restriction on voting, see Terzian, *supra* note 12, at 206-10. This restriction was rendered inoperative by the adoption of the Fifteenth Amendment in 1870, which allowed African Americans to vote in Ohio despite the whites-only provision in the state constitution. *See* DAVID A. GERBER, BLACK OHIO AND THE COLOR LINE, 1860-1915, at 40 (1976). The 1912 constitutional convention, which was dominated by progressive forces, proposed an amendment to delete the word "white" from the suffrage provision, but the voters rejected that idea. *See* HOYT LANDON WARNER, PROGRESSIVISM IN OHIO, 1897-1917, at 325, 342 (1964); Robert E. Cushman, *Voting Organic Laws*, 28 POL. SCI. Q. 207, 227-28 (1913); Lloyd Luther Sponholtz, Progressivism in Microcosm: An Analysis of the Political Forces at Work in the Ohio Constitutional Convention of 1912, at 244, 246 (unpublished Ph.D. dissertation, University of Pittsburgh, 1969). Several sources note without explanation that the racial limitation was finally removed in 1923, but no good historical study of this belated amendment seems to exist. *See, e.g.,* 2 GALBREATH, *supra* note 11, at 115; GEORGE W. KNEPPER, OHIO AND ITS PEOPLE 335 (2d ed. 1997). One scholar notes in passing that the enfranchisement of women might have affected the decision. *See* Terzian, *supra* note 12, at 279.

the constitution, the legislature soon passed laws imposing various legal disabilities on blacks. Consequently, the Ohio Supreme Court had many occasions to address racial issues. The court first had to determine who was white under racial legislation that restricted persons of color from appearing as witnesses. The rules developed in this area served as precedents for interpreting the whites-only rule for voting.

A. Statutory Disabilities and the Definition of "White"

Although the 1802 constitutional convention rejected proposals to impose additional limitations on persons of color other than the ban on voting, the legislature quickly enacted statutory disabilities. In early January 1804, the second session of the General Assembly passed a law requiring all "black or mulatto" persons intending to live in the state to produce a certificate of freedom.[15] Three years later, the legislature stiffened the rules. Now any "negro or mulatto" immigrant would have to arrange for a $500 bond "with two or more freehold sureties" in order to assure the immigrant's "good behavior."[16] Perhaps these provisions reflected a genuine economic concern that slave owners in the adjoining states of Virginia and Kentucky might force their aging or infirm slaves to emigrate to Ohio.[17] That is certainly not the whole story. Another provision of the 1807 law makes clear that racism was a substantial factor in the adoption of these measures. That provision prohibited any "black or mulatto person" from "be[ing] sworn or giv[ing] evidence" in any legal proceeding in which a white person was a party or in which the state was prosecuting a white person.[18]

The Ohio Supreme Court never addressed the constitutionality of this law, but its decisions make clear the judicial distaste for racial restrictions. The leading case on the meaning of the racial restriction on testimony is *Gray v. State*,[19] in which the defendant was one-quarter black and three-quarters white. Polly Gray was charged with robbery; she invoked the statutory bar when the prosecutor called a black man as a witness against her. The trial judge, observing that Gray was "of a shade of color between the mulatto and white," concluded that she was not entitled to prevent

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[15]Act of Jan. 5, 1804, ch. IV, § 1, 2 Ohio Laws 63, 63. This measure also required blacks and mulattoes to register with the county clerk, who would on payment of a fee of twelve and a half cents issue a certificate of freedom. Failure to obtain a proper certificate, either from the county clerk or a court of competent jurisdiction, would prevent blacks and mulattoes from obtaining employment. Persons who employed blacks and mulattoes who lacked a certificate were subject to fines. *See id.* §§ 2, 3, 5.

[16]Act of Jan. 25, 1807, ch. VIII, § 1, 5 Ohio Laws 53, 53.

[17]*See* Terzian, *supra* note 12, at 117. This concern was made explicit in an 1831 statute, which emphasized that the measure would not "enable any black or mulatto person to gain a legal settlement in this state." An Act for the Relief of the Poor, § 2, 29 Ohio Laws 320, 321 (1831).

[18]Act of Jan. 25, 1807, ch. VIII, § 4, 5 Ohio Laws 53, 54. The legislature enacted additional restrictions over the next quarter-century. *See* GERBER, *supra* note 14, at 4; *see generally* STEPHEN MIDDLETON, THE BLACK LAWS IN THE OLD NORTHWEST: A DOCUMENTARY HISTORY 13-18, 47-48 (1993). Most of these measures were repealed in 1849 after more than a decade of political struggle. *See generally* Leonard Erickson, *Politics and Repeal of Ohio's Black Laws, 1837-1849*, 82 OHIO HIST. 154 (1973).

[19]4 Ohio 353 (1831).

the black witness from testifying.[20] The supreme court reversed in a terse ruling. The law was "one which a court is called upon to execute with reluctance,"[21] and the justices were "unwilling to extend the disabilities of the statute further than its letter requires."[22] Accordingly, the statutory terms "white, black, and mulatto" should be strictly construed: "Color alone is insufficient."[23] The proper test was one of blood: "[A] man [*sic*], of a race *nearer white than a mulatto*, . . . should partake in the privileges of whites."[24] In short, any person who was less than half black was legally white, regardless of skin tone.

This definition of white is strikingly more inclusive than the approach taken in other states, not only during the Nineteenth Century but also well into the Twentieth. Typically, a fraction of African ancestry as small as one-eighth or one-sixteenth was sufficient to render a person legally black elsewhere in the country.[25] For at least some purposes, several states followed the notorious one-drop rule, under which the slightest amount of African ancestry disqualified an individual from having the legal status of white.[26] At the same time, there is a profound irony to the *Gray* decision. By expansively defining "white," the court protected a visibly mixed-race defendant against the potentially damaging testimony of a full-blooded black witness.

