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Between 1904 and 1935, while southern courts almost universally excluded African Americans from their juries, the U.S. Supreme Court failed to reverse the conviction one even one black defendant in the face of such obvious racial prejudice. That southern whites wanted all-white juries comes as no surprise. Keeping juries white prevented the investigations and prosecutions of vigilantes and lynchers that would have undermined white supremacy. What needs explaining is why the U.S. Supreme Court would have allowed such discrimination. One prominent view now states how this could happen in three steps. First, the U.S. Constitution, particularly the Fourteenth Amendment, did not explicitly forbid jury discrimination. This left the door open for public opinion to influence the judges deciding jury discrimination cases. Finally, the structure of the American court system gave the Supreme Court little power over subordinate judges and their courts. After the Supreme Court ruled, federal trial judges and state judges could evade decisions they disliked. Michael Klarman summarizes this grim picture by writing that constitutional rights could be defeated by sub-constitutional rules.[1]

This essay tests each element in the architecture of this explanation. First, it looks for foundational principles outside the text of the Fourteenth Amendment in Americans'

shared understanding about the meaning of jury service. It then looks at the influence of politics on due process and does so historically, searching for change over time. Within this broader context, it examines the small-scale politics among the nine justices sitting on the Supreme Court. Finally, the last part of this paper looks at the fruits of Supreme Court politicking, studying the decisions Mississippi judges and lawyers made as they confronted an early twentieth-century challenge to their state's all-white jury system. This paper compares rights making by the Supreme Court with the recognition and enforcement of those rights in trial courts.[2] Testing the response of Mississippi courts against the Supreme Court's rule making suggests that concerns about the high court's structural inability to reach into the provinces may be overblown. The Suprem

In the colonial era, communities relied on jurors to represent their interests against laws issued from central authorities. Jurors protected rights both natural and civil. The most famous instance of this came in 1735, when lawyers for the printer John Peter Zenger asked jurors to reject British libel and slander law to find in favor of freedom of the press. The jurors did so. In 1747, New York grand jurors refused to indict rioters, making a political statement. Virginia grand jurors also acted politically by indicting aristocrats for petty offenses. British colonial officers, including William Kempe, New York attorney general, complained that jurors lacked the competence necessary to decide questions of law.[4]

The colonial experience explains why the Constitution guarantees trial by jury in four places: Article III, the Fifth Amendment, Sixth Amendment, and the Seventh Amendment. Article III requires that the trial of all crimes shall by jury and promises due process of law. After the Constitution's framers wrote Article III, along with the rest of the Constitution, Americans divided into Antifederalists and Federalists to debate, in large part, whether a bill of rights should be added to the nation's organic law or not. Both sides in this quarrel recognized that jury service offered ordinary people an opportunity to be represented in the workings of their government. Antifederalists charged that the Constitution inadequately protected the right to a jury trial which they touted as a bastion against tyranny. Richard Henry Lee called the "full and equal representation of the people" on juries essential to a free and good government. "Every order of men in the community" had to have access to jury service, Lee said. Alexander Hamilton agreed on the meaning of jury service, which he saw in less sanguine terms. He worried that ordinary people lacked the competence necessary to investigate

complicated legal questions. Hamilton doubted jurors "competent to investigate questions involving complicated legal issues." The answer, of course, was to restrict jurors to questions of fact, leaving law to the judges, a solution Thomas Jefferson favored. Hamilton, though, did not believe such a separation would solve the problem. "In most legal cases," he wrote, "legal consequences are complicated with fact in such a manner as to render a separation impracticable."[5] In 1800, Samuel Chase agreed, scolding a lawyer who tried to argue law to the jury in United States v. Callender: "it is not competent to the jury to decide" law.[6] Both Hamilton and Chase feared an invasion of the jury box by the less-well-off or the down-and-out. But neither man doubted the meaning of jury service: it offered ordinary people a path into the inner workings of government.

Antifederalists did not disagree that some ordinary citizens might not immediately have the expertise to effectively participate on juries, but they expected jury service would uplift ordinary people; given the power, they would find the understanding to use it, one Antifederalist said. Antifederalists pushed hard for the jury trial of the vicinage, "the trial of the fact in the neighborhood," as a way of protecting the jury service of poorer and less privileged members of society. Holding trials far from the scene of the crime or dispute, Antifederalists worried, threatened the ability of the lowliest white and male members of the community to serve on juries. Evidence had to come from the mouths of live witnesses for the poorest of the poor, the illiterate, to understand it. Distant trials necessitated written depositions, impossible for illiterate jurors.[7]

Given the democratic connotations associated with jury service, it is not surprising that after the Revolutionary War many states required the random selection of

jurors. One writer contrasted the English system, where "jurors are returned by the sheriff" with the American procedure, where "they are draughted by lot, from each town, which ... is the most equitable method ...."[8] No one seriously expected women or children or African Americans to serve, of course, but revolutionary ideology demanded that every white male freeholder have an equal opportunity to represent his community on a jury. Illinois opened grand jury service to "all free white male taxable inhabitants ... being of sound mind and discretion."[9] Michigan instructed its assessors to search their rolls for all persons of "good character."[10] Rhode Island lawmakers told their town councils in 1798 to make lists of "all persons liable by law, and whome they shall judge to be qualified as Jurors, and put the names of such persons on separate pieces of paper into a box." Officials picked grand and petit jurors in blind drawings.[11]

North Carolina went to the greatest lengths of all to insure selection of grand and petit jurors truly representative of the white male population. That state ordered court clerks to select potential jurors from freeholders listed on the county tax returns. But North Carolinians worried that some freeholder might not be on the tax rolls: "and if said tax returns shall not contain the names of all the inhabitants of their said county, who in their opinion are well qualified to act as such jurors, they shall cause the names of all such persons to be inserted on their said jury list." But legislators thought that even that might not insure that every last freeholder made it onto the list and so went on to require judges "to examine carefully the jury lists ... and diligently inquire if any persons qualified to be jurors as above mentioned are omitted ...." The names produced by this process went into a box. To guarantee a random selection, the law required that the

drawing be performed by a child under ten years of age and presumably unable to read the names of the persons in the box.[12]

Random selection of jurors explains the persistent complaints about the low quality of jurors. Newspapers periodically reported that jurors drank or read while on duty. In 1843, the New York Herald announced that it had had enough with weak-minded jurors' sympathy for criminal defendants. "The great mass of the intelligent and reputable portion" of the population knew that juries perpetrated great evils, the Herald declared before adding that if northern jurors did not shape up, the North would soon have no choice but to adopt the vigilante and lynching techniques so common in the South.[13]

Legislators tried to accommodate relentless popular complaints about juror incompetence by specifying that jurors be "good and lawful," "discrete," "reputable," and "judicious" "gentlemen" of "good moral character." One recent student of Illinois juries estimates that Illinois law eliminated all but ten percent of the population from jury service. Custom further prompted jury commissioners to prefer the wealthier and more influential over the less well off.[14]

