

# The Surprising History of Race and Law in Michigan

## A Legal Vignette Presented by Paul Finkelman at the April 27, 2006 Annual Luncheon

The legal history of race relations in nineteenth and early twentieth century Michigan is enormously complicated and full of surprises. Traditional scholarship has portrayed the Midwest as deeply hostile to black rights. The antebellum Midwest is remembered for laws that prohibited blacks from voting, testifying against whites, or serving on juries, while placing various impediments to their settling in the states north of the Ohio River. Most scholarship ignores race relations in the post-Civil War Midwest, except to note that blacks faced discrimination and hostility. While this story may be true for Illinois and Indiana, recent scholarship on the legal history of Ohio suggests a more complex story. The forthcoming *A History of Michigan Law* shows that the received wisdom that the Midwest was overwhelmingly hostile to blacks does not reflect the history of Michigan.

Antebellum Michigan was known as a Beacon of Liberty for fugitive slaves and free blacks seeking a better life. After Reconstruction, Michigan adopted a number of laws to protect the civil rights of blacks in the Wolverine state. By 1900, Michigan had some of the strongest civil rights laws in the nation and a supreme court committed to enforcing them.

## Liberty and Race in Antebellum Michigan

The new state of Michigan inherited a number of restrictive laws when it was carved out of the Northwest Territory. Blacks could not vote anywhere in the Northwest and, not surprisingly, the Michigan Constitution did not enfranchise African Americans. Once written into the Constitution, this disability remained embedded in the state's laws until after the Civil War. Since jury service was tied to voting, blacks were not able to serve on juries in antebellum Michigan. At statehood, Michigan inherited Ohio's black code, which required that African Americans entering the jurisdiction register with local officials, provide proof of their freedom, and find sureties to guarantee their good behavior and that they would not require public assistance. These laws could have made Michigan a deeply unwelcoming place for blacks. But in fact, they were rarely enforced and were silently repealed with the publication of the first Michigan revised code in 1838. This repeal took place more than a decade before Ohio repealed most of its black laws and more than two decades before such legislation disappeared from the codes of Indiana and Illinois. Even while these laws were on the books they were almost never enforced. For example, in 1830, a few years before statehood, jurors in Wayne County declared that "no such law ought to exist or be enforced in a free republican country." Reflecting the egalitarian sentiments of many of Michigan's early settlers, they declared: "We do not believe that a human being, who is a freeman, although possessing a black or yellow complexion, or being one or more shades darker than is common to white freemen, should be deprived of those rights and privileges, which are the common heritage of this happy and republican country. Attempts have been made to carry into execution said law. But owing to public opinion to the contrary,

on account of its unconstitutionality, it cannot be effected." In fact, there is only one recorded attempt to enforce the black laws in Michigan.

With the black laws unenforced and then repealed, the state's African- American population grew rapidly, doubling and tripling every decade, growing from 300 in 1830 to 2,500 by 1850 and to just under 7,000 by the eve of the Civil War. > These figures only reflect the recorded population, which did not include the hundreds, perhaps thousands, of fugitive slaves living in the state.

Although most fugitive slaves would have avoided the census takers, they had little to fear while living in Michigan. Michigan's early settlers – who mostly came from upstate New York and New England – were overwhelmingly anti-slavery and most would never willingly help return a fugitive slave. The few attempts to capture fugitive slaves were notoriously unsuccessful, in part because of massive popular resistance to these deeply unpopular fugitive slave laws. For example, in 1833 a mob severely beat Sheriff John M. Wilson of Wayne County when he unsuccessfully tried to prevent a crowd of black rescuers from removing a fugitive slave from his custody. Similarly, in 1847 a mob in Marshall, Michigan rescued a fugitive slave in the famous Crosswhite case, and Zachariah Chandler, who would later serve in the U.S. Senate, paid the fines imposed by a federal court on the rescuers. In 1855 the Michigan legislature prohibited state officials from participating in return of fugitive slaves. In 1859 the radical abolitionist John Brown openly transported a dozen fugitive slaves across the state.

