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OHIO JOINS THE NEW JUDICIAL FEDERALISM MOVEMENT: A LITTLE TO-ING AND A LITTLE FRO-ING

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I'm going to use the year 1993 as the focal point of my talk. Obviously, the Ohio Supreme Court had used its own constitution as the basis of decisions many times before that, but that's when the court expressly joined the New Judicial Federalism Movement. The official announcement, so to speak, came in the syllabus of *Arnold v. Cleveland*,[2] authored by Justice Andy Douglas. He wrote:

> A noticeable trend has recently emerged among state courts. It appears that more state courts are increasingly relying on their constitutions when examining personal rights and liberties. . . . *In joining the growing trend in other states, we believe that the Ohio Constitution is a document of independent force*. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.[3]

Just as an aside, it is quite interesting that the *Arnold* case is the one in which Ohio joined the New Judicial Federalism Movement, because the case itself dealt with the right to bear arms.[4] A challenge was brought under the Ohio Constitution to a Cleveland ordinance that banned the possession and sale of assault weapons in the city.[5] The court noted that unlike the Second Amendment,[6] the right to bear arms in

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[2]67 Ohio St. 3d 35, 616 N.E.2d 163 (1993).

[3]*Id.* at 42, 616 N.E.2d at 168-69 (emphasis added).

[4]*Id.* at 39, 616 N.E.2d at 166.

[5]*Id.* at 39, 616 N.E.2d at 166.

[6]"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

Ohio is a personal, not a collective right,[7] but subject to reasonable regulation.[8] The court held that the ban on that limited category of weapon was a reasonable exercise of the police power.[9]

As I'm sure everyone knows, this issue was just argued to the Ohio Supreme Court in the concealed carry case, where the concealed carry law was challenged solely on state constitutional grounds.[10] But back to the big picture.

I'm going to talk about the approaches the court has taken since it announced it was joining the New Judicial Federalism Movement in 1993. Although different nomenclature is used, there is generally thought to be three approaches to state constitutional analysis. I like the language Professor Jennifer Friesen uses in her book on state constitutional law.[11]

First is the lockstep approach. Here, the state court does not deviate in any way from U.S. Supreme Court analysis and precedent when interpreting state constitutional provisions that are analogous to federal provisions.

Second is the reactive posture, or what Professor Friesen calls the "supplemental/independent method."[12] I like to call this the selective independent posture. Here's what Professor Friesen has to say about this approach:

> The supplemental approach treats state constitutional rights as supplemental to a federal benchmark, necessary only when the federal law does not protect the right asserted. In application this means that the current federal doctrine is treated as the presumptively correct standard for state law as well, except when the state court finds persuasive reasons to "depart" or "diverge" from the Supreme Court, or fill in gaps left by its opinions.[13]

So, here a state generally follows federal precedent, but grants more rights under its own constitution in certain limited instances. Under this approach, federal law is analyzed first.

Finally, there is the "beyond reactive," or again, in Professor Friesen's terms, the "primacy" method.[14] Here, the state court engages in a truly separate and independent state constitutional analysis, and analyzes state law first. With this approach, Professor Friesen asserts, the state should look to its "common law history,

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[7]"The people have the right to bear arms for their defense and security[.]" OHIO CONST. art. I, § 4.

[8]*Arnold*, 67 Ohio St. 3d at 43, 45-46, 616 N.E.2d at 169, 171.

[9]*Id.* at syllabus ¶ 3.

[10]*See* Klein v. Leis, 99 Ohio St. 3d 537, 795 N.E.2d 633 (2003) (holding that there is no constitutional right to bear concealed weapons).

[11]1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES (3d ed. 2000).

[12]*Id.* at § 1-6(c).

[13]*Id.* at §§ 1-45, 1-46 (internal footnotes omitted).