Nevertheless, the approach in *Gray* reflected the Ohio Supreme Court's discomfort with the race-based witness-disqualification statute. The court reiterated its distaste for the law fifteen years later, in the civil case of *Jordan v. Smith*,[27] noting both its unsavory implications for the interests of blacks and its potential for promoting injustice by excluding potentially crucial evidence. The dispute involved

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[20]*Id.* at 353 (emphasis omitted).

[21]*Id.* at 354.

[22]*Id.*

[23]*Id.*

[24]*Id.* (emphasis added).

[25]*See generally* PAULI MURRAY, STATES' LAWS ON RACE AND COLOR (1950); GILBERT THOMAS STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 14-17 (1910).

[26]*See* MURRAY, *supra* note 25, at 22 (Alabama), 39-40 (Arkansas), 90 (Georgia), 173-74 (Louisiana), 356 (Oklahoma), 428 (Tennessee), 443-44 (Texas), 462 (Virginia). Virginia's laws defining race have an especially fascinating history, at one time embodying both the one-drop rule for defining African Americans and a Pocahontas exception for descendants of John Rolfe and the Indian princess. *See* A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia,* 77 GEO. L.J. 1967, 1975-81 (1989); Walter Wadlington, *The* Loving *Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1191-1204 (1966). The state's law against interracial marriage was invalidated in *Loving v. Virginia*, 388 U.S. 1 (1967). The last installment in the battle over Louisiana's racial classification laws was fought within the past two decades. *See* Doe v. State *ex rel.* Dep't of Health and Human Resources, Office of Vital Statistics, 479 So. 2d 369 (La. Ct. App. 1985), *cert. denied*, 485 So. 2d 60 (La.), *appeal dismissed for want of a substantial federal question*, 479 U.S. 1002 (1986); *see generally* Raymond T. Diamond & Robert J. Cottrol, *Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment*, 29 LOY. L. REV. 255 (1983); Calvin Trillin, *American Chronicles: Black or White*, NEW YORKER, Apr. 14, 1986, at 62.

[27]14 Ohio 199 (1846).

a white man's attempt to collect a debt from a black woman. The defendant denied having executed the note, whereupon the plaintiff sought to rebut that denial with the deposition of another black woman who claimed to have signed the note as a witness. He argued that the second woman would not be serving as a witness in the case but merely verifying the allegations of the complaint.[28] The court rejected this argument, reasoning that the logic of the plaintiff's position would "more completely put the black man in the power of the white" by allowing whites to take advantage of blacks with impunity unless there happened to be a white witness to the events.[29] By effectively preventing an African American from "swear[ing] to the truth of his plea, . . . you call in the courts of justice in carrying out a system of oppression."[30] Therefore, the plaintiff had to prove the execution of the note. Although there was no doubt that he had a good claim, he could prove his case only through the testimony of the second woman and the statute prevented her from testifying.[31] Because there was no evidence to support the complaint's allegations, the case had to be dismissed even though the effect of the statute was "to prevent justice."[32]

The *Jordan* opinion suggests that the court might have been receptive to a more direct attack on the statute, but the white plaintiff sought to evade rather than attack its exclusion. On the other hand, when confronted with a constitutional challenge to the law two years later, the court avoided the issue. *Woodson v. State ex rel. Borland*[33] was an action against the surety of an estate administrator who allegedly had failed to collect debts that were owed to the estate. The defendant surety sought to call the debtors, who were mulattoes, as witnesses, but the trial court refused to allow them to testify.[34] On appeal, the surety argued that the disqualification law did not apply in this case because none of the parties was white but that, if the statute did somehow apply, it was unconstitutional.[35] Without reaching that question, the court held that the action could not proceed because there had been no proper demand for payment.[36]

In short, the Ohio Supreme Court took pains to construe the witness-disqualification law as narrowly as possible. Of particular significance, the expansive definition of white would have wider implications for interpreting the race-based qualification for voting.

B. "White" Voting

The constitutional limitation of voting rights to white males generated a substantial body of litigation. The Ohio Supreme Court consistently adhered to its

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[28] *Id.* at 200.

[29] *Id.* at 202.

[30] *Id.*

[31] *Id.* at 204.

[32] *Id.*

[33] 17 Ohio 161 (1848).

[34] *Id.* at 163.

[35] *Id.* at 166-67.

[36] *Id.* at 169.

expansive definition of "white" despite several attempts by the legislature to impose stricter tests for voter eligibility. In all of these cases, the court relied on its reasoning in *Gray*.

Voting cases first reached the court in 1842. In *Jeffries v. Ankeny*,[37] the court held that a man who was one-quarter Indian and three-quarters white was a lawful voter. Chief Justice Lane observed that "many persons of the precise breed of this plaintiff," including the current clerk of the Ohio Supreme Court, had "exercised political privileges . . . and worthily discharged the duties of officers."[38] Although *Gray* had involved the construction of a statute involving African Americans rather than the interpretation of a constitutional provision and the present case involved American Indians, the court found the reasoning of the earlier case persuasive. If a person who was more white than black could be white, so could a person who was more white than Indian in ancestry.[39] In *Thacker v. Hawk*,[40] a case decided the same day, the court explicitly rejected the one-drop rule for voting. A man who was partly black and partly white argued that he had been wrongly prevented from voting. He invoked *Gray*, but the trial court instructed the jury to find against him "if the plaintiff have any negro [*sic*] blood whatever."[41] Chief Justice Lane dispatched the issue in a single sentence, saying only that the "charge was wrong, and judgment must be reversed."[42]

These rulings did not settle the issue for whites who agreed with the *Thacker* dissenter that "[t]he word 'white' means *pure white*, unmixed."[43] Following the adoption of the new state constitution in 1851 and shortly after the *Dred Scott* decision,[44] the Ohio legislature passed a bill excluding mixed-race men from voting.[45] Local officials relied on the new law to prevent a man who was one-eighth black and seven-eighths white from voting. The Ohio Supreme Court found the statute unconstitutional in *Anderson v. Millikin*.[46] The unanimous opinion began by citing *Gray* and the voting cases decided under the 1802 constitution, then noted that the convention that wrote the 1851 constitution had to know of the authoritative

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[37]11 Ohio 372 (1842).