In addition to protecting black freedom, the Michigan legislature offered greater protection for black rights than they had in other Midwestern states. Unlike Indiana, Illinois, and Ohio before 1849, blacks could always testify against whites in Michigan. This right was extremely important because it allowed blacks to defend both their physical safety and their economic interests in the courts. In the right to testify, Michigan resembled New England and New York more than the Midwest. After 1855, blacks were also allowed to vote in school board elections on the same basis as whites. Black education in Michigan approached levels found in New England. In 1860, 46 percent of all blacks between age six and twenty were in school. This exceeds the average for the entire North of only 35 percent. More impressive, the percentage of blacks in school in Michigan was greater than the percent of whites attending school in every one of the eleven states that would soon form the Confederacy. At no time did Michigan law require segregation, and in much of the state blacks attended schools with whites.

### ***Civil Rights in the Civil War Era***

The federal law prohibited blacks from serving in state militias, but Michigan did not prevent blacks from organizing their own private militia companies. This was a common practice among whites throughout the nation. Thus, in 1860 black men in Detroit organized the Liberty Guards and began to drill. Members of the Guards were among the 200 blacks who volunteered to serve in the Massachusetts 54<sup>th</sup> Regiment – the "Glory Brigade." About 1,000 African- American men from Michigan would later serve in

the First Michigan Colored Infantry, which would be re-named the 102<sup>nd</sup> US Colored Troops.

After the War, Michigan turned its attention to ending race discrimination in the state. In 1867, the legislature prohibited segregation in public schools. > Detroit resisted this law, arguing that it did not apply to schools in the city. Officials in Detroit argued that blacks and whites could not peaceably attend school together and that whites did not want to attend the same schools as blacks. The school board's lawyer argued that "there exists among a large majority of the white population of Detroit a strong prejudice or animosity against colored people, which is largely translated to the children in the schools, and that this feeling would engender quarrels and contention if colored children were admitted to the white schools." This sort of argument presaged the claims of southern leaders in the 1950s and 1960s, such as the public officials in Arkansas who tried to close the Little Rock public schools rather than integrate them. In the wake of the Civil War, where more than 200,000 African Americans, including members of the First Michigan Colored Regiment, fought for the Union Cause, such blatant appeals to racism must have shocked the Republican-dominated Michigan Supreme Court.

In *Workman v. Board of Education* (1869), the Michigan Supreme Court emphatically rejected the racism of the Detroit school board. Chief Justice Thomas Cooley seemed incredulous that the Detroit school board would even make such arguments, asserting that "It cannot be seriously urged that with this provision in force, the school board of any district which is subject to it may make regulations which would exclude any resident of the district from any of its schools, because of race or color, or religious belief, or personal peculiarities. It is too plain for argument that an equal right to all the schools, irrespective of all such distinctions, was meant to be established." In a concurring opinion Justice Campbell declared that no argument was "less likely to be sanctioned, than one which should operate against those who, from poverty, were most in need of public aid, and in whose training and elevation the community are interested as future voters and citizens."

Neither the legislature nor the Courts had the power to enfranchise blacks for general elections – that required a constitutional amendment. However, the Michigan Court was able to expand the franchise for some African Americans. *People v. Dean* (1866) involved the prosecution of a person of mixed race who had voted in Wayne County. The Court reversed Dean's conviction on the grounds that he was of mixed > ancestry and was mostly white. Chief Justice George Martin, in a separate opinion, argued that a "preponderance" of white blood made someone white, and the rule should simply be if someone was more than half white the person was white. This was more expansive a position than the rest of the court was prepared to take. In explaining his position, Martin denounced the "racial science" of the prosecution, which offered the testimony of a medical doctor who claimed the shape of Dean's nose proved he was not white. Martin was disgusted with the timidity of his fellow justices, who were unwilling to take a more egalitarian stand on race. He mocked the majority opinion, declaring that under "the rule my brethren have established" the constitution should be "amended with all speed, so

as to authorize the election or appointment of nose pullers or nose inspectors, to attend the election polls in every township and ward of the state, to prevent illegal voting."