[14]*Id.* at § 1-6(a).

state history, state policy, and constitutional structure as sources for independent interpretation."[15] Federal precedent is relevant but not binding.[16]

OK, so whither Ohio? I have three contentions. First, despite the bold announcement in *Arnold*, the court takes awhile to "get" it—except for Justice Craig Wright, who got it right away and is really the leader of this movement, and the most sophisticated analyst.

Second, on the criminal law side of the ledger, especially in the area of search and seizure, the court has intentionally chosen to remain in lockstep with federal precedent, because of the conservative bent of a majority of the justices about the rights of criminal defendants.

Finally, on the civil side, the court has been more willing to sally forth—but even when heading beyond the lockstep approach, it has not really engaged in the kind of meaningful analysis that Professor Friesen suggests should characterize these approaches. It has used more of what I call the "magic wand" view—simply an announcement that Ohio is taking a different position. Justice Pfeifer has replaced Justice Wright as the heir to the New Judicial Federalism Movement, but is a less thorough analyst.

After *Arnold*, we're going to see some to-ing and fro-ing. I've chosen as examples cases involving speech and the press, searches and seizures, and religion.

I. SPEECH AND THE PRESS

A. Defamation

It's always useful in these analyses to start by looking at a comparison of the constitutional language. Identical language doesn't always mean lockstep is going to be the approach, nor does different language mean independent analysis. Still, it's a good place to start. With speech and the press, we are comparing the First Amendment to the U.S. Constitution[17] with Article I, Section 11 of the Ohio Constitution.[18]

First, let's look at defamation—an area where I think the court almost accidentally fell into a beyond reactive posture. The court's defamation jurisprudence can be seen as very, very bold, or as overly deferential to the media, depending on one's viewpoint.

The court's view emerged before *Arnold* from the companion cases of a wrestling coach named Milkovich, a school superintendent named Scott, and the Willoughby News Herald newspaper.[19] The question was whether a sportswriter for the newspaper defamed the coach and the superintendent in his column.

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[15] *Id.* at § 1-42.

[16] *Id.* at § 1-41.

[17] "Congress shall make no law … abridging freedom of speech or of the press. . . ." U.S. CONST. amend. I.

[18] "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech, or of the press." OHIO CONST. art. I, § 11.

[19] Milkovich v. News Herald, 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984); Scott v. News Herald, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986).

The coach and the superintendent each sued the paper separately, and each case got to the Ohio Supreme Court separately. In both cases, the media argued that the column was an opinion and was therefore absolutely protected under federal law.[20] In Milkovich's case, which reached the Ohio Supreme Court first, the court rejected that argument, and decided the case on the private figure/negligence basis.[21] The case was reversed and remanded.[22]

In Scott's case, which reached the Ohio Supreme Court two years and one election later, the court overruled *Milkovich,* declared school superintendent Scott a public figure, and held the article to be opinion—which, as such, was absolutely protected, *both* by Article I, Section 11 of the Ohio Constitution as a proper exercise of freedom of the press, and by the First Amendment.[23] It is worth noting that this was intended as the lockstep approach, but was an incorrect interpretation of federal law. Because of this, the Ohio Supreme Court is going to fall into a beyond reactive posture.

Meanwhile, the *Milkovich* case, which had been reversed and remanded, was re-decided in favor of the media, based on the opinion privilege set forth in *Scott.*[24] The U.S. Supreme Court accepted review of *Milkovich* and told the Ohio Supreme Court in no uncertain terms that there is no separate opinion privilege under federal constitutional law.[25] The U.S. Supreme Court reaffirmed the actual malice standard of *New York Times v. Sullivan*[26] as striking the proper balance between freedom of the press and the protection of the reputation of public persons, and determined that the language in the article was actionable.[27]

So what lesson does the Ohio Supreme Court take from this U.S. Supreme Court rebuke in *Milkovich*? That it could avoid rebuke by truly relying on its own state constitution. It's going to move away from lockstep and chose affirmatively to find a different interpretation under state law.