[38]*Id.* at 375.

[39]A dissenting opinion endorsed the one-drop rule, asserting that the racial restriction "excludes Indians and part Indians, and all persons not of the pure blood of the white race." *Id.* at 375-76 (Read, J., dissenting).

[40]11 Ohio 376 (1842).

[41]*Id.* at 379.

[42]*Id.*

[43]*Id.* at 380 (Read, J., dissenting).

[44]Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[45]An Act to Prescribe the Duties of Judges of Elections in Certain Cases, and Preserve the Purity of Elections, 56 Ohio Laws 120 (1859); *see* Kenneth J. Winkle, *Ohio's Informal Polling Place*, *in* THE PURSUIT OF PUBLIC POWER: POLITICAL CULTURE IN OHIO, 1787-1861, at 169, 181-82 (Jeffrey P. Brown & Andrew R.L. Cayton eds., 1994).

[46]9 Ohio St. 568 (1859).

judicial construction of the whites-only voting provision.[47] Moreover, there was actual evidence that the convention delegates were aware of this construction.[48] Accordingly, the meaning of "white" in the voting clause was the same under the new constitution as it was under the old one: men who were more white than black were legally white and therefore entitled to vote.[49] Moreover, nothing in *Dred Scott* required a contrary conclusion. Scott himself was said to be a pure-blooded African, so the case did not address the legal status of mixed-race persons.[50] It was clear, however, that the framers of the Ohio Constitution intended "no reference to color" in referring to "citizens of the United States" in the suffrage section.[51] Finally, although the legislature was entitled to disagree with the court's interpretation of this crucial word, a mere statute could not alter the meaning of a constitution. The framers of the new constitution were entitled to overturn the court's interpretation of the prior document, but they had not done so.[52]

Anderson did not settle the voting question. That issue became caught up in the Reconstruction politics of Ohio. In April 1868, the antiblack majority that gained control of the legislature in the 1867 elections passed another law forbidding anyone "having a distinct and visible admixture of African blood" from voting.[53] In *Monroe v. Collins*,[54] the court unanimously struck down this new law, reasoning that it was even more objectionable than the one invalidated in *Anderson*.[55] The statute imposed "unreasonable burdens of proof" on otherwise qualified voters and improper limits on the "kind and amount of evidence" that they had to produce in order to exercise the franchise.[56] In particular, "admixture of *black* blood may be proven by

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[47]*Id.* at 569-70.

[48]*Id.* at 571-72.

[49]*Id.* at 572.

[50]*Id.* at 572-73.

[51]*Id.* at 577. Indeed, if only whites could be citizens of the United States, the addition of the word "white" to the voting section would have been redundant. *Id.* at 578.

[52]*Id.* at 578-79.

[53]Act of Apr. 16, 1868, § 1, 65 Ohio Laws 97, 97. This measure also required election judges to propound a lengthy set of intrusive questions to challenged voters, who were also required to produce two credible witnesses to attest to their whiteness. On the background to this measure, see FELICE A. BONADIO, NORTH OF RECONSTRUCTION: OHIO POLITICS, 1865-1870, at 104-05 (1970); *see generally id.* at 79-109. This was not the only mischief perpetrated by the new legislature. It also purported to rescind the previous legislature's ratification of the Fourteenth Amendment and rejected the Fifteenth Amendment. *See* GERBER, *supra* note 14, at 39. The legislature tried to resolve any lingering ambiguity about Ohio's position by belatedly ratifying the Fourteenth Amendment earlier this year. *See* Stephen Ohlemacher, *More Than 130 Years Later, Ohio OKs 14th Amendment: Equal-Protection Issue Ratified After Long, Bitter Fight*, CLEV. PLAIN DEALER, Mar. 13, 2003, at A1. It didn't take that long for the Buckeye State definitively to ratify the Fifteenth Amendment. That happened in early 1870. *See* GERBER, *supra* note 14, at 40.

[54]17 Ohio St. 665 (1868).

[55]*Id.* at 685.

[56]*Id.* at 686.

reputation, appearance, or opinion, and by any number of witnesses that may 'seem proper' to the challengers, who may ask 'any *other* questions' that may 'seem to them necessary,' but *white* blood must be shown by direct and positive testimony, and in many, if not most cases, such testimony as can not be supposed to be within the power of the voter."[57] Because the statute would exclude many potential voters who were less than half black, it conflicted with the state constitution as that charter had been repeatedly and authoritatively construed.[58]

These decisions demonstrate the Ohio Supreme Court's commitment to limiting the impact of racial restrictions on suffrage. By consistently holding that any person who could claim ancestry of more than half white was legally white, the court provided what by Nineteenth Century standards was unusually strong protection for persons of color. To be sure, the court did not challenge the racist premise underlying the voting restriction. Nonetheless, its rulings afforded rights to some visibly mixed-race individuals who were regarded as black. Similar issues arose in the context of public education, and at least for a time the court took a similar approach to some persons of color in that setting. The court would eventually reject constitutional attacks on segregated schools, but its reasoning was less offensive than it might have been.

II. SEGREGATED SCHOOLS

To understand the background to the school cases, it is important to understand that African Americans were excluded from Ohio public schools for many years. The very first common school law, enacted in 1829, forbade "black and mulatto persons" from attending tax-supported schools.[59] Not until 1848 did the legislature specifically authorize schools for nonwhite children.[60] That law was repealed and replaced by a somewhat different measure the following year.[61] Both statutes prohibited the imposition of taxes on white property owners to support colored schools, so as a practical matter few communities provided for the education of children who were not legally white.[62] For many years, therefore, school litigation dealt with whether children who were not purely white could attend public schools.

This question first arose in the 1834 case of *Williams v. Directors of School District No. 6*,[63] a case decided by two justices on circuit rather than by the full Ohio

[57]*Id.* at 687.