State law based on common law principles rather than the U.S. Constitution controlled jury selection procedures for almost every criminal trial in America before the Civil War and those laws recognized that defendants had two competing expectations. First, defendants could demand that juries be chosen fairly, meaning sheriffs had to proceed neutrally and randomly, not seating friends or enemies of one side or the other. This suggests that very ordinary people should serve on juries, including the town drunk or neighborhood loafers. Attorneys, though, could insist that only competent persons serve on their juries. Defense lawyers, then, could attack juries as irregularly summoned

and empanelled or they could try to pick off individual jurors as incompetent. In legal parlance, this meant that lawyers attacked jurors in two ways: by challenging either the array or the polls. Challenges to the array alleged partiality or some procedural error by the sheriff or his deputies in their method for picking jurors. In the first half of the nineteenth century, defense lawyers enjoyed a rollicking range of grounds for attacking the array. Some must have seemed outlandish even at the time. Henry St. James Tucker, in lectures delivered to the Winchester (Virginia) Law School, said that foreigners could challenge an array that included only American citizens, though they had no right to demand their own countrymen. Tucker acknowledged that he had never actually seen a jury that included foreigners. Some responsible authorities tried to rein in defense counsel. Joseph Chitty emphasized the very limited number of legitimate challenges to the array. A defense lawyer needed to show the sheriff's actual affinity to either of the parties through a pecuniary interest in the case or "if an action of battery be depending between the sheriff and the defendant."[15] Despite such concerns, judges sometimes sternly enforced rules against anomalies in jury selection procedures. In 1834, a New York lawyer named David Graham observed that in New York the practice had once been so strict, "the jurymen [so] rigidly scanned," that lawyers could even set aside inquests on trivial errors made by the sheriff when assembling the jury.[16]

Challenges to the polls took exception to individuals as unsuitable for jury service. Antebellum lawyers commonly cited Sir Edward Coke's four categories of challenges to the polls. Some of these were irrelevant in the American context, such as propter honoris respectum which excused lords of parliament. The important one was propter affectum, suspicion of bias or partiality. Good defense lawyers energetically

sought statements indicating bias when examining potential jurors. Appeals courts threw out convictions when defense lawyers produced evidence that a juror had made remarks revealing prejudice. In addition, persons rendered infamous could not serve. Nor could slaves; Coke called this a "defect of liberty."[17]

Not long after the Civil War, Americans seemed to realize that widely accepted principles of equal access to jury service by men might allow or even require black access to juries. After Congress passed its Reconstruction Act in March 1867, military authorities in some districts ordered an end to all-white juries. "We have a new thing under the sun," the New Orleans Crescent reported.[18] Initial reports suggested the "experiment" with black jurors had failed. The New York Times' correspondent in Richmond reported that black jurors had disrupted federal Judge John Curtis Underwood's court for the Eastern District of Virginia, preventing the court from carrying out its business. Later reports entirely contradicted the New York Times account. The jurors had behaved themselves, acting much like white jurors.[19] In Alabama, the first state jurors served on a coroner's jury looking into the death of a black woman beaten to death by her husband near Tuskegee.[20] In Texas, whites thought the experience of serving with black jurors "humiliating" but conceded that "it has been attended with no serious results."[21] Newspapers periodically reported misconduct by black jurors, much as they had with white jurors before the Civil War, but in 1873 a correspondent from the Cincinnati Commercial reported black jurors "always anxious to do the right thing." Whites had initially objected, the Commercial reporter observed, "but they had to swallow the dose, and now have got used to it." The Commercial's favorable assessment was widely reprinted around the country.[22]

Blacks participating in grand juries protected African Americans from being indicted solely on the word of a white person. Black grand jurors insisted that black witnesses be taken seriously. Blacks serving on trial juries made sentencing more equitable. In Warren County, Mississippi, black participation in grand juries peaked in 1873, when 65% of jurors were black. Such a heavy black presence on grand juries encouraged black crime victims to come forward. The percentage of black crime victims among the total crime victims identified in Warren County grand jury indictments climbed from 13% in 1866 and 1867 to 48% in 1870 and 54% in 1871. In his close study of a Reconstruction-era Texas county, Donald Nieman found that even when blacks made up less than a third of jurors, they made a difference. As a result, blacks and whites received "remarkably" similar punishments.

Politicization of due process

Although some scholars now emphasize the influence of politics on judicial process, it makes more sense to recognize that the ideal of principled due process has always complicated political efforts to influence criminal justice. The idea that apolitical judicial principles could trump political prejudice showed signs of life early in American history and began to gain serious traction on the eve of the Civil War. In Calder v. Bull (1798) Supreme Court Justice Samuel Chase wrote that "vital principles" constrained legislative power. A few years later, in Dartmouth College v. Woodward (1819), Daniel Webster argued that constitutions articulate "those fundamental and unalterable principles of justice, which must lie at the foundation of every free and just system of

laws."[23] Thereafter some state judges followed Webster and found that their legislatures did not have free hand to act on every popular whim. North Carolina's Thomas Ruffin said in 1833 that "law of the land" did not "merely" mean any act of any legislature. The Supreme Court did little with the Fifth Amendment's due process clause before deciding Murray's Lessee v. Hoboken Land and Improvement Co. in 1856 when Associate Justice Benjamin Curtis consciously worked to invigorate the meaning of due process. In an imaginative opinion, Curtis found that the framers of the Fifth Amendment "undoubtedly" meant to constitutionalize the Magna Charta's "law of the land" formulation when they wrote due process protections into the Fifth Amendment. The framers had available the whole phrase as it had appeared in the Magna Charta: "by the judgment of his peers and the law of the land." Had they adopted that language in its entirety, Curtis speculated, the framers would have duplicated the jury protections found in the Sixth and Seventh Amendments and in Article III. If they simply edited out the jury part of the clause, they ran the risk of degrading Americans' rights to a trial by jury. So, Curtis wrote, they substituted "due process of law" for the whole phrase, suggesting the term protected jury trials and had ancient origins long before the advent of American politics. Thus, Curtis saw due process as a restrain on the legislature. Congress could not, under Curtis's formulation, intrude on due process by its "mere will." Curtis continued this line of reasoning in his Dred Scott opinion.[24]

While Curtis advanced his due process ideas for a unanimous Court in Murray's Lessee v. Hoboken Land and Improvement Co., he could only speak for himself when he dissented in Dred Scott v. Sandford. To Curtis, the majority opinion seemed more political than judicial. Don Fehrenbacher agreed with Curtis when he argued that

politicians constitutionalized questions that should have been political. Republicans saw the question of whether Congress would allow slavery in the territories as plainly not a subject for judicial debate.[25] While some scholars now contend that Chief Justice Roger Taney followed plausible legal logic, Fehrenbacher unquestionably captured contemporary Republican views of the Dred Scott decision. One Republican blasted Taney and his fellow justices for making "an unhallowed interference…with the great political question of the day." Another critic called the opinion "a sheer usurpation of the powers of Congress."[26]

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only unworthy to govern, but unfit to live." Sherman wrote that the Republican Party split over how far Congress could go in extending due process rights to freed blacks.[28]