Let's move to the post-*Arnold* world of defamation. The case is *Vail v. Plain Dealer Publishing Company*;[28] the year, 1995. Cleveland Plain Dealer columnist Joe Dirk wrote some very dicey things about state senatorial candidate Loren Vail.[29] Vail sued the newspaper for defamation. The Ohio Supreme Court upheld the dismissal of the case against the Plain Dealer on the basis of the opinion privilege it had first announced in *Scott.*[30] What about the U.S. Supreme Court decision in

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[20]*Milkovich*, 15 Ohio St. 3d at 298, 473 N.E.2d at 1196; *Scott*, 25 Ohio St. 3d at 244, 496 N.E.2d at 701.

[21]*Milkovich*, 15 Ohio St. 3d at 296-99, 473 N.E.2d at 1195-97.

[22]*Id.* at 299, 473 N.E.2d at 1197.

[23]*Scott*, 25 Ohio St. 3d at 247-48, 254, 496 N.E.2d at 704, 709.

[24]Milkovich v. News-Herald, 46 Ohio App. 3d 20, 545 N.E.2d 1320 (1989).

[25]Milkovich v. Lorain Journal Co., 497 U.S. 1, 24 (1990).

[26]*Id.* at 16 (referring to New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964)).

[27]*Id.* at 3.

[28]72 Ohio St. 3d 279, 649 N.E.2d 182 (1995).

[29]*Id.* at 282-83, 649 N.E.2d at 186.

[30]*Id.* at 281, 649 N.E.2d at 185.

Milkovich? The *Vail* court unapologetically concedes it may have been wrong in its interpretation of federal law, but emphatically reaffirms the opinion privilege under state law.[31]

Chief Justice Moyer, who authored the majority opinion, had this to say: "Regardless of the outcome in *Milkovich*, the law in this state is that embodied in *Scott*. The Ohio Constitution provides a separate and independent guarantee of protection for opinion ancillary to freedom of the press."[32] He went on to hold the column was protected opinion as a matter of law.[33]

I want to highlight the separate concurrence of Justice Wright in this case because he is the most consistent voice for the "beyond lockstep" approach to the New Judicial Federalism. He said:

> I write separately not out of disagreement with some aspect of the Chief Justice's opinion, but to stress its stated underpinnings—Section 11, Article I of the Ohio Constitution. Time and again, but never more clearly than today, we have stressed that the protections accorded opinion under the Ohio Constitution are broader than the First Amendment jurisprudence developed by the United States Supreme Court.[34]

Justice Pfeifer, although concurring in the judgment, chided the court for relying on nothing more than a "naked assertion that Section 11, Article I of the Ohio Constitution provides greater protection for the publishing of opinions than the First Amendment to the federal Constitution."[35] He believes that the Ohio Constitution is actually stricter about abuses of the rights of free speech than the First Amendment.[36]

After *Vail*, the question remained as to whether this separate opinion privilege was just for the media. The answer came in 2001 in *Wampler v. Higgins*,[37] in which the court held that "[t]he Ohio Constitution's separate and independent protection for opinions recognized in *Scott* . . . and reaffirmed in *Vail*, is not limited in its application to the allegedly defamatory statements made by media defendants[.]"[38]

B. Ethnic Intimidation

Remember this talk is called a little to-ing and a little fro-ing. We've seen the to-ing. Now for a little fro-ing, where the court has not been quite so bold in striking out on its own. Let's look at ethnic intimidation, which I see as a toe in the "beyond reactive" water, pulled out quickly when it gets burned. The case is *State v. Wyant.*[39] At issue was a state law that created a penalty enhancement when certain menacing

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[31] *Id.* at 281, 649 N.E.2d at 185.

[32] *Id.* at 281, 649 N.E.2d at 185.

[33] *Id.* at 283, 649 N.E.2d at 186.

[34] *Id.* at 284, 649 N.E.2d at 187 (Wright, J., concurring).

[35] *Id.* at 285, 649 N.E.2d at 188 (Pfeiffer, J., concurring).

[36] *Id.* at 285-86, 649 N.E.2d at 188 (Pfeifer, J., concurring).