In 1867 the state constitutional convention overwhelmingly endorsed a provision for black suffrage as part of a proposed new constitution. The voters rejected this constitution, but not, as earlier scholars have argued, because of the black suffrage provision. As Martin J. Hershock persuasively argued in his 2003 book, *The Paradox of Progress: Economic Change, Individual Enterprise and Political Culture in Michigan, 1837-1878*, the voters defeated the Constitution because of provisions involving railroad financing, salaries for government officials, and liquor prohibition. William Howard, the chairman of the state Republican Party, which dominated the Convention and the State, enthusiastically supported the new constitution. Howard asserted that the Republican Party would not support any candidate "who turns his back on this fundamental issue" of black suffrage.

Howard's position suggests that the whole analysis of this vote should be turned inside out. Rather than dragging the Constitution down to defeat, the Republicans in the Convention used black suffrage, which was popular among the rank-and-file, to garner support for the less popular aid to railroads and salary provisions for state officeholders. In other words, it may not be that suffrage undermined the Constitution, but rather, while strong, support for black suffrage was not strong enough to overcome deeper opposition to other parts of the constitution.

This analysis is supported by the actions of the Republicans at the convention. If the Republican leaders had thought black suffrage would have hurt ratification of the Constitution they might have put the suffrage clause on the ballot as a separate item, allowing the electorate to ratify the new constitution without having to accept black equality. They in fact did this with the controversial prohibition clause. But, at the Convention the Republican majority, by a vote of 50 to 16, decisively voted down a proposal to have black suffrage submitted to the electorate as a separate provision. Republicans in Michigan were so committed to black suffrage and black civil rights that they were certain it was an issue that could carry the constitution despite other provisions – such as those involving railroads – that were not strongly supported within the party. Despite the defeat of the 1867 constitution, this analysis is supported by the statutes, constitutional changes, and court cases dealing with race in the period from 1867 to 1885.

In 1869 the Republicans sent a series of amendments to the people, to be voted on separately. No longer content with black suffrage, the Party now proposed to eliminate *all* racial distinctions from Michigan's Constitution and Michigan law. Despite opposition from Democrats, 52 percent of the voters in the election supported this expansion of civil rights, even as they defeated other proposed amendments. By this time Michigan had ratified the three Civil War amendments to the U.S. Constitution, thus helping to fundamentally reorder the nation's treatment of minorities.

### ***Michigan Responds to the Jim Crow Era***

By the end of Reconstruction, Michigan had integrated its schools and eliminated racial terminology in its constitution. Blacks were free to attend school with whites; black men could vote, serve in the militia, and be called for jury duty on the same basis as white men. One part of the state code still reflected antebellum notions of race. Like many other states, Michigan still banned interracial marriage. In 1883, Michigan repealed its ban on such marriages and retroactively legitimized all interracial marriages that had already taken place in the state. What had once been the most volatile issue regarding race and law had suddenly and without much fanfare disappeared in Michigan.

The context of this law illustrates the direction of civil rights in Michigan and stands in marked contrast to the direction the American South and the U.S. Supreme Court were taking. The same year that Michigan allowed interracial marriage the U.S. Supreme Court upheld the prosecution of an Alabama interracial couple in *Pace v. Alabama* (1883). Thus, at the very time that the southern states were vigorously prohibiting interracial marriage and sex, and the Supreme Court was supporting this development, Michigan headed in a quite different direction.

With the adoption of the 1883 law, Michigan had eliminated all forms of state sanctioned racial discrimination. Whites, blacks, and Indians were now formally equal in the state. > Private discrimination remained legal, however, at least under state law. The federal Civil Rights Act of 1875 had prohibited a great deal of private discrimination, and thus legislators in Michigan may not have felt any need to legislate in this area.

In 1883 the U.S. Supreme Court struck down the federal Civil Rights Act of 1875, which had mandated equality in public accommodations and places of public entertainment like theaters and restaurants. Arguing that the Fourteenth Amendment only limited state action, the Court held Congress had no power to regulate private discrimination. Two years later, Michigan responded by passing a state civil rights act, which prohibited discrimination by most private business. No longer could restaurants, hotels, or theaters legally deny service to blacks in Michigan.