Republicans might be expected to take a skeptical view of judicial power, especially after criticizing Taney's plainly political conduct in Dred Scott v. Sandford. In 1968 Stanley Kutler published an important and influential book arguing that despite the Dred Scott furor, Congressional Republicans did not unite around a hostile attitude toward the federal judiciary and, in fact, actually expanded its powers. Kutler described the Supreme Court as tough and tenacious and denied that any "lapse in judicial development" occurred after the Civil War.[29]

Congressional Republicans demonstrated their interest in the judiciary by continually passing laws regulating the judicial process. In 1863 Congress passed the Habeas Corpus Act. On July 27, 1866 Congress passed the Removal Act, allowing the victims of state discrimination to remove their court cases from state to federal courts. On March 2, 1867, Congress amended the Removal Act with the Local Prejudice Act, further expanding litigants' ability to escape state courts. In 1875 Congress revisited the issue with yet another removal law. Throughout this period Congress repeatedly debated the nature of due process, whether blacks could or should be jurors, and the power of courts and judges to reconstruct the South. Republicans saw the federal judiciary as a valuable prize, one they wanted for themselves, no matter what residual angst they might suffered from the pre-war Taney Court.

But this continual legislative agitation put due process issues in the hands of politicians for partisan debate. Some politicians tried to escape charges of partisanship by positioning due process in purely neutral, non-partisan, constitutional terms.

Republican Frederick Frelinghuysen insisted that his party fought for "the perfect equality of all men before the law", which he described as "the great cardinal principle of this Government."[30] Another Republican, Charles Sumner of Massachusetts, pronounced himself undeterred by any "party cry." The Republican Party was the vehicle, but the task transcended petty party politics, he declared, "the regeneration of the Nation according to the promises of the Declaration of Independence." [31] Ohio Republican George Bingham traced the constitutional principles he advocated to the Magna Charta. The Democrats more persuasively argued that politics controlled all, insisting that laws "must conform to popular sentiment." Laws that go beyond the limit of public support, Garrett Davis of Kentucky told the Senate, stir "revolt of the public mind", making their enforcement hopeless.[32] Democrats considered Republican civil rights legislation "political and not reformatory."[33]

And the Supreme Court enmeshed itself in the political turmoil by its controversial, and seemingly highly political, rulings in the Legal Tender Cases and its role in the disputed election of 1876. President Grant further politicized the judiciary by his maladroit appointment process. Democrats plausibly charged that Grant "packed" the Court in 1870 with his appointments of Joseph P. Bradley and William Strong, two sure votes in favor of legal tender, to the Court shortly before the Court reconsidered its decision on that matter. In 1873, Grant's blundering search for a chief justice reminded many that the Court had a mission to decide the fate of Reconstruction, the great political question of the day. At one point, Grant seemed certain to nominate his friend Roscoe Conkling, the flamboyant senator from New York and a man clearly lacking in judicial temperament. Stories circulated that he once threatened to shoot dead a newspaper editor

planning to publish an expose of the senator's sexual dalliances.[34] The winning nominee for chief justice, Morrison Waite, emerged out of conservative Ohio politics the enemy of the leading radical James Ashley, to roll back Reconstruction, surely a political task, or so his biographers have boasted.[35]

Within the Waite Court strong personalities contended for dominance. Samuel Freeman Miller came to the court ambivalent about industrialization and a bitter critic of eastern capitalism. Before coming to the Court, he had led Iowa Republicans, small time capitalists invested heavily in land speculation and railroad development. The 1857 economic recession hit these small town elite merchants hard and they blamed eastern banks and financiers for their financial hard times. They formed a western wing of the Republican Party that conceived a free-labor, producer ideology so hostile to eastern capitalists that it considered them little better than slaveowners. On the Court Miller encountered another westerner, Stephen J. Field who had learned a different lesson from his youthful western adventures. He used Jacksonian rhetoric to defend the moneyed classes. Miller was on the wrong side of history and Field's liberty of contract ideology would eventually dominate the Republican Party and the Supreme Court, but during the time Miller and Field served together, Field often wrote in dissent. Miller's biographer describes the Court as divided into two factions, with Miller leading one group and Field and Swayne making up the entirety of the other.[36]

Within the seven justices that made law through the 1870s and 1880s, there was plenty of room for competing ideas about rights. Two justices, John Marshall Harlan and Miller, left a detailed record of their ideas about judges and judging in the form of lengthy lectures they delivered to law students. In the winter of 1889 and the spring of

1890, Miller delivered ten lectures to the Law School of National University, in Washington, D.C. He apparently read from texts, because after he died J. C. Bancroft Davis edited the lectures for publication, along with two other speeches, finding that he could print the lectures "as they came to me." Harlan delivered similar lectures in the 1897-98 academic year to students at Columbian University in Washington, D.C. Harlan seems not to have read from a prepared text, but two students transcribed his speeches. Harlan and Miller both recounted the history of the United States in their lectures, but the two men outlined competing understandings of rights. Harlan believed the United States was on a divinely appointed mission and that the Civil War confirmed the nation's egalitarian principles. Judges did not make such principles, they discovered them in nature. He laced his lectures with Biblical references and religious allusions. [37]

Miller, whose first biographer described him as a proto-populist, took nothing from the Bible when addressing his students but instead recognized the power of public opinion.[38] While Harlan thought the United States divinely inspired, Miller wrote that "the wisdom of the nation" legitimized the 1787 Constitution. Miller also recognized that "no amount of wisdom in a constitution can produce wise government, unless there is a suitable response in the spirit of the people." Miller believed that a written constitution could not guarantee the safety or perpetuity of any government. That required "a due reverence by the people for it and for their laws." Miller paraphrased Alexander Hamilton to describe the judicial branch as "the feeblest branch" of government, reliant "upon the confidence and respect of the public for its just weight or influence." Miller thought that public opinion determined the outcome of particular cases, including McCulloch v. Maryland, a case decided when the "prevailing sentiment of the country

and especially of its leading statesmen" favored the bank. Taney's great fault, in his Dred Scott decision, was to violate "the strongest feelings of a large portion of the people of the United States." Miller took pride in his own Slaughterhouse Cases opinion which won public sentiment "with great unanimity."[39]

By navigating between Harlan's religiosity and Miller's more secular stance, Joseph Bradley played a pivotal role in the Waite Court. Born on a backcountry family farm, Bradley grew up listening to his father read from the Bible. Bradley credited his mother as the source for his most enduring values. She was a Methodist "of the mild, not the ardent type." He studied theology at Rutgers before turning to law and religion left its stamp on Bradley. "We must adhere to God's law," he told his son, as it "will guide us into the true way."[40] Bradley had a transnational worldview based on natural law, seeing America as uniquely positioned to access many traditions and grand histories, "making the milk of political wisdom from so many fountains." Someday, he predicted, the best laws and institutions of all lands, the Hebrew, the Indian, the Greek, the Roman, and the Gothic would produce a truly Divine law for all the world to follow no matter the form of government.[41]

Like all his contemporaries, Bradley saw the Constitution change in dramatic and profound ways at the end of the Civil War. Congress proposed the Fourteenth Amendment on June 13, 1866. Ratification by the states was complete on July 9, 1868. The new amendment defined citizenship and said "No state shall make or enforce any law which shall abridge the privileges of immunities of citizens." The amendment also instructed the states not deprive any person of life, liberty, or property without due process of law and required the states to treat their citizens equally.