[37] 93 Ohio St. 3d 111, 752 N.E.2d 962 (2001).

[38] *Id.* at syllabus.

[39] 64 Ohio St. 3d 566, 597 N.E.2d 450 (1992) (hereinafter *Wyant I*).

crimes were committed because of the race, color, religion, or national origin of the victim.[40] The predicate offenses were already crimes.[41] The Ohio Supreme Court held that the effect of the ethnic intimidation statute was to create a "thought crime" in violation of Article I, Section 11 of the Ohio Constitution, and the First and Fourteenth Amendments to the United States Constitution.[42] Certiorari was granted in this case by the U.S. Supreme Court,[43] along with a number of other state ethnic intimidation cases.

In 1993, the U.S. Supreme Court upheld Wisconsin's similar ethnic intimidation statute in *Wisconsin v. Mitchell*,[44] holding that a penalty enhancement increases punishment for conduct, and does not impermissibly punish thought.[45] The U.S. Supreme Court sent *Wyant* back to the Ohio Supreme Court for reconsideration in light of its holding in *Mitchell.*[46]

What happened in *Wyant II*?[47] The court meekly retreated to lockstep. Here's the whole decision. "For the reasons stated in *Wisconsin v. Mitchell*, we vacate our opinion in *State v. Wyant* and uphold the constitutionality of the ethnic intimidation law, under both the United States and Ohio Constitutions."[48] This drew a strong dissent by Justice Wright, joined by Justice Pfeifer. "Today, sad to say, we have beaten a hasty retreat from our previous pronouncement in this very case. . . ."[49]

Whether or not the *Mitchell* decision dictates that "[Ohio's ethnic intimidation statute] be held constitutional under the First Amendment, I believe that it is unconstitutional under Section 11, Article I of the Ohio Constitution. As we said in *Wyant I*, 'the Constitution of Ohio is even more specific [than the First Amendment]; it guarantees to every citizen freedom to 'speak, write and publish his sentiments on all subjects.'"[50]

"Because the Ohio Constitution provides a more expansive protection for freedom of speech than does the United States Constitution, nothing in the *Mitchell* decision alters our conclusion in *Wyant I* that [Ohio's ethnic intimidation statute] violates the Ohio Constitution. . . ."[51]

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[40]OHIO REV. CODE § 2927.12 (1987).

[41]*Wyant I*, 64 Ohio St. 3d at 570-71, 597 N.E.2d at 453.

[42]*Id.* at syllabus.

[43]Ohio v. Wyant, 508 U.S. 969 (1993).

[44]508 U.S. 476 (1993).

[45]*Id.* at 487-88.

[46]Remand from the United States Supreme Court, No. 92-568.

[47]State v. Wyant, 68 Ohio St. 3d 162, 624 N.E.2d 722 (1994) (hereinafter *Wyant II*).

[48]*Id.* at 164, 624 N.E.2d at 724.

[49]*Id.* at 164, 624 N.E.2d at 724 (Wright, J., dissenting).

[50]*Id.* at 167, 624 N.E.2d at 726 (Wright, J., dissenting) (quoting *Wyant I*, 64 Ohio St. 3d at 577, 597 N.E.2d at 457).

[51]*Id.* at 168, 624 N.E.2d at 727 (Wright, J., dissenting).

C. Speech on Private Shopping Mall Property

Next, let's turn to speech on private property. The case is *Eastwood Mall v. Slanco*.[52] The year is 1994, which is after *Arnold*, before *Vail*, and the same year as the *Wyant* remand. The issue is whether a private shopping mall can constitutionally ban all handbilling, picketing, soliciting, and other similar activities done on its property without its permission.[53] Federal precedent at this time is yes, it can.[54] The Ohio Supreme Court chooses lockstep and also answers yes, holding that Article I, Section 11 of the Ohio Constitution is no broader on this point than the federal First Amendment.[55] This again is over a strong dissent by Justice Wright:

