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# An Unacknowledged Constitutional Crisis: United States v. Shipp II (1909)

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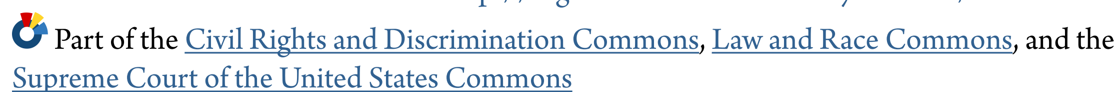
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**AN UNACKNOWLEDGED CONSTITUTIONAL CRISIS:**
***UNITED STATES V. SHIPP II* (1909)**

LESLIE F. GOLDSTEIN[*]

According to my dictionary, one type of "crisis" is "[a]n unstable condition in political . . . affairs in which an abrupt or decisive change is impending."[1] A rarely acknowledged but nonetheless decisive change in the United States Supreme Court's treatment of the U.S. Constitution, as that document applied to black Americans, began in 1911. This Essay argues that the constitutional reset, so to speak, was triggered by a group of incidents amounting to critical proportions that occurred between 1900 and 1910. Two crisis-inducing events transpired in that decade: (1) a new style of anti-black race riots developed in the northern United States and spread to the South; and (2) the Supreme Court, for the only time to date, tried a criminal case on original jurisdiction.[2]

The crime that prompted the trial was contempt of court. The contempt was perpetrated by a lynch mob, including a sheriff and his deputies, who committed a murder by lynching a black man whose appeal against his own conviction for the rape of a white woman had just been accepted to be heard by the U.S. Supreme Court. This original jurisdiction trial, heard by the Fuller Court, was *United States v. Shipp* (*Shipp II*).[3] As of 2017, one can say the Fuller Court has been the most anti-black Supreme Court since the Civil War.[4] In December 1910, Justice Edward White became the Chief Justice, replacing Chief Justice Melville Fuller.[5] A noticeable shift took place on the White Court and set forth a trajectory that lasted until the 1990s, during which the Supreme Court took on a leadership role within the federal government to uphold the rights of black Americans.

The Fuller Court years of 1888–1910 were the post-Civil-War nadir for the civil rights of black Americans. Outright hostility to these rights began showing up in both the executive and legislative branches once Grover

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1. *Crisis*, THE AMERICAN HERITAGE DICTIONARY (2d College ed.,1982).

2. *See* United States v. Shipp, 214 U.S. 386 (1909).

3. 214 U.S. 386 (1909). United States v. Shipp (Shipp I), 203 U.S. 563 (1906) was the decision allowing the Supreme Court to take jurisdiction on the contempt issue.

4. *See infra* text accompanying notes 44–45.

5. *Justices 1789 to Present*, SUP. CT. U.S., https://www.supremecourt.gov/about/members_text.aspx (last visited Sept. 10, 2017).

Cleveland, a Democrat, was elected President in 1884.[6] Prosecutorial efforts by President Teddy Roosevelt's ("T.R.") Justice Department in 1901–1909 to bring to justice perpetrators of anti-black violence provided the only bright spot in this dismal picture of withdrawal by the President and Congress from the black civil rights arena in the twenty-year period of 1891–1910. Not only did T.R. call upon Congress to adopt anti-lynching legislation in his *State of the Union* message of December 1906 (and publicly condemn lynching as early as 1902), but his Justice Department also brought successful prosecutions against lynch mobs: *Riggins v. United States* (1905),[7] *United States v. Shipp* (*Shipp I*) (1906)[8], and *Shipp II* (1909). The last of these, *Shipp II*, is the original criminal jurisdiction case described above, which, this Essay will argue, marked an important turning point in the Supreme Court's treatment of the Constitution.