[58]*Id.* at 688-89.

[59]An Act to Provide for the Support and Better Regulation of Common Schools, § 1, 37 Ohio Laws 72, 73 (1829). African Americans were not obliged to pay taxes to support the common schools. *Id.*

[60]An Act to Provide for the Establishment of Common Schools for the Children of Black and Mulatto Persons, 46 Ohio Laws 81 (1848) [hereinafter 1848 Act]. There is some confusion about the children eligible to attend these schools. The statute's title referred to "black and mulatto persons," but § 1 talked of "black or colored persons." *Id.* at 81.

[61]An Act to Authorize the Establishment of Separate Schools for the Education of Colored Children, 47 Ohio Laws 17 (1849) [hereinafter 1849 Act]. This bill also repealed the 1804 and 1807 disability laws, as well as some other black laws. *Id.* § 6, 47 Ohio Laws at 18.

[62]*See* 1848 Act § 9, 46 Ohio Laws at 83; 1849 Act § 3, 47 Ohio Laws at 17.

[63]Wright 578 (Ohio 1834).

Supreme Court. At issue was whether the five children whose father was one-quarter black and whose mother was white could attend the public schools.[64] Relying on *Gray*, the court reasoned that the school law focused on "*blood* and not *complexion*."[65] Any other interpretation "might operate to exclude many children not intended to be excluded by the Legislature" and in any event would reward the school district for its "shabby meanness" of requiring the father to pay taxes to support schools from which his children were barred.[66]

The full court endorsed this definition of "white" in several cases over the next decade and a half. The first of these cases was *Chalmers v. Stewart*,[67] in which a teacher was not paid after allowing black children to attend his classes. The court began by noting that it had just decided, in the voting context, that anyone whose ancestry was more than half white was deemed to be legally white.[68] This determination did not resolve the case, however, because the evidence showed that some of the children Stewart had taught were not legally white, and the school law forbade black pupils from attending public schools.[69] If this could be established, the teacher had violated his obligation "to keep a legal school" and therefore had no right to be paid.[70] At this point the opinion took on a jarring and offensive tone: Justice Wood analogized the teacher's acceptance of black students to "admit[ting] the vicious and corrupt [and] fill[ing] his school with prostitutes or thieves, or those openly profane or licentious."[71] Subsequent cases avoid such inflammatory language, however.

The following year, in *Lane v. Baker*,[72] the court held that *Gray* and *Williams*, as well as the voting cases, required a local school district to admit racially mixed children who were more than half white. The jury found that the plaintiff's son "was of negro [*sic*], Indian and white blood, but of more than half white blood," which was sufficient to establish the boy's entitlement to attend the public school.[73]

Then in 1848, in *Stewart v. Southard*,[74] the court returned to the issue addressed in *Chalmers* and dispensed with the inflammatory rhetoric. This unanimous ruling rejected a white parent's suit against the local school board for unlawfully allowing colored children to attend classes.[75] The court first distinguished *Lane*, which involved the unlawful rejection of a legally eligible "white" student of mixed race

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[64] *Id.* at 579.

[65] *Id.* at 580.

[66] *Id.*

[67] 11 Ohio 386 (1842).

[68] *Id.* at 387 (citing Thacker v. Hawk, 11 Ohio 376 (1842)).

[69] *Id.* at 387-88.

[70] *Id.* at 387.

[71] *Id.* at 388.

[72] 12 Ohio 237 (1843).

[73] *Id.* at 242.

[74] 17 Ohio 402 (1848).

[75] *Id.* at 402.

rather than the unlawful admission of legally ineligible students; the former was a complete denial of the right to an education, whereas the latter simply made school attendance "less desirable" than it might otherwise have been.[76] The court went on to find two insurmountable obstacles to the parent's lawsuit. First, allowing the case to proceed would open the floodgates to claims by every parent in the district, an eventuality for which there was "[n]o necessity."[77] Second, there was no evidence about how the particular school was funded. It was conceivable that the black parents had voluntarily put up the money for the school, in which case the law allowed their children to attend classes. Accordingly, there was a fatal flaw in the record.[78]

These rulings, like those in the voting cases, offered legal protection only to those mixed-race persons whose ancestry was more than half white. On the other hand, the decisions provided limited benefits to some individuals who were commonly regarded as persons of color. At a time when most African American children were barred from public schools, those limited benefits suggest the Ohio Supreme Court's continuing ambivalence about racial discrimination. It would be wrong to regard the court as a hotbed of abolitionist sentiment, of course, but that tribunal was surely more progressive than the U.S. Supreme Court during this period.

The education cases discussed so far addressed only who was eligible to attend public schools. Now we turn to cases involving segregation. Those cases suggest that the Ohio Supreme Court was more tolerant of race-based laws when those laws at least in theory provided alternative options for African Americans than when those laws completely denied them rights or opportunities that were available to whites.

The court first upheld segregated schools in *State ex rel. Directors of the Eastern and Western School Districts v. City of Cincinnati*,[79] a case that arose under the 1849 separate school law. Under that statute, two separate colored school districts were established in Cincinnati, and city officials collected taxes from African American residents to support those districts. Those officials refused, however, to disburse the funds to the school districts, at least in part on the theory that the 1849 law was unconstitutional because it allowed African Americans to serve as school district directors.[80] The court rejected this argument. It began by noting that the 1849 school law had also repealed most of the statutory disabilities that previously had been imposed on black Ohioans, which would presumably have allowed the admission of African American children to the previously all-white Cincinnati public schools unless the city acted under other sections of this statute to create separate schools for colored youth.[81] Nothing in the Ohio Constitution prevented the legislature from authorizing the creation of such districts.[82] Finally, the court explained that invalidating the separate colored school districts would have the

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[76] *Id.* at 404-05.

[77] *Id.* at 406.

[78] *Id.*

[79] 19 Ohio 178 (1850).