> It seems to me this court has taken one step forward but two steps backward in recent cases involving interpretation of the Ohio Constitution. The step forward occurred in *Arnold v. Cleveland*, when we recognized the independent force of the Ohio Constitution. However, in less than one year, this Court took a substantial step backwards in *State v. Wyant*, when this Court failed even to address the "independent force" of the Ohio Constitution as applied to the constitutionality of the ethnic intimidation statute. Unhappily, a second step to the rear occurs today. In the present case, Section 11, Article I of the Ohio Constitution loses much of its independent force and appears as a mere shadow of the First Amendment to the United States Constitution. Because I support the view that "the Ohio Constitution is a document of independent force" and believe that Section 11, Article I affords Ohio citizens greater civil liberties and protections than does the First Amendment, I must vigorously dissent. . . .[56]

As a point of comparison, when the state of California was confronted with this same issue in *Robins v. Pruneyard Shopping Center*,[57] the California Supreme Court struck down the anti-handbilling injunction, holding that the California Constitution protects speech and petitioning, reasonably exercised, in shopping centers, even when the centers are privately owned.[58]

II. SEARCH AND SEIZURE—LOCKSTEP ON PURPOSE

The language of the Fourth Amendment and of Article I, Section 14 is virtually identical.[59] While there have been a few aberrant "beyond lockstep" decisions, the

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[52]68 Ohio St. 3d 221, 626 N.E.2d 59 (1994).

[53]*Id.* at 222, 626 N.E.2d at 60.

[54]Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

[55]*Eastwood Mall*, 68 Ohio St. 3d at 223, 626 N.E.2d at 61.

[56]*Id.* at 225, 626 N.E.2d at 62 (Wright, J., dissenting) (quoting *Arnold*, 67 Ohio St. 3d at 42, 616 N.E.2d at 169).

[57]592 P.2d 341 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980).

[58]592 P.2d at 347.

[59]The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants

Ohio Supreme Court has reined them in and has opted for a clear and intentional policy of what it calls "harmonization" in this field.

In 1984, in *State v. Burkholder*,[60] the court held that under the Ohio Constitution, evidence obtained through an unreasonable or unlawful search and seizure is inadmissible in a probation violation proceeding.[61] However, twelve years later, in 1996, in *State ex rel. Wright v. Ohio Adult Parole Authority*,[62] the court expressly overruled *Burkholder* and held that evidence obtained through an unreasonable or unlawful search and seizure is generally admissible in both probation and parole revocation proceedings.[63] The *Wright* court criticized *Burkholder* for failing to recognize that the Ohio Constitution should be "interpreted to protect the same interests and in a manner consistent with the Fourth Amendment."[64]

In 1992, relying on both the state and federal constitutions, the court held in *State v. Brown*[65] that a police officer may not open a small closed container found inside the glove compartment solely as a search incident to the driver's arrest for a traffic violation, after the officer has the suspect and sole occupant of the vehicle under control in the police cruiser.[66] In April of 2002, in *State v. Murrell*,[67] the court expressly overruled *Brown*, holding that when a police officer has made a lawful custodial arrest of the occupant of an automobile, the officer may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.[68] In her majority opinion in *Murrell*, Justice Resnick wrote that the Fourth Amendment to the U.S. Constitution and Article I, Section 14 of the Ohio Constitution are to be "harmonized."[69]

And finally, I will discuss the *Robinette* cases, which I think had the most drastic ramifications for Ohio's approach to the New Judicial Federalism.

> shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

> The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.

OHIO CONST. art. I, § 14.

[60] 12 Ohio St. 3d 205, 466 N.E.2d 176 (1984).

[61] *Id.* at 206, 466 N.E.2d at 178.

[62] 75 Ohio St. 3d 82, 661 N.E.2d 728 (1996).

[63] *Id.* at 91, 661 N.E.2d at 735.

[64] *Id.* at 88, 661 N.E.2d at 733.

[65] 63 Ohio St. 3d 349, 588 N.E.2d 113 (1992).