Bradley at first took an expansive view of the Fourteenth Amendment.[42] In 1871, when he discussed the new amendment with a circuit judge, Bradley saw no problem with federal officers policing white southern criminality, when the misconduct violated constitutional rights. So, when white Democrats fired guns into a Republican political meeting, they had committed a "savage and dastardly act punishable in federal court," Bradley believed.[43] Such a dramatic shift in the balance of power between the states and the federal government unsettled Bradley, though, and proved quite willing to revisit his initial conclusions. In 1874, Bradley described his own mind as "rather in the condition of seeking the truth" and not following any particular dogma. His best friend and college chum, Frederick Frelinghuysen, served as U.S. Senator from New Jersey and urged Bradley toward ever more radical opinions, toward greater expansion of national power. For Bradley the question was not what rights citizens had (God had already decided that), but rather, what power did Congress have to protect citizens' rights.

As Bradley struggled to decide just how much power the Fourteenth Amendment gave Congress to protect citizens' rights, the political landscape shifted. Democrats swept to victory in August, 1870 elections. Within the Republican Party a new generation of leaders, including Roscoe Conkling and James G. Blaine had begun to displace the party's old commitment to the antislavery ideal. According to Brooks Simpson, Grant fought a valiant holding action against the tides of change. In 1875, when Democrats and Republicans fought over control of the Louisiana legislature, Grant dispatched General Phil Sheridan to restore order. Even Republicans thought the spectacle of military troops crudely intervening on behalf of a political party hard to stomach. James G. Blaine called the affair a millstone that threatened to sink the Republican Party. Grant defended

himself with a moral message, but leading Republicans, and all Democrats, saw his message as nothing more than a political appeal, designed to shore up his party's failing fortunes in the South.[44]

Bradley's friend, Frederick Frelinghuysen, reasoned that the Fourteenth Amendment conferred both federal and state citizenship and that this allowed Congress to enforce all privileges and immunities which attach to citizenship. Bradley thought his friend's theory had much force, but he cautiously made two observations. If the framers of the Constitution had defined citizenship in 1789, Bradley said, there would be little doubt that the title to all citizenship, state and national, would be seen as flowing from the US Constitution and not dependent on any state or local regulation. Bradley's second point, though, complicated the picture. "Has it not always been the fact, he asked, that the Constitution implicitly conferred citizenship?" If so, Bradley reasoned, then Congress had no new power to protect its citizens, it had always had such power. The Fourteenth Amendment changed little, an idea the conservative Bradley found comforting. Although he endorsed dual citizenship in a way that protected some states' rights, Bradley did not worry about the conflict between national and state jurisdictions. Such conflicts did not present insurmountable problems, he believed, thinking that the nation could find the answer to the question of how much power Congress had to protect rights in the Fourteenth Amendment's text, most particularly the clause protected citizens' privileges and immunities. If privileges and immunities meant the natural rights (Bradley called them "private") all citizens enjoy regardless of their government, then Congress could legislate on all subjects whatsoever. Bradley rejected this possibility because it would allow the federal government to duplicate state authority for all

purposes, creating a structure with the states and the federal government performing the same tasks and assuming the same responsibilities. No sensible man would contemplate such a monstrosity, Bradley believed.[45]

"I do not think," Bradley said, "that the rights, privileges and immunities of a citizen embrace all private rights." By distinguishing what he called "private" rights from "individual" or natural rights, Bradley followed Tom Payne who had recommended duality of rights. Private rights came to a citizen politically, from government; individual rights came from nature. The right to go to court was politically determined, the rights fought for in court came from nature. Bradley maneuvered between Harlan and Miller: rights were naturally determined; the right to enforce those rights depended on public opinion.[46]

Frelinghuysen thought the Congress had powers equal to the states to protect citizens' privileges and immunities. Bradley agreed that much would depend on the meaning of "privileges and immunities."[47] Happily, there was a judicial answer: Corfield v. Coryell, an 1823 circuit court opinion written by Bushrod Washington that Bradley considered authoritative. Bradley liked Washington's formulation because it matched his own natural law proclivities. Privileges and immunities, Washington had declared, are "fundamental; which belong, of right, to the citizens of all free governments." Washington said that listing them all would be tedious, but he nonetheless composed an impressive list: "Protection by the government; the enjoyment of life and liberty, with the right to . . . pursue and obtain happiness and safety."[48] Not just Bradley, but numerous observers recognized that Corfield v. Coryell offered an obvious roadmap for judges seeking an apolitical path to understanding the scope of the Fourteenth Amendment's

power. The citizenship rights Bushrod Washington enumerated, Bradley said, are always the same, universally alike and equal for all persons.[49] Within a month after Bradley mentioned Washington's opinion to Frelinghuysen, the senator summarized it on the floor of the U.S. Senate.[50] Bradley differentiated between natural and political rights. Popular opinion mattered less to Bradley than it did to Miller, but more than it did for Harlan.

On April 14, 1873, Miller announced the Court's opinion in The Slaughterhouse Cases. On one level, Miller's opinion addressed a public health law from Loisiana

Protection by the Government	To demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government.
	Right of free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several States
The enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety	
	The right to peaceably assemble and petition for redress of grievances
To pass through, or to reside in any other state for the purposes of trade, agriculture, professional pursuits, or otherwise	To come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share it offices, to engage in administering its functions
	The right to use the navigable waters of the

	united States, however they may penetrate the territory of the several States
To claim the benefit of the writ of habeas corpus	The privilege of the writ of habeas corpus
To institute and maintain actions of any kind in the courts of the state	
To take, hold and dispose of property, either real or personal	
An exemption from higher taxes or impositions than are paid by the other citizens of the state	
The elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.	

Miller cited on Corfield v. Coryell, correctly describing it as "the leading case" on privileges and immunities. But, while Bradley and many others understood Corfield v. Coryell to protect national rights, Miller read it to protect state citizens. Miller's biographer doubts his commitment to precedent, and his concern with public opinion is evident throughout the text of his decision. He wrote that "In the early history of the organization of the government, its statesmen seem to have divided on the line which should separate the powers of the National government from those of the State governments, and though this line has never been very well defined in public opinion,

such a division has continued from that day to this."[53] Miller concluded his opinion with another appeal to public opinion, one that asserted his Court's role as a steadying influence: "whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts."[54]

With his Slaughterhouse opinion, Miller effectively neutralized the clause in the Fourteenth Amendment that might have most broadly placed citizens' natural rights under the protection of Congress. Bradley dissented in Slaughterhouse and only came around to Miller's view after several more years of judging and thinking about the Fourteenth Amendment. But Bradley's view that the enforcement of natural rights depended political will had been established by Miller in the Slaughterhouse Cases opinion.