[80] *Id.* at 196.

[81] *Id.* at 191.

[82] *Id.* at 197.

undesirable consequence of allowing African American children to attend the white schools. "As a matter of policy," said the court, "it is unquestionably better that the white and colored youth should be placed in separate schools."[83]

We can read this ruling in at least two ways. First, and most obviously, it upheld segregated schools. That fact is not especially unusual. Indeed, the year before this case was decided, the Supreme Judicial Court of Massachusetts upheld segregated schools in *Roberts v. City of Boston*.[84] Second, and more significant, unlike *Roberts*, in which segregation was challenged by African Americans who sought integrated public schools, the challengers in the Cincinnati case were local officials who had no interest in providing any education at all for black children. Despite the Ohio Supreme Court's obvious distaste for integration, its unanimous decision makes clear that the city could not prevent African Americans from attending school. The validity of segregation was not really at issue in this case.

That subject was strongly affected by the new school law of 1853, which repealed the 1849 statute and comprehensively restructured public education in Ohio.[85] This new measure specifically authorized public schools for "colored children" but did not define that crucial term.[86] In *Van Camp v. Board of Education*,[87] the Ohio Supreme Court, in a 3-2 decision, for the first time departed from the rule that any person who is more than half white by blood is legally white. Local school officials in the Village of Logan, in Hocking County, refused to permit children who were five-eighths white and three-eighths black to attend the white public school.[88] The majority opinion emphasized that the 1853 school law required school districts to create separate schools for African Americans and guaranteed those schools a proportionate share of all school taxes collected.[89] Accordingly, the statute was "one of *classification* and not of *exclusion*," so the traditional racial definitions did not necessarily apply.[90] Whites over the previous two generations had developed a "natural repugnance" against close association with African Americans, whom the majority described in terms reminiscent of *Dred Scott* as "a proscribed and degraded race."[91] Moreover, it was "notorious" that the court's rulings allowing

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[83] *Id.* at 198.

[84] 59 Mass. (5 Cush.) 198 (1849). The U.S. Supreme Court would attach considerable significance to this ruling from the highest court in a jurisdiction where the interests of African Americans "ha[d] been longest and most earnestly enforced." Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

[85] An Act to Provide for the Reorganization, Supervision and Maintenance of Common Schools, 51 Ohio Laws 429 (1853) [hereinafter 1853 Act].

[86] *Id.* § 31, 51 Ohio Laws at 441.

[87] 9 Ohio St. 406 (1859).

[88] *Id.* at 408.

[89] *Id.* at 409. The majority might have given this provision an excessively positive interpretation. The obligation to provide separate schools for colored children arose only when there were more than 30 such children in the district. *See* 1853 Act § 31, 51 Ohio Laws at 441.

[90] *Van Camp*, 9 Ohio St. at 410.

[91] *Id.*

visibly colored children to attend classes with white children "did not receive the hearty approval of the state at large."[92] Under these circumstances, the legislature's references to race in the school law should be given their "ordinary and common acceptation."[93] The children at issue were "in fact, if not in law, *colored*."[94] Except for *Gray*, most of the earlier cases are only cursorily reasoned, and the decisions appeared to rest on the exclusionary nature of the restrictions; under the 1853 school law, by contrast, black and visibly mixed-race children were provided for.[95] Only at this point did the majority concede that there was no colored school in Logan because of the small number of African American children (fewer than the statutory threshold of thirty). Still, making "further and more definite provision" for the plaintiff's children was "a matter for the consideration of the legislature, and not for the judiciary."[96] As a result, the children could not attend any public school at all. For them, the practical effect of this ruling was indeed exclusion rather than classification.

The dissenters challenged every aspect of the court's analysis. They viewed the majority as having endorsed "caste legislation"[97] and, in language that anticipated modern equal protection doctrine, warned against racial, religious, and similar classifications, which deserved "strict construction" against their validity.[98] They concluded with an extensive review of prior cases, which established that the terms "white" and "colored" had precise legal definitions that differed from popular usage.[99] Ironically, the full court used precisely this kind of analysis later the same term in *Anderson*, the unanimous decision striking down the legislature's attempt to eliminate mixed-race voting.[100] Meanwhile, *Van Camp* contributed to the legislature's revision of the 1853 law in 1864. That amendment lowered the threshold for establishing colored schools to twenty and authorized adjoining school districts with lower school-age African American populations to combine their resources to provide separate education for minority pupils.[101] This development led

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[92] *Id.* at 411 (noting "the repugnance felt by many of the white youths and their parents to mingling, socially and on equal terms, with those who had any perceptible admixture of African blood"). The majority's reasoning therefore cannot be construed as even implicitly endorsing the one-drop rule. The court explained that "[t]he only question presented" in the case dealt with the legal status of "children of five-eighths white and three-eights African blood, who are *distinctly colored and generally treated and regarded as colored children by the community where they reside*." *Id.* at 408 (emphasis added). Under the school law, the majority concluded that "colored" meant "[a] person who has *any perceptible admixture* of African blood." *Id.* at 411 (emphasis added).

[93] *Id.* at 412.

[94] *Id.* at 411.

[95] *Id.* at 413.

[96] *Id.* at 414.

[97] *Id.* at 415 (Sutliff, J., dissenting).

[98] *Id.* at 416.

[99] *Id.; see id.* at 416-24 (reviewing decisions dating back to *Gray*).

[100] *See supra* notes 44-52 and accompanying text.

[101] Act of Mar. 18, 1864, § 4, 61 Ohio Laws 31, 33.

to another important segregation ruling that the U.S. Supreme Court would cite in two of its most important cases on the subject.