[66] *Id.* at 353, 588 N.E.2d at 116.

[67] 94 Ohio St. 3d 489, 764 N.E.2d 986 (2002).

[68] *Id.* at 496, 764 N.E.2d at 993.

[69] *Id.* at 495-96, 764 N.E.2d at 993.

In 1995, the Ohio Supreme Court decided the first of the *Robinette* cases.[70] This was a routine traffic stop case.[71] The court, in a decision authored by Justice Pfeifer, upheld the suppression of drugs found in the car following an ostensibly consensual search.[72] The court formulated a new rule that after a valid detention, before any interrogation could be deemed consensual, the citizen had to be told that he/she was free to go[73] (later referred to by Justice Ginsburg as the first-tell-then-ask test).[74] The court held this outcome was guaranteed by the U.S. and Ohio Constitutions (much as it had done with the opinion privilege in *Scott*).[75]

The U.S. Supreme Court accepted review of this case,[76] which it could not have done had the case been decided on truly adequate and independent state grounds.[77] The high court gave short shrift to the independent state grounds alleged in the syllabus, holding that despite that statement, the entire analysis and underpinning of the decision was federal law.[78]

Just as it had done in *Milkovich*, the U.S. Supreme Court again rebuked the Ohio Supreme Court, telling the Ohio court that it had wrongly interpreted federal law.[79] The case was reversed and remanded,[80] with profound effect on Justice Pfeifer, as I will discuss. I think he took this rebuke very much to heart, and he emerged as the champion of the New Judicial Federalism after Justice Wright's retirement, which took place after *Robinette* was remanded.

When the case came back to the Ohio Supreme Court, the court could have chosen either to analyze the case on truly adequate, independent state grounds or to apply the federal test for consent correctly. Just as it had done in *Wyant*, the ethnic intimidation case, the court chose to follow federal law, and declined to reexamine its earlier decision on independent state grounds.[81] Justice Wright was no longer on the court to tweak his colleagues. The court vacated the first-tell-then-ask holding of *Robinette I*'s syllabus, and held that "under Section 14, Article I of the Ohio Constitution, the totality-of-the-circumstances test [which is the federal test[82]] is

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[70]State v. Robinette, 73 Ohio St. 3d 650, 653 N.E.2d 695 (1995) (hereinafter *Robinette I*), *rev'd*, 519 U.S. 33 (1996).

[71]*Robinette I*, 73 Ohio St. 3d at 653-54, 653 N.E.2d at 698.

[72]*Id.* at syllabus ¶ 1.

[73]*Id.* at syllabus ¶ 2.

[74]Ohio v. Robinette, 519 U.S. 33, 41 (1996) (hereinafter *Robinette II*) (Ginsburg, J., concurring).

[75]*Robinette I*, 73 Ohio St. 3d at 655, 653 N.E.2d at 699.

[76]Ohio v. Robinette, 516 U.S. 1157 (1996).

[77]*Robinette II*, 519 U.S. at 36-37; *see* Michigan v. Long, 463 U.S. 1032 (1983).

[78]*Robinette II*, 519 U.S. at 36.

[79]*Id.* at 39-40.

[80]*Id.* at 40.

[81]State v. Robinette, 80 Ohio St. 3d 234, 237-39, 685 N.E.2d 762, 766-67 (1997) (hereinafter *Robinette III*).

[82]Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

controlling in an unlawful detention to determine whether permission to search a vehicle is voluntary."[83] The court did go on to find that even under this test, Robinette's consent had not been voluntary.[84]

Here are some concluding observations from *Robinette III* about the New Judicial Federalism from Justice Stratton's majority opinion: "Despite this wave of New Federalism, where the provisions are similar and no persuasive reason for a differing interpretation is presented, this court has determined that protections afforded by Ohio's Constitution are coextensive with those provided by the United States Constitution."[85]

Thus, case law indicates that, consistent with *Robinette II*, "we should harmonize our interpretation of Section 14, Article I of the Ohio Constitution with the Fourth Amendment, unless there are persuasive reasons to find otherwise."[86]