Miller's most recent and best biographer doubts Miller reflected growing northern disgust with Reconstruction. Rather, Miller sought to affirm the work of Louisiana's biracial legislature and repel Campbell's effort to attack Reconstruction. Field's dissent supports the view that Miller identified himself with progressive public opinion. By the 1870s Field had become increasingly suspicious of the masses, as evidenced by the Paris Commune and increasingly labor militancy. Field saw the Court's role as preventing the majority from using the democratic process to do the work of the mob.[55]

Jury cases

It is the politicization of racial questions that helps explain the Supreme Court's compromise on the question of African Americans' jury rights. On March 1, 1880, the Supreme Court handed down decisions written by William Strong in three cases dealing with state exclusions of blacks from their juries.[56] The simplest one came from West Virginia. On March 12, 1873, the West Virginia legislature limited jury service to "all white male persons who are twenty-one years of age and who are citizens of the State." Strong said that by singling out "colored persons" for discrimination, West Virginia affixed a brand upon its black population, asserting their inferiority and stimulating race prejudice. This clearly violated the Fourteenth Amendment, Strong wrote, which necessarily implied a positive immunity or right, the right being the exemption from unfriendly legislation.[57]

Another jury case announced the same day came from a murder: Virginia authorities had accused Burwell and Lee Reynolds of murdering Aaron C. Shelton. U.S. District Judge Alexander Rives removed the Reynoldses from state court because Virginia had refused to allow blacks to serve on their juries. Virginia, unlike West Virginia, had no law limiting jury service to white persons. Instead, Virginia required that counties select jurors from "all male persons." The Supreme Court ordered Reynolds returned to state authorities. Strong wrote:

> "If, as was alleged in the argument, though it does not appear in the petition or record, the officer to whom was intrusted the selection of the persons from

> whom the juries for the indictment and trial of the petitions were drawn, disregarding the statute of the State, confined his selection to white persons, and refused to select any persons of the colored race, solely because of their color, his action was a gross violation of the spirit of the State's laws, as well as of" federal law.[58]

Strong believed that state officers selecting only white men as jurors criminally misused their own state's law. "In such a case, it ought to be presumed the [state] court will redress the wrong."[59]

Strong's opinion emphasized that Reynolds had not proved discrimination by the state officers. Strong referred to "The assertions in the opinion for removal" and declared that such assertions "fall short of showing that any civil right was denied."[60] The Court's decision in Virginia v. Rives, then, is quite clear: black defendants in state court claiming that state authorities discriminated by picking only white men for their juries, had to produce positive proof of the discrimination. Mere assertions and allegations would not be sufficient. Under Strong's formulation, federal courts could intervene when states seated white-only juries, but only if state authorities confessed their prejudice and the highest state court endorsed the discrimination.

The third jury case decided the same day involved a Virginia state judge, J.D. Coles, indicted and arrested in federal court for refusing to seat black jurors. In Virginia v. Rives Strong held that individuals could not be prosecuted in federal court for their private actions. Strong indicated that federal judges should presume that the states would discipline state officers criminally misusing their own state laws. In the case of Judge

Coles, however, Strong ruled for the United States. State officers had no immunity from federal prosecution, Strong wrote. Coles, Strong wrote, "is correctly held to answer for" his actions.[61] In this compromised decision, the justices sacrificed due process to appease political interests.

The Washington Post saw the jury decisions as "partisan" and headlined its story, "The States Rights Cases Decided for the Republicans." The Post noted that both Democrats on the Court filed a "vigorous dissent."[62] The St. Louis Globe-Democrat agreed, calling the decisions "Judgments Against Democracy", meaning against the Democratic Party, often called "the Democracy." The Globe-Democrat explained to its readers that Democrats in Congress had been trying to roll back the results of the Civil War, working night and day to do so. The paper observed that the two Democrats on the Supreme Court took the same position as their Democratic allies in Congress, standing against their Republican associates.[63]

Despite perceptions that the Supreme Court had followed a Republican agenda, in fact, what the Court did was far more subtle. Black defendants had a right to hold state officers accountable for their discriminations. Black defendants did not have a right to have blacks on their juries, but every defendant had a right to a jury where the state had practiced no discrimination against blacks because of their color. The mere absence of blacks did not prove that a civil right had been violated; evidence of deliberate discrimination by a state officer did.[64] Defendants would have to prove, not merely allege or assert, that state officers had discriminated by selecting only whites for their juries.

Subsequent decisions reaffirmed but did not materially alter the decisions Strong issued on March 1, 1880. A year later, in Neal v. Delaware, Justice John Marshall Harlan ruled first that Delaware's all-white juries did not result from the kind of legislative action indulged in by West Virginia. Delaware lost its case when its chief justice conceded that only whites sat as jurors in his state. The state judge explained this as "nowise remarkable in view of the fact – too notorious to be ignored – that the great body of black men residing in this State are utterly unqualified by want of intelligence, experience, or moral integrity to sit on juries."[65] Harlan thought this "a violent presumption" and followed Strong's reasoning: Neal had proof of state discrimination, not a mere allegation or assertion based on the absence of blacks from state juries. Neal's lawyers had done nothing to uncover the proof, Delaware volunteered it, but they had it nonetheless and won their case on that basis.

In 1896, an African-American attorney named Cornelius J. Jones took a case to the U. S. Supreme Court from a Mississippi county where officials could not find a single black qualified for jury service in a population of seven thousand African Americans legally eligible for jury duty and only fifteen hundred whites. Jones had collected no testimony from county officials admitting they only picked whites; he could only ask the Supreme Court to reason from the statistics. The Court spurned Jones's invitation, declaring instead that a mixed jury was not "always or absolutely necessary to the enjoyment of the equal protection of the laws." In order for the federal courts to intervene, Mississippi would have to overtly discriminate through its constitution or its laws, as interpreted by its supreme court.[66]

In 1900 U.S. Supreme Court decided Carter v. Texas, and again followed the rules articulated by Strong in 1880. Texas had rejected Carter's challenges to an already seated jury for coming too late. Texas indicted Seth Carter for murder on November 26, 1897, calling the case for trial at March term, 1898. Before arraignment or pleading, Carter presented a motion to quash the indictment alleging that he had been indicted by an all-white grand jury. The trial court had overruled the motion and proceeded with the trial, convicting Carter of murder and sentencing him to death. The Texas Court of Criminal Appeals affirmed the trial court, saying "It is too late, after indictment found, to question the manner of impaneling a grand jury." The Court of Criminal Appeals delivered another opinion denying a motion for a rehearing. In this second opinion, the Texas judges abandoned their first as untenable, conceding that the crime had occurred after the grand jury had been impaneled. Obviously, the defendant had no opportunity to question the array under the terms of the first opinion. The second opinion also rejected Carter's argument, but this time complained that his motion "was not predicated on the record" and had no supporting testimony or even the names of witnesses who might support the motion. The Supreme Court ruled that state courts had to allow defendants to call witnesses and hear evidence to prove allegations of discrimination. "The question whether a right or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a Federal question…." Horace Gray said in a unanimous opinion.[67]

Dabney Marshall

By the twentieth century, Mississippi's lawyers and judges had carefully studied and absorbed the lessons of the Supreme Court's jury decisions. Mississippi maintained all-white juries, not because of structural weakness in the court system, but because the Supreme Court had provided them with a virtual roadmap for discrimination. The system, though, relied heavily on the cooperation of white defense lawyers. As Carter v. Texas confirmed, they could call witnesses and challenge the system.