The direct legal challenge to segregated schools in Ohio came in the case of *State ex rel. Garnes v. McCann*.[102] The case was tried on stipulated facts. The only question was the constitutionality of separate schools; the parties agreed that the school for colored children "affords to such children all the advantages and privileges of a common school, equal to those of the school for white children."[103] A unanimous court rejected the constitutional challenge. The opinion emphasized that the black children had not been denied an education equal to that afforded to whites; if that had been the situation, "more doubt would arise."[104] Prior cases had "firmly established" the government's power under state law to classify and segregate schoolchildren.[105] Turning to federal law, the court rejected arguments based on the Privileges or Immunities Clause of the Fourteenth Amendment. Although that provision had yet to receive authoritative construction from the U.S. Supreme Court, the Ohio Supreme Court anticipated the ruling in *The Slaughter-House Cases*[106] that this provision offered limited protection against state regulations. The court suggested that the clause "includes only such privileges or immunities as are derived from, or recognized by, the constitution of the United States."[107] Moreover, there was no equal protection violation because the segregation law did not "deprive colored persons of any rights"; that law guaranteed "equal common school advantages."[108] Echoing the reasoning of *Van Camp*, although perhaps with greater justification because there were in fact separate public schools for colored pupils in this case, the court found that the black children had been classified rather than excluded:

> Equality of rights does not involve the necessity of educating white and colored persons in the same school, any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school. Any classification which preserves substantially equal school advantages is not prohibited by either the State or federal constitution, nor would it contravene the provisions of either.[109]

The U.S. Supreme Court would cite *Garnes* in two of its major segregation cases, but the Court seems not to have read the opinion very carefully. The first citation

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[102]21 Ohio St. 198 (1872).

[103]*Id.* at 203.

[104]*Id.* at 207. Because of the absence of any provision for the education of colored children in *Van Camp*, the *Garnes* court explicitly declined to "approve or disapprove" the result in that earlier case, although it did endorse the basic principle that the separate-school law was one of classification only. *Id.* at 208.

[105]*Id.* at 208.

[106]83 U.S. (16 Wall.) 36 (1873).

[107]*Garnes*, 21 Ohio St. at 210.

[108]*Id.*

[109]*Id.* at 211.

came in *Plessy v. Ferguson*,[110] as the first case in a list of state cases that upheld segregated schools.[111] The second was second in another string citation in *Gong Lum v. Rice*,[112] a case that suggested that the validity of segregated schools had long ago been settled.[113] *Plessy* in particular might have been marginally less offensive had the majority relied on the Ohio Supreme Court's approach in *Garnes*, with its emphasis on classification rather than exclusion. Instead, the majority drew a forced distinction between political and social equality,[114] then dismissed the idea that segregation stigmatized African Americans as a figment of hypersensitive black imaginations.[115] Despite the result upholding segregation, *Garnes* at least did not add gratuitous insult to the injury of its actual holding.

There is one last footnote to Ohio's school segregation saga during the Nineteenth Century. As in *Roberts*, which was effectively overruled by the Massachusetts legislature,[116] the Ohio General Assembly repealed the statutory authorization for segregated schools in 1887.[117] The repeal came about due to intense competition between Republicans and Democrats for the African American vote.[118] The Ohio Supreme Court recognized the statutory repeal the following year in a one-paragraph opinion that made clear that boards of education could not take account of race or color in assigning children to public schools.[119]

III. THE END OF OHIO EQUALITY DOCTRINE AND THE MEANING OF THE STATE BILL OF RIGHTS

The Ohio Supreme Court's Nineteenth Century jurisprudence of racial equality reflected the country's and the state's profound ambivalence about this subject. The

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[110]163 U.S. 537, 545 (1896).

[111]This string citation followed the Court's discussion of the *Roberts* case involving segregation in Boston. *See supra* note 84 and accompanying text.

[112]275 U.S. 78, 86 (1927).

[113]*Id.* at 85-86. *See also* Hall v. DeCuir, 95 U.S. 485, 504 (1878) (Clifford, J., concurring in the judgment) (citing *Garnes* for the proposition that segregation is constitutional when there is "no substantial inequality" between separate accommodations).

[114]*Plessy*, 163 U.S. at 545.

[115]*Id.* at 551 ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but only because the colored race chooses to put that construction upon it.").

[116]*See* Ch. 256, 1855 Mass. Acts 674.

[117]*See* An Act to Repeal Sections 4008, 6987 and 6988 of the Revised Statutes of Ohio, 84 Ohio Laws 34 (1887).

[118]*See* GERBER, *supra* note 14, at 237-43.

[119]*See* Bd. of Educ. v. State *ex rel.* Gibson, 45 Ohio St. 555, 16 N.E. 373 (1888) (per curiam). The repeal of the segregation laws did not eliminate segregated schools in Ohio. *See*, *e.g.*, Reed v. Rhodes, 500 F. Supp. 404, 407-10 (N.D. Ohio 1980), *aff'd*, 662 F.2d 1219 (6th Cir. 1981); Penick v. Columbus Bd. of Educ., 429 F. Supp. 229, 234-36 (S.D. Ohio 1977), *aff'd in part and remanded on other grounds*, 583 F.2d 787 (6th Cir. 1978), *aff'd*, 443 U.S. 449 (1979).

court never invalidated a racial classification during this period. In part, this reflected the arguments of litigants, few of whom ever contested the constitutionality of laws and public policies that discriminated on the basis of race. The paucity of constitutional arguments might have reflected gaps in existing legal doctrine. After all, the racial restriction on voting was written into the state constitution, and the federal Bill of Rights did not apply to the states at this time.[120] When constitutional arguments were presented, the court either avoided or rejected them. Even in rejecting such arguments in *Garnes*, the court at least treated them with a modicum of respect. Of course, that ruling ignored the real meaning of segregation, which the first Justice Harlan recognized in his celebrated *Plessy* dissent: "Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from [facilities] occupied by blacks, as to exclude colored people from [facilities] occupied by or assigned to white persons."[121] Still, the Ohio Supreme Court apparently went out of its way to construe racial restrictions narrowly and repeatedly emphasized their evil effects. In this respect, at least, the court was notably more sensitive than the U.S. Supreme Court and most other state courts.