After showing no inclination to depart from harmonization in this area, in the summer of 2003 the Court upheld the suppression of crack cocaine obtained from a custodial search following an arrest for jaywalking.[87] The Court held that a full custodial arrest for a minor misdemeanor ran afoul of the state Constitution, holding that Section 14, Article I provides greater protection than the Fourth Amendment against warrantless arrests for minor misdemeanors.[88] While this is an important exception, harmonization remains the stated policy in the area of search and seizure.[89]

III. SCHOOL VOUCHERS

After *Robinette* comes the school voucher decision, *Simmons-Harris v. Goff*.[90] To me, this case represents the court's most disappointing failure to do a thorough independent state constitutional analysis—which I believe would have warranted a different result in the case, but that's another talk. For comparison, I would like to point to the analysis in *Holmes v. Bush*,[91] in which a Leon County, Florida trial judge held that the Florida school voucher program violated the state constitution.[92]

Let's come back to Ohio. There were many challenges to the school voucher program. I will talk here only about the religion challenges. There were two under the Ohio Constitution—one under the school funds clause (Article VI, Section 2),[93]

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[83]*Robinette III*, 80 Ohio St. 3d at 245, 685 N.E.2d at 771.

[84]*Id.* at 246, 685 N.E.2d at 771-72.

[85]*Id.* at 238, 685 N.E.2d at 766.

[86]*Id.* at 239, 685 N.E.2d at 767.

[87]State v. Brown, 99 Ohio St.3d 323 (2003).

[88]*Id*. at syllabus.

[89]*Id*.

[90]86 Ohio St. 3d 1, 711 N.E.2d 203 (1999).

[91]No. CV 99-3370, 2002 WL 1809079 (Fla. Cir. Ct. Aug. 5, 2002).

[92]*Id*. at *3.

[93]"[N]o religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state." OHIO CONST. art. VI, § 2.

the other under Ohio's ban on religious establishment (Article I, Section 7).[94] The primary challenge, of course, was under the Establishment Clause of the federal First Amendment.[95] Justice Pfeifer authored this rather curious opinion (which has no syllabus, and was actually decided under the arcane single-subject rule).

The court found no violation of any of the religion clauses, state or federal.[96] As for the school funds challenge, the court used a neutrality analysis that carried the day when a separate challenge later reached the U.S Supreme Court.[97] As for the challenge under the state establishment clause equivalent, the Ohio Supreme Court said this:

> This court has had little cause to examine the Establishment Clause of our own Constitution and has never enunciated a standard for determining whether a statute violates it. Today we do so by adopting the elements of the three-part *Lemon* test.[98] We do this not because it is the federal constitutional standard, but rather because the elements of the *Lemon* test are a logical and reasonable method by which to determine whether a statutory scheme establishes religion.[99]

And then, what I call the "I-heard-you-in-*Robinette*" passage:

> There is no reason to conclude that the Religion Clauses of the Ohio Constitution are coextensive with those in the United States Constitution, though they have at times been discussed in tandem. The language of the Ohio provisions is quite different from the federal language. Accordingly, although we will not on this day look beyond the *Lemon-Agostini*[100] framework, neither will we irreversibly tie ourselves to it. See *Arnold v. Cleveland* [asserting that the Ohio Constitution is a document of independent force]. We reserve the right to adopt a different constitutional standard pursuant to the Ohio Constitution, whether because the federal constitutional standard changes or for any other relevant

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[94]"No person shall be compelled to attend, erect, or support any place of worship against his consent, and no preference shall be given, by law, to any religious society. . . ." OHIO CONST. art. I, § 7.

[95]"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

[96]*Simmons-Harris*, 86 Ohio St. 3d at 4, 711 N.E.2d at 207.