On December 8, 1905, Warren County, Mississippi, arraigned Joseph Hill for the murder of his wife. At his arraignment, Hill met his lawyer, Dabney Marshall, for the first time. Hill, a poorly educated laborer, had no way of knowing he had a right to challenge the array of jurors against him until December 8. Marshall filed a motion to quash Hill's indictment on December 13. The judge promptly overruled the motion for coming too late. Under Mississippi law the makeup of a grand jury could be challenged only before the jurors were sworn and impaneled.

Marshall wanted to challenge the grand jury that had originally indicted Hill. The grand jury was all white and, in fact, despite the high percentage of black jurors in Reconstruction, it had been many years since a black man had sat on any jury in Warren County. Marshall himself was white and a member of a prominent family connected to the famous chief justice, John Marshall, but he had special reasons to challenge Mississippi's white power structure. Born in 1861, Marshall had pursued a promising political career until his opponents circulated a career-killing rumor that he was homosexual. In the nineteenth-century South's honor culture, no man could allow such talk to circulate without challenge. Marshall agonized over the decision, first, because he did not believe in guns or violence and, more practically, because he was so near-sighted

and inexperienced with firearms that he stood little chance against his foe, a man skilled in the use of firearms. Nonetheless, Marshall killed his opponent, pleaded guilty to murder and went to prison. Although unquestionably guilty of homicide, Marshall considered his imprisonment unjust since he lived in a culture and a society that virtually forced him into an armed confrontation with his tormentor. In prison Marshall wrote at least one short story with an apparently black protagonist. Released from prison with a pardon, Marshall resumed the practice of law but could not restart his political career. Instead, he vented his frustration by representing black clients, suing the police department, the county, and other power centers. In 1905, when he became Joseph Hill's attorney, Marshall had compiled an extensive record of often successfully defending black clients.

The trial judge rebuffed Marshall's demand for a hearing on the all-white grand jury – he said Marshall's complaint came too late under Mississippi law – but he had no choice but to hear a challenge to the not-yet-seated trial jury. At the hearing on this motion, Marshall called county officers to testify about how they chose jurors. He was looking for the kind of confession that had decided the case of Neal v. Delaware. While the sheriff tried to evade Marshall's questions, he confessed that he never chose black men as jurors and that he did not "go hunt" Negroes for jury duty because "they are generally not eligible," testimony Marshall easi

he bore in on the deputy. “Now be fair with us,” he instructed, “Don’t you know that you would not summon a Negro on the jury if you could get out of it just because he was a Negro?” Chiles weaseled: “Oh, I don’t know, I have not hatred towards the Negro; I rather like them.” Marshall brushed aside the obfuscation: “Do you like them as jurors?” The deputy answered that he had never seen a black juror, so he really did not see how he could be expected to have an opinion on that.[68]

Marshall would not be put off. “Now be fair with me,” he repeated, “would you summon a Negro…?” After further evasion, Chiles finally said, “I have never given it a thought.” Marshall pounced: “You never even think about it.” Chiles testily agreed and so Marshall continued, “The policy is so settled in this court to summon white men solely you don’t even think about summoning a Negro?” Chiles, sounding nettled, snapped that it was “Settled with me; I never give it a thought.”[69]

This was getting dangerously out of hand, so Judge Oliver Catchings, perhaps casting a wary glance at his court stenographer mindlessly transcribing every word as Deputy Chiles marched deeper into territory already pioneered by the chief justice of Delaware, intervened. Catchings got the witness to reiterate that no one ever instructed him to select only white jurors. The deputy, in turn, never told his helpers to choose only white people as jurors. It just happened to work out that way. “Did you summon this jury simply because they were white people?” Catchings asked, getting things firmly back on track. It was a leading question and even a Warren County deputy sheriff could figure out what he was supposed to say: “No, sir.”[70]

Despite the judge’s intervention, Marshall left court confident that, as he put it in his brief to the Mississippi Supreme Court, “the cat is out of the bag.”[71] Marshall argued

that state officers had admitted their discrimination against potential black jurors, not only violating the Fourteenth Amendment but doing so overtly, making comments about the general lack of qualification among blacks that sounded similar to the Delaware chief justice. Marshall felt he had forced a Mississippi court to document its own discrimination. Not only that, but the judge rejecting his challenge to the grand jury said he did so because it had been filed too late. Marshall's strongest argument relied on Carter v. Texas, but the problem Marshall faced was that the Mississippi Supreme Court would have to overrule both itself and the law of Mississippi to follow the US Supreme Court. "The American judicial system vests considerable discretion in lower-court judges," Gerald Rosenberg has observed, adding that the biased judge "has a myriad of tools with which to abuse discretion."[72]

The trial proceeded and an all-white jury convicted Hill and sentenced him to death. Marshall appealed his conviction to Mississisppi's Supreme Court, where Judge Solomon S. Calhoon would decide his case. To determine whether Calhoon was the kind of biased judge likely to abuse his discretion requires only a little digging. Calhoon outlined his racial views in an 1890 pamphlet entitled Negro Suffrage. To properly understand black people, Calhoon urged his readers to look to Africa, where, Calhoon averred, there is "No advancement, no invention, no progress, no civilization, no education, no history, no literature, no governmental polity. We see only ignorance, slavery, cannibalism, no respect for women, no respect for anything save the strong hand." Calhoon insisted he felt "affection for the negro, and esteem highly many of his characteristics. As a rule he is docile, good-natured, hospitable, charitable, faithful in his friendships, but not inventive, not progressive, not resourceful, not energetic." Calhoon

wrote about black voting in 1890, but his comments no doubt captured his feelings about black jury service as well when he wrote that "Negro suffrage is an evil, and an evil to both races. Its necessary outcome is that conflicting aspirations and apprehensions must produce continual jars and frequent hostile collisions, which do not occur with homogeneous races." Calhoon said that some whites believed that education and Christianization could remedy blacks' shortcomings. "This is a grave mistake," he said. Black inferiority, Calhoon believed, followed "God's own laws" and could not be remedied by the hand of man.[73]

Judges are limited not only by their own prejudices, but by the culture they inhabit. As a resident of Mississippi, Calhoon lived in a society that tolerated and even encouraged every possible discrimination against black Americans from segregated cemeteries to lynching. Nonetheless, the U.S. Supreme Court had ruled that state judges had to allow criminal defendants to at least try and prove discrimination in jury selection. Hill's trial judge had cut off Hill's effort to attack his grand jury much as Texas had disallowed Seth Carter's effort to prove discrimination in Texas. It took ten months for Calhoon to write 1007 words in five paragraphs. As the Vicksburg Evening Post observed, "it is evident that the members of the bench tried to reach some other conclusion, but in the face of the Federal decisions, it was impossible to do so." [74]