Unfortunately, the last school case was decided just a few years before the court effectively abandoned the idea of developing a coherent body of Ohio-based equality doctrine. By 1895, the state supreme court was saying that the guarantees of the Ohio equal protection clause were coextensive with those of the federal equal protection clause.[122] For more than a century now, the state constitution's equality guarantee has had no independent significance.[123] The only rationalization for this phenomenon was offered more than eighty years ago: the U.S. Supreme Court's greater expertise arising from its dealing with more equal protection cases than "any state court."[124] One possible consequence of the retreat from Buckeye equality doctrine was a 1933 ruling upholding segregation in higher education. In *State ex rel. Weaver v. Board of Trustees*,[125] the court found no equal protection problem in

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[120]*See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[121]Plessy v. Ferguson, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting). Of course, Justice Harlan had his own blind spots about race. *See id.* at 561 (discussing the Chinese, "a race so different from our own that we do not permit those belonging to it to become citizens of the United States"); *see generally* Gabriel J. Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 157-66 (1996).

[122]*See* State *ex rel.* Schwartz v. Ferris, 53 Ohio St. 314, 341, 41 N.E. 579, 584 (1895).

[123]*See, e.g.,* State v. Thompson, 95 Ohio St. 3d 264, 266, 767 N.E.2d 251, 255 (2002); Fabrey v. McDonald Village Police Dep't, 70 Ohio St. 3d 351, 353, 639 N.E.2d 31, 33 (1994); Beatty v. Akron City Hospital, 67 Ohio St. 2d 483, 491, 424 N.E.2d 586, 591-92 (1981); Kinney v. Kaiser Aluminum & Chem. Corp., 41 Ohio St. 2d 120, 123, 322 N.E.2d 880, 882 (1975); State *ex rel.* Struble v. Davis, 132 Ohio St. 555, 560, 9 N.E.2d 684, 687 (1937); City of Xenia v. Schmidt, 101 Ohio St. 437, 449, 130 N.E. 24, 27 (1920); Steele, Hopkins & Meredith Co. v. Miller, 92 Ohio St. 115, 126, 110 N.E. 648, 651 (1915).

[124]City of Xenia v. Schmidt, 101 Ohio St. 437, 449, 130 N.E. 24, 27 (1920). This notion overlooks the possibility that the Ohio equality provision, like other state constitutional equality guarantees, was "drafted differently, adopted at different times, and aimed at different evils" than the federal provision. Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1197 (1985).

[125]126 Ohio St. 290, 185 N.E. 196 (1933) (per curiam).

Ohio State University's exclusion of an African American home economics major from living in a laboratory house with several other students, which was a degree requirement in her field. The university offered her an alternative arrangement that would keep her from sharing quarters with white students.[126] A per curiam opinion quickly dispatched her constitutional challenge. To be sure, the opinion invoked *Garnes* for the proposition that she would have "substantially equal school advantages" under the alternative, segregated arrangement.[127] The bulk of the analysis relied primarily on *Plessy*, however, as the justices went on to characterize the young woman's claim as involving social rather than political equality and concluded that she had no legitimate grievance against the university.[128] Although this ruling came only six years after the U.S. Supreme Court had suggested that the constitutional validity of educational segregation was settled,[129] another state court would shortly find that some types of school segregation could still be impermissible.[130] Moreover, the idea of segregating African American students within an otherwise racially mixed university seemed especially incongruous.[131] Whether or not greater reliance on Ohio constitutional doctrine would have changed the outcome of *Weaver*, the increased sensitivity to racial issues exhibited in so many of the Nineteenth Century opinions might have affected the tone of the ruling.

Moreover, the Ohio Supreme Court's subordination of state to federal equality principles was part of a much more general reluctance to develop a body of doctrine interpreting other provisions of the state's Bill of Rights. This reluctance could not initially have reflected deference to the U.S. Supreme Court's greater experience in dealing with individual rights claims asserted against state and local governments, because until 1925 no provision of the federal Bill of Rights had been incorporated against the states.[132] In fact, the call for state supreme courts to develop an independent jurisprudence affording greater protection to individual liberties than was available under the U.S. Constitution dates back just over a quarter-century and arose in response to concerns about restrictive interpretations of the federal Bill of Rights.[133] The Buckeye State was hardly a pioneer in this respect: the Ohio Supreme

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[126] *Id.* at 290-94, 185 N.E. at 196-97.

[127] *Id.* at 297, 185 N.E. at 199.

[128] *Id.* at 297-99, 185 N.E. at 199. This case became an issue in the 1936 gubernatorial election, when Democratic Governor Martin L. Davey attacked his Republican opponent, Attorney General John W. Bricker, for having defended the university in *Weaver*. *See* Frank P. Vazzano, *Martin Davey, John Bricker, and the Ohio Election of 1936*, 104 OHIO HIST. 5, 18 (1995).

[129] *See supra* text accompanying notes 112-13.

[130] *See* Pearson v. Murray, 182 A. 590 (Md. 1936).

[131] *See* McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637 (1950).

[132] *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) ("For present purposes we may and do assume that freedom of speech and of the press–which are protected by the First Amendment from abridgment by Congress–are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

[133] *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); *see also* James A. Gardner, *The Failed Discourse of State*

Court waited until 1993 to declare that "the Ohio Constitution is a document of independent force."[134] Indeed, the court's hesitancy in this regard has been described as a judicial "failure."[135] Regardless of the accuracy of this description, the record is decidedly mixed. Others in this symposium will address this topic in more detail.[136] For now, let me offer only two examples.