In May 1885, the legislature passed "An Act to protect all citizens in their civil rights." The law was introduced by Representative Robinson J. Dickson, a Republican from Cass County, which had the second largest black population of any county in the state, and the largest percentage of blacks in the state. In commenting on the bill, the *Detroit Evening News* noted that blacks throughout the state complained they could not get service at restaurants or obtain lodging at hotels. Interviews with hotel managers confirmed this, as the paper noted that most innkeepers were "more or less opposed to giving colored men, save in exceptional cases, the accommodations" which they offered to the white "traveling public." With sweeping simplicity, and enormous economy of language, the legislature, in three short sections, sought to end private discrimination in the state.

The law declared that all persons "within the jurisdiction" of Michigan were "entitled to the full and equal accommodations, advantages, facilities, and privileges of inns, restaurants, eating-houses, barber shops, public conveyances on land and water,

theaters, and all other places of public accommodation and amusement." Violators were subject to fines of one hundred dollars and up to thirty days in jail. There were similar fines and punishments for "any officer or other person charged with any duty in the selection or summoning of jurors" who excluded potential grand jurors or petit jurors on the basis of race. With the passage of the law Michigan seemed to have created a society where race did not matter, at least in the public sphere.

The Michigan Civil Rights Act of 1885, while a huge step forward in race relations, did not guarantee equality. In those parts of Michigan where the Republican Party was in power, enforcement might be easy. The party was still committed to racial equality, and though few in number, Michigan's black voters were overwhelmingly loyal to the party of Lincoln, which was also the party of such stalwart supporters of black rights as Senators Jacob Howard and Zachariah Chandler. But, in those parts of the state where Republicans were not in power, enforcement of the Civil Rights Act would be uncertain or non-existent. Most importantly, the large and growing population of blacks in Detroit could not expect vigorous enforcement of the new law from the Democrats who controlled Wayne County and who were generally hostile to black rights.

Enforcement of the law was mixed. In Detroit, which had the largest number of blacks in the state, Democratic prosecutors refused to intervene on behalf of blacks. Local judges were equally unsympathetic to civil rights. Thus, private citizens had to bring suit under the law. But, such cases were expensive and unpredictable. When the owner of Gies's European Restaurant refused to serve a black businessman in his main dining room, William W. Ferguson sued. The trial judge charged the jury that discrimination was illegal, but that no one had a right to a particular seat in any particular part of a restaurant, and that serving blacks in the saloon part of the restaurant, but not in the dining room, passed muster under the law. The trial judge thus endorsed the legitimacy of separate but unequal treatment of blacks.

In *Ferguson v. Gies* (1890) the Michigan Supreme Court reversed this holding. Justice Allen B. Morse emphatically rejected the racist argument of the trial judge. Morse declared that:

*in Michigan there must be and is an absolute, unconditional equality of white and colored men before the law. The white man can have no rights or privileges under the law that is denied to the black man. Socially people may do as they please within the law, and whites may associate together, as may blacks, and exclude whom they please from their dwellings and private grounds; but there can be no separation in public places between people on account of their color alone which the law will sanction.*

The lawyers for Gies had cited *Roberts v. Boston* (1850), a Massachusetts case that had upheld segregated schools in that state. Morse noted that *Roberts* "was made in the *ante bellum* days, before the colored man was a citizen, and when, in nearly one-half of the Union, he was but a chattel. It cannot now serve as a precedent." In an extraordinary affirmation of racial equality, the Michigan Court asserted that the *Roberts* case was

*But a reminder of the injustice and prejudice of the time in which it was delivered. The negro [sic] is now, by the constitution of the United States, given full citizenship with the white man, and all the rights and privileges of citizenship attend him wherever he goes. Whatever right a white man has in a public place, the black man has also, because of such citizenship.*

Justice Morse declared that the Michigan Civil Rights Act of 1885,

*[E]xemplifies the changed feeling of our people towards the African race and places the colored man upon a perfect equality with all others, before the law in this state. Under it, no line can be drawn in the streets, public parks, or public buildings upon one side of which the black man must stop and stay, while the white man may enjoy the other side, or both sides, at his will and pleasure; nor can such a line of separation be drawn in any of the public places or conveyances in this act.*

Emphatically denouncing racism, Justice Morse declared that "any discrimination founded upon the race or color of the citizen is unjust and cruel, can have no sanction in the law of this state." Morse believed that this sort of discrimination, which could be found in other states, "taints justice." He then demolished the racist notion that God had made blacks inferior to whites. He argued that such ideas were founded on reasoning that "does not commend itself either to the heart or judgment." A Civil War veteran who had lost an arm storming Missionary Ridge as a member of the 16<sup>th</sup> Michigan, Justice Morse understood exactly what the purpose of the War had been, and he proudly and fearlessly declared that in Michigan equality was the law of the land.