On December 18, 1906, Calhoon reversed Hill's conviction and awarded him a new trial. He did not say that blacks could or should serve on juries, but he did say that the Supreme Court would not permit Mississippi to block defense lawyers' inquiries into all-white juries. The following January, the Vicksburg Evening Post announced that the county's board of supervisors was busily at work adding African Americans' names to

the county's jury lists. In May, white jurors protested the presence of blacks in their midst and the circuit judge had to silence their protests before proceeding. The Vicksburg Evening Post called the Hill opinion important and far-reaching, one likely to return blacks to Mississippi juries. The Post warned that failure to admit blacks to jury service would allow defense attorneys with black clients to "defeat the ends of justice, regardless of the merits of their cases." [75]

Conclusion

Local authorities in Vicksburg feared judicial power. Public safety demanded that even rules that contradicted Mississippi law, rules emanating from the hated federal government, must be obeyed. Courts had the power to release prisoners. Judges had the power to tighten and enforce their rules, making it easy for defense attorneys to challenge every conviction of a black defendant. Hordes of black thieves and murderers could be unleashed on the city, if local authorities refused to cooperate with Supreme Court rules. For that reason, in matters of criminal procedure, the Supreme Court had considerably more structural power over provincial authorities than some scholars now allow.

The system did depend on energetic and capable defense attorneys to vigorously defend the rights of African Americans who ran afoul of the law. Dabney Marshall was clearly an unusual person; few white defense attorneys so boldly challenged white power and the all-white jury system. In explaining the brief break in Mississippi's all-white jury system, he was what Marc Bloch would call an exceptional rather than a general cause. In one sense, obviously, he confounded his context and baffles our expectations. But he

also represented his context: he served time in prison because of a characteristically southern “affair of honor” and he then turned his talents on behalf of black defendants out of his own thwarted ambitions. He was no exception to his culture, he was very much a product of it. It was his honor-bound, hyper-masculinized culture freed him from its constraints by sending him to prison. Perhaps more importantly, the judges of Mississippi’s supreme court, where racism ran amok, and the Warren County Board of Supervisors, dared not cross the determined rules of the United States Supreme Court, when clearly articulated. Mississippi’s brief experiment with integrated juries had a systemic cause too.

[1] Michael Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality (New York: Oxford University Press, 2004), 40-43; Paul Finkelman, "Civil Rights in Historical Context: In Defense of Brown," Harvard Law Review 118 (January 2005): 973-1029; Matthew Lassiter, "Does the Supreme Court Matter? Civil Rights and the Inherent Politicization of Constitutional Law," Michigan Law Review 103 (May 2005): 1401-1422; Clayborne Carson, "Jim Crow's Enduring Legacy," Stanford Law Review 57 (March 2005): 1243-1250.

[2] For neutral principles, the classic statement is Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," Harvard Law Review 73 (November 1959): 1-35; for the contrary view, see Derrick A. Bell, Jr., "Brown v, Board of Education and the Interest-Convergence Dilemma," Harvard Law Review 93 (1980): 518-533. Thomas L. Haskell, "The Curious Persistence of Rights Talk in the 'Age of Interpretation,'" Journal of American History 74 (Dec, 1987): 984-1012, argues that rights talk refers to "something real" and "is a valuable cultural practice."

[3] This question has a long history. In 1897, Oliver Wendell Holmes urged lawyers to consider "how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind." He favored the study of history not to allow tradition to override rational policy, but to "get the dragon out of his cave" to "count his teeth and claws" and then kill or tame him. Holmes, "The Path of the Law," Harvard Law Review 10 (March 25, 1897): 457-478. In 1965 Alfred H. Kelly published a landmark article criticizing justices for using history to act politically, Kelly, "Clio and the Court: an Illicit Love Affair," Supreme Court Review (1965): 119-158; Bernard Bailyn and Gordon Wood emphasized that ideas cannot be separated from behavior. Gordon S. Wood, "Ideology and the Origins of Liberal America," William and Mary Quarterly 3d ser., 44 (July, 1987): 628-640; Bernard Bailyn, The Ideological Origins of the American Revolution (Cambridge: Harvard University Press, 1967); Gordon S. Wood, The Creation of the American Republic, 1776-1787 (New York: W. W. Norton, 1969). In 1986 William E. Nelson argued for history and neutral principles in Nelson, "History and Neutrality in Constitutional Adjudication," Virginia Law Review 72 (October, 1986): 1237-1296; William Wiecek accused adherents of the jurisprudence of original intent of having "a dangerous delusion"—that they can see the past as it really was. Wiecek, "Clio as Hostage: The United States Supreme Court and the Uses of History," California Western Law Review 24 (1988): 227-276; Paul Finkelman agreed a year later, Finkelman, "The Constitution and the Intentions of the Framers: The Limits of Historical Analysis," University of Pittsburg Law Review 50 (Winter, 1989): 349-398.

[4] J. R. Pole, "Reflections on American Law and the American Revolution," William and Mary Quarterly 3d ser., 50 (January 1993): 123-159; Shannon C. Stimson, The American Revolution in the Law: Anglo-American Jurisprudence before John Marshall (Princeton: Princeton University Press, 1990), 5-12, 49. For a more general review comparing jury service to voting, see Vikram David Amar, "Jury Service as Political Participation Akin to Voting," Cornell Law Review 80 (January 1995): 203-259.

[5] Alexander Hamilton, "Federalist 83" in J. R. Pole, ed., The Federalist (Indianapolis: Hackett, 2005), 441-451.