[97]*Id.* at 7-8, 711 N.E.2d at 210. *See* Simmons-Harris v. Zelman, 234 F.3d 945 (6th Cir. 2000), *rev'd,* Zelman v. Simmons-Harris, 536 U.S. 639 (2002). The school voucher program provided tuition assistance to needy children, allowing families to choose among participating schools that included private, public, religious and non-religious schools. 234 F.3d at 948. On appeal, even though 96% of the students in the program enrolled in religiously affiliated schools, the U.S. Supreme Court held the program did not violate the Establishment Clause because schools were selected wholly as a result of truly independent choices by parents and students. 536 U.S. at 652.

[98]Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

[99]*Simmons-Harris*, 86 Ohio St. 3d at 10, 711 N.E.2d at 211 (citations omitted).

[100]*Lemon*, 403 U.S. at 612-13; Agostini v. Felton, 521 U.S. 203, 223, 230-33 (1997).

> reason. We reiterate the reasoning discussed during our analysis of the federal constitutional standard, and although we now analyze pursuant to the Ohio Constitution, we not surprisingly reach the same conclusion. We conclude that the School Voucher Program does not have an impermissible legislative purpose or effect and does not excessively entangle the state and religion. The School Voucher Program does not violate Section 7, Article I of the Ohio Constitution.[101]

So, even though the language in both state religion clauses is quite different from the federal First Amendment, in *Simmons-Harris,* the Ohio Supreme Court chose lockstep, but in a manner suggesting that it had learned its lesson in *Robinette.* Although the court did not even attempt any real separate state constitutional analysis, it left the door open for a "beyond lockstep" moment in the future. That future moment arrived in 2000 in the persona of a prison guard with long hair.

IV. FREE EXERCISE

In *Humphrey v. Lane*,[102] the plaintiff was a Native American who wore his hair long as part of his practice of Native American spirituality.[103] But that conflicted with the prison grooming policy.[104] After Humphrey was told to cut his hair or be fired, he filed suit in state court raising a free exercise challenge to the policy.[105] Federal law at this point was to apply a rational basis test for religion-neutral laws that have an incidental effect of burdening religious practices.[106] But the Ohio Supreme Court opted for a supplemental, or reactive posture, which shows it is getting bolder. In this free exercise challenge, Ohio expressly rejected the federal test in favor of the stricter compelling state interest test.[107] The opinion author is again Justice Pfeifer. Although the court found the state had proven the grooming policy furthered a compelling state interest, it failed to prove the policy was the least restrictive means of furthering that interest.[108] So Humphrey won his case, and was allowed to keep his long hair pinned under his cap.[109] Although the court held that under the Ohio Constitution free exercise protection is broader than under the U.S. Constitution, there is little analysis underpinning this position.[110]

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[101] *Simmons-Harris*, 86 Ohio St. 3d at 10, 711 N.E.2d at 211-12 (citations omitted).

[102] 89 Ohio St. 3d 62, 728 N.E.2d 1039 (2000).

[103] *Id.* at 68-69, 728 N.E.2d at 1045.

[104] *Id.* at 69, 728 N.E.2d at 1045.

[105] *Id.* at 69, 728 N.E.2d at 1045.

[106] Empl. Div., Dept. of Human Resources of Or. v. Smith, 494 U.S. 872 (1990).

[107] *Humphrey*, 89 Ohio St. 3d at 68, 728 N.E.2d at 1045.

[108] *Id.* at 70-71, 728 N.E.2d at 1047.

[109] *Id.* at 69-71, 728 N.E.2d at 1046-47.

[110] *Id.* at 68, 728 N.E.2d at 1045.

V. CONCLUSION

Let me conclude with these observations. While the Ohio Supreme Court has been part of the New Judicial Federalism movement now for a decade, I think the court is still struggling with the fundamentals. It has gotten the concept but hasn't really engaged in the kind of rigorous analysis the subject deserves. Since we now have a court majority with a very different philosophy from the court that signed on to the New Judicial Federalism Movement during this last decade, it will be interesting to see in what areas of the law, if any, the court is willing to find greater protections under Ohio's Constitution.