In *Gies*, the Michigan Supreme Court offered one of the most emphatically egalitarian opinions of the century. The Court placed Michigan in the vanguard of offering legal protection for black civil rights. Unfortunately, the decision could only give Ferguson the right to a new trial, and not guarantee him a fair judgment. That was to be left to a jury, which on retrial awarded him only token damages. This outcome illustrates the gap between legal rights and the political realities of racism in Detroit, where juries were overwhelming white and made up of people, usually Democrats, unsympathetic to civil rights.

After *Gies*, Michigan continued to support equality with laws prohibiting discrimination in insurance, a reaffirmation of the right of people to marry who they wished, and in the 1930s and 1940s other laws that supported civil rights and fair employment. Race relations were hardly perfect in Michigan. Businessmen like *Gies* continued to discriminate and most blacks could not afford to sue to vindicate their rights.

There was always a gap between the law on the books and the reality of life in Michigan. But, as other states moved to Jim Crow laws – with the blessing of the U.S. Supreme Court – Michigan continued on its path as a beacon of liberty on the nation's northern frontier.

### ***Housing and Justice after the Turn of the Century***

Even with civil rights laws on the books, private decision makers, especially real estate agents, brokers, and developers, along with some public officials, severely limited housing options for blacks, leading to fairly rigid residential segregation. While the state Supreme Court still supported civil rights, the Court upheld the legality, under state law, of restrictive covenants in housing in 1922 and again in 1947, and discriminatory practices of real estate brokers and agents in 1963. Without a statute banning such discrimination the Court was unwilling to move civil rights in a new direction.

Perhaps the best example of the tension between law and reality in Michigan can be seen in the case of Ossian Sweet. By the early 1920s, blacks in Detroit had been successfully ghettoized by a combination of private business practices – such as restrictive covenants, the refusal of banks to give loans to blacks for homes in some neighborhoods, and the refusal of real estate agents to show houses to blacks in white neighborhoods – and public policies that kept blacks out of some Detroit neighborhoods as well as suburbs like Grosse Pointe and Dearborn. In 1925 Dr. Ossian Sweet, a successful black physician, purchased a house in an "all white" neighborhood in Detroit.

While an individual private actor – the person who sold Sweet his home – might break with the unwritten racial rules, other private actors were often unwilling to accept the result. In the late summer of 1925, when a mob attacked his home, Sweet and his friends defended the home and in the process a white was killed. Eleven people – Sweet, his wife, his two brothers, and friends who had come to help him – were indicted for murder. In May 1926, a jury of twelve white men concluded that in Michigan black men had a right to defend their homes from enraged mobs of whites. Despite the prejudice and racism in the city, despite the rise of the Ku Klux Klan in the North in this period, fundamental justice prevailed.

Sweet's acquittal did not lead to racial harmony, nor did it open up Detroit's housing market to blacks. Rather, the case symbolizes the complexity of race and law in Michigan. Formally, legal equality reigned, but private discrimination in housing and employment left blacks ghettoized and often underemployed. Court decisions respected private property and upheld restrictive covenants. But in Sweet's case the jury also respected private property, and affirmed Sweet's right to defend his home from the mob. This surely distinguished Michigan from much of the nation – in many states the mob would have lynched Sweet for killing a white or for even moving into a white neighborhood.

The attack on Sweet's house, his indictment for defending his home, and the deplorable housing and employment options for blacks, especially in Detroit, show that law and legal traditions of Michigan could not easily eradicate racism and hatred. The outcome of the Sweet case and the existence of civil rights legislation, on the other hand, show that equality and racial fairness were still embedded in Michigan's legal culture. This culture shows that on a good day – such as the day the jury acquitted Henry Sweet for helping defend his brother's house – the rule of law can overcome hatred and prejudice.