[6] United States v. Callender, 25 F. Cas. 239 (1800).
[7] Richard Henry Lee, Observation Leading to a Fair Examination of the System of Government, 1787 in Schwartz, ed., The Bill of Rights, 1: 466-473.
[8] Essay by a Farmer (June 6, 1788), in 4 The Complete Anti-Federalist 214 (Herbert J. Storing ed., 1981).
[9] Act of June 1, 1827, 1, 1833 Ill. Laws 378.
[10] An Act Concerning Grand and Petit Jurors, 1833 Mich. Laws 217, 1.
[11] An Act Proportioning Each Town's Quota of Jurors to Attend the Several Courts of this State, and Directing the Method of Choosing Them, and Regulating their Attendance at Said Courts, 2, 1798 R.I. Laws 181.
[12] Rev. Stat. N.C. ch. 31, 26-27 (Iredell & Battle 1837).
[13] Maryland Gazette and State Register, September 21, 1826; New York Herald, July 24, 1843.
[14] Stacy Pratt McDermott dissertation (University of Illinois, Urbana, 2007).
[15] Henry St. George Tucker, Commentaries on the Laws of Virginia 2 vols. (Winchester, 1831), 2:282-3; Joseph Chitty, A Practical Treatise on the Criminal Law, Comprising the Practice, Pleadings, and Evidence 3 vols. (American edn., corrected and enlarged, Springfield, 1836), 1:536.
[16] David Graham, An Essay on New Trials (New York, 1834), 19-44.
[17] Tucker, Commentaries on the Laws of Virginia, 2:282-3.
[18] New Orleans Crescent reprinted in the Savannah Daily News and Herald, October 25, 1867.
[19] Bangor Daily Whig and Courier, May 20, 1867.
[20] Savannah Daily News and Herald, July 1, 1867.
[21] Bangor Daily Whig and Courier, July 3, 1867.
[22] Cincinnati Commercial reprinted in the San Francisco Daily Evening Bulletin, July 8, 1873; Georgia Weekly Telegraph and Georgia Journal and Messenger, July 8, 1873.
[23] Dartmouth College v. Woodward, 17 U.S. 518 (1819).
[24] Stuart Streichler, Justice Curtis in the Civil War Era (Charlottesville: University of Virginia Press, 2005), 98-118.
[25] Don E. Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics (New York: Oxford University Press, 1978), 114-151.
[26] Austin Allen, Origins of the Dred Scott Case: Jacksonian Jurisprudence and the Supreme Court, 1837-1857 (Athens: University of Georgia Press, 2006), 178-202.
[27] US Stat. 27.
[28] John Sherman, John Sherman's Recollections of Forty Years in the House, Senate, and Cabinet, an Autobiography 2 vols. (Chicago: Werner Co., 1895), 1: 369-370.
[29] Stanley I. Kutler, Judicial Power and Reconstruction Politics (Chicago: University of Chicago Press, 1968).
[30] Cong. Globe, April 6, 1871, 42d Cong., 1st sess,, 498.
[31] Cong. Globe, April 13, 1871, 42d Cong., 1st sess., 651.
[32] Cong. Globe, April 13, 1871, 42d Cong., 1st sess., 645.
[33] Cong. Globe, April 13, 1871, 42d Cong., 1st sess., 660.
[34] David M. Jordan, Roscoe Conkling of New York: Voice in the Senate (Ithaca: Cornell University Press, 1971), 144-145. Bradley expected Grant to nominate Conkling in May,

see Bradley to wife, May 16. 1873, Bradley Papers, New Jersey Historical Society, Newark, N.J.

[35] Bruce R. Trimble, Chief Justice Waite: Defender of the Public Interest (Princeton: Princeton University Press, 1938), 171-174, credits Waite with overthrowing the congressional plan of Reconstruction in seven years; C. Peter Magrath, Morrison R. Waite: The Triumph of Character (New York: Macmillan, 1963), 153-163, attributes Waite's course to his friendship with fellow Ohioan Hayes. For Ashley's radical politics, see Michael Les Benedict, "James M. Ashley, Toledo Politics and the Thirteenth Amendment," _____.

[36] Michael A. Ross, Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era (Baton Ro0uge: Louisiana State University Press, 2003), 7-157; Paul Kens, Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age (Lawrence: University Press of Kansas, 1997), 65-123.

[37] Linda Przybyszewski, The Republic According to John Marshall Harlan (Chapel Hill: University of North Carolina Press, 1999), 44-72; Linda Przybyszewski, "Judicial Conservatism and Protestant Faith: The Case of Justice David J. Brewer," Journal of American History 91 (September 2004):471-496.

[38] Charles Fairman, Mr. Justice Miller and the Supreme Court, 1862-1890 (Cambridge, 1939).

[39] Samuel Freeman Miller, Lectures on The Constitution of the United States (New York: Banks and Brothers, 1891), 16, 32, 70, 86, 97, 388, 390, 394, 404, 405, 411.

[40] Bradley to Charles Bradley, March 1, 1880, box 4, Bradley Papers, New Jersey Historical Society, Newark, N.J.

[41] Bradley to Charles Bradley, June 4, 1876, box 4, Bradley Papers, New Jersey Historical Society, Newark, NJ.

[42] Scholars have vigorously debated Bradley's consistency on constitutional questions. John A. Scott has argued that Bradley radically changed his views, see Scott, "Justice Bradley's Evolving Concept," 552-569; Whiteside, "Justice Joseph Bradley," dates Bradley's shift to 1877-1883; Michael Les Benedict has argued for Bradley's consistency, finding that the justice consistently took an expansive view of national power, but did so in dicta, Benedict, "Preserving Federalism: Reconstruction and the Waite Court," The Supreme Court Review (1978): 39-79; Lurie, "Mr. Justice Bradley," also finds consistency, Bradley just did not value social rights; Collins, Justice Bradley's Civil Rights Odyssey," also sees Bradley as consistent, always differentiating natural rights from political rights. Bradley himself indicated he changed his mind about the power of Congress to protect individual rights.

[43] Bradley to William B. Woods, January 3, 1871, box 3, Bradley Papers, New Jersey Historical Society, Newark, NJ.

[44] Brooks D. Simpson, The Reconstruction Presidents (Lawrence: University Press of Kansas, 1998), 152-180; Charles W. Calhoun, Conceiving a New Republic: The Republican party and the Southern Question, 1869-1900 (Lawrence: University Press of Kansas, 2006), 47-89.

[45] Bradley to Frelinghuysen, July 19, 1874, box 18, Bradley Papers, New Jersey Historical Society, Newark, NJ.

South and West, 1870-1893 (Tuscaloosa: University fo Alabama Press, 1991), 1-78, 133-180.

[67] Carter v. Texas, 177 U.S. 442 (1900).

[68] Testimony Taken on Motion to Quash Indictment, Joe Hill vs. State of Mississippi, case 12017, box 14359, Supreme Court of Mississippi, Mississippi Department of Archives and History, Jackson.

[69] Testimony Taken on Motion to Quash Indictment, Joe Hill vs. State of Mississippi, case 12017, box 14359, Supreme Court of Mississippi, Mississippi Department of Archives and History, Jackson.

[70] Testimony Taken on Motion to Quash Indictment, Joe Hill vs. State of Mississippi, case 12017, box 14359, Supreme Court of Mississippi, Mississippi Department of Archives and History, Jackson.

[71] H.H. Coleman and Dabney Marshall, Abstract of Facts and Brief, March 22, 1906, Joe Hill vs. State of Mississippi, case 12017, box 14359, Supreme Court of Mississippi, Mississippi Department of Archives and History, Jackson. The published synopsis of Marshall's brief does not include this quote. Joseph Hill v. State of Mississippi, 89 Miss. 23 (1906).

[72] Carter v. Texas, 177 U.S. 442 (1900). As recently as April 1905 the Mississippi Supreme Court insisted that once impaneled, a sitting grand jury could not be challenged, even by a defendant unaware that the grand jury might indict him. Challenges had to come before the grand jury was sworn. This followed Mississippi statute law. David Posey v. State of Mississippi, 86 Miss. 141 (1905); Elias Cain v. State of Mississippi, 86 Miss. 505 (1905). Neither case involved race. Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (Chicago: University of Chicago Press, 1991), 17.

[73] S. S. Calhoon, Negro Suffrage (Commonwealth Steam Print: Jackson, 1890), 7-11.

[74] Vicksburg Evening Post, December 20, 1906.

[75] Vicksburg Evening Post, January 8, 1907, May 24, 1907, December 20, 1906.