Consider first the judicial minuet in the *Robinette* case, which involved the constitutionality of a motor vehicle search after a traffic stop. The Ohio Supreme Court first held the search unlawful under the Fourth Amendment and the Ohio Constitution.[137] The U.S. Supreme Court reversed the Fourth Amendment holding and remanded the case for further proceedings.[138] Despite a virtual invitation from Justice Ginsburg in a concurring opinion to ground its decision exclusively on state law,[139] the Ohio Supreme Court concluded that the protections afforded by the state constitution were "coextensive" with those provided by the Fourth Amendment.[140]

Finally, consider *State ex rel. R.T.G., Inc. v. State*,[141] a 4-3 regulatory-taking case decided late last year. The Division of Reclamation of the Ohio Department of Natural Resources designated 833 acres of land as unsuitable for coal mining because mining operations could harm an aquifer that supplied water to a nearby

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Constitutionalism, 90 MICH. L. REV. 761, 762-63 nn.5-7 (1992) (collecting additional sources advocating the same approach).

[134]Arnold v. City of Cleveland, 67 Ohio St. 3d 35, 42, 616 N.E.2d 163, 169 (1993).

[135]*See* Mary Cornelia Porter & G. Alan Tarr, *The New Judicial Federalism and the Ohio Supreme Court: Anatomy of a Failure*, 45 OHIO ST. L.J. 143 (1984).

[136]*See* Bettman, *supra* note 10; Saphire, *supra* note 10.

[137]State v. Robinette, 73 Ohio St. 3d 650, 653 N.E.2d 695 (1995).

[138]Ohio v. Robinette, 519 U.S. 33 (1996).

[139]*See id.* at 44-45 (Ginsburg, J., concurring in the judgment) ("On remand, the Ohio Supreme Court may choose to clarify that its instructions to law enforcement officers in Ohio find adequate and independent support in state law, and that in issuing these instructions, the court endeavored to state dispositively only the law applicable in Ohio.").

[140]State v. Robinette, 80 Ohio St. 3d 234, 238, 685 N.E.2d 762, 766 (1997). The majority opinion emphasized that Article I, § 14 of the Ohio Constitution was "in almost the exact language" of the Fourth Amendment, *id.* at 239, 685 N.E.2d at 767, and that there was "no persuasive reason" to interpret the provisions differently. *Id.* at 238, 685 N.E.2d at 766. Applying the totality-of-the-circumstances test mandated by the U.S. Supreme Court for Fourth Amendment purposes rather than the bright-line rule it had used in its previous decision, the Ohio Supreme Court reaffirmed that the search was unlawful. *Id.* at 246, 685 N.E.2d at 771-72. Because this ruling rested explicitly on the Ohio Constitution (albeit applying the same standard that applied under the Fourth Amendment), there were no grounds for seeking further review in the U.S. Supreme Court. For discussion of the substantive implications of this final ruling in *Robinette*, see Christo Lassiter, *Eliminating Consent from the Lexicon of Traffic Stop Interrogations*, 27 CAP. U. L. REV. 27 (1998). For discussion of the judicial-federalism aspects of the case, see Marianna Brown Bettman, *Identical Constitutional Language: What Is a State Court to Do? The Ohio Case of* State v. Robinette, 32 AKRON L. REV. 657 (1999); Ben Glassman, *Decide the Law Clearly–A Reply to Judge Bettman*, 48 CLEV. ST. L. REV. 469 (2000).

[141]98 Ohio St. 3d 1, 780 N.E.2d 998 (2002).

village.[142] After concluding that the mining company had no federal takings claim,[143] the court declared that "states are free to interpret their constitutions independently of the United States Constitution as long as that interpretation affords, at a minimum, the same protection as its federal counterpart."[144] Because a 1907 Ohio case had recognized mineral rights as separate and distinct property interests under state law,[145] the agency's "unsuitable for mining" order had unconstitutionally taken the company's mineral rights.[146] That is the extent of the court's analysis.[147] Whatever else these cases might imply, they offer support for Professor Gardner's skeptical view of judicial federalism: "State courts often seem downright reluctant to construe their state constitutions at all, and when they do so their opinions are often vague, perfunctory, or almost entirely dependent on analytic strategies and terminology borrowed from federal constitutional discourse."[148]

IV. CONCLUSION

Race was a central issue in Ohio from the very beginning. The original state constitution of 1802 and the successor constitution of 1851 explicitly limited suffrage to whites even as both documents forbade slavery. Moreover, the legislature imposed various legal disabilities and restrictions on African Americans. For much of the Nineteenth Century, however, the Ohio Supreme Court tried to narrow the scope of those restrictions by developing a distinctive jurisprudence that was in some respects more progressive, and in general less obnoxious, than that developed in other states and by the U.S. Supreme Court. Before the end of the century, though, the court gave up the quest for a distinctive approach to equality. The court's diffidence in this area reflected a larger reluctance to develop an independent jurisprudence of individual liberty under the state constitution. At the same time, the court never directly challenged the racist assumptions built into the state constitution. For this reason, we should not delude ourselves into believing that the Ohio Supreme Court could have lit the way toward a more racially enlightened society. Still, the failure to make better use of the state bill of rights was a lost opportunity. It remains to be seen whether the modern court can do better than its predecessors.

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[142]*Id.* at 3-4, 780 N.E.2d at 1002.

[143]*Id.* at 10, 780 N.E.2d at 1007-08.

[144]*Id.* at 11, 780 N.E.2d at 1008 (citing Arnold v. City of Cleveland, 67 Ohio St. 3d 35, 616 N.E.2d 163 (syllabus ¶ 1) (1993)).

[145]*Id.* at 11, 780 N.E.2d at 1008 (citing Moore v. Indian Camp Coal Co., 75 Ohio St. 493, 80 N.E. 6 (1907)).

[146]*Id.* at 12, 780 N.E.2d at 1009.

[147]The rest of the opinion was devoted to determining the "relevant parcel," an important aspect of any takings case, *id*. at 12, 780 N.E.2d at 1009, rejecting the argument that the company's activities did not constitute a nuisance (which would have defeated the taking claim), *id.* at 13, 780 N.E.2d at 1009-10, and concluding that the company was entitled to attorney's fees and costs because the state's position was not substantially justified, *id.* at 14-15, 780 N.E.2d at 1010-11.

[148]Gardner, *supra* note 133, at 805.