Lynch mob prosecutions were the only occasions on which the Fuller Court upheld rights of black Americans.[9] T.R.'s unsuccessful prosecutions included efforts that prosecuted, with some initial success, individuals who forced black persons into "peonage" (compelled labor to pay off a claim of a debt) and mobs that were terrorizing blacks into abandoning their jobs. These efforts, however, were thwarted by the Fuller Court in *Clyatt v. United States* (1905)[10], *Hodges v. United States* (1906)[11], and *Boyett v. United States* (1907).[12]

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6. For details, see LESLIE F. GOLDSTEIN, THE U.S. SUPREME COURT AND RACIAL MINORITIES: TWO CENTURIES OF JUDICIAL REVIEW ON TRIAL 127 (2017). Cleveland stopped federal efforts to enforce voting rights in the South, and Congress in 1894 legislatively undid the explicit voting rights protections it had adopted in the Reconstruction Era. *Id.* at 128. Congress made no effort to invoke Section 2 of the Fourteenth Amendment when the South began massive disenfranchisement of Southern black voters in the 1890s (which it successfully completed in the early twentieth century). *Id.* at 128–29. Also, Congress ignored T.R.'s call for anti-lynching legislation. *Id.* at 129–30.

7. 199 U.S. 547 (1905).

8. 203 U.S. 563 (1906).

9. To be sure, the Fuller Court, in *Clyatt v. United States*, refrained from declaring unconstitutional the Federal Anti-Peonage Act of 1867, ch. 187, 14 Stat. 546, but in that case the Court ordered the *release* of a man accused of holding a black man in peonage servitude. 197 U.S. 207, 216, 222 (1905). And in 1908, the Fuller Court *resisted* T.R.'s Justice Department's pleas to issue a pre-trial release of a black man jailed under an Alabama peonage (debt-servitude) law. Bailey v. Alabama, 211 U.S. 452, 453, 455 (1908).

10. 197 U.S. 207 (1905).

11. 203 U.S. 1 (1906).

12. 207 U.S. 581 (1907) (per curiam). Detailed discussion of these three cases is provided in the following sources: OWEN M. FISS, 8 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910 379–84 (Stanley N. Katz ed., 1993); J. Gordon Hylton, *The Judge Who Abstained in* Plessy v. Ferguson*: Justice David Brewer and the Problem of Race*, 61 MISS. L.J. 315, 320 n.21 (1991); Pamela S. Karlan, *Contracting the Thirteenth Amendment:* Hodges v. United States, 85 B.U. L. REV. 783 (2005); William H. Pruden III, *Hodges v. United States,* ENCYCLOPEDIA OF ARK. HIST.

## I. THE WHITE COURT SHIFT, 1911–1921

The Supreme Court's record on civil rights for black Americans took a sharp turn for the better in 1911 with the promotion of Justice Edward White to Chief Justiceship in December of 1910.[13] Scholars continue to debate the causes of this turn. It may have been due to the departure of moderately proslavery Chief Justice Melvin Fuller (who died in 1910).[14] It could have been because of the psychological impact of the Supreme Court actually trying guilty parties for a lynching in 1909 on charges of contempt of court. (The sheriff and deputy co-conspirators involved knew that the appeal of the man they were about to lynch to death had been accepted for a hearing at the U.S. Supreme Court). It could have been caused by surrounding socio-political events.[15] Most likely, it was due to a combination of all of these elements.[16]

The cases that comprise what I call this "turn for the better" are described in Part II. In brief, they include two anti-segregation decisions, two anti-peonage-law decisions, and three pro-voting rights decisions. This turn by the White Court was hardly to be expected. The new Chief Justice White had served as an officer in the Confederate Army and, in Louisiana, he was a politician who led opposition to Reconstruction.[17] *Vanderbilt Law Review*

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& CULTURE, http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=7404 (last updated Mar. 28, 2016).

13. *See Justices 1789 to Present*, *infra* note 5.

14. Melville Fuller served as the campaign manager for Stephen Douglas's presidential campaign in 1860. *Melville W. Fuller*, OYEZ, http://www.oyez.org/justices/melvin_w_fuller. While Douglas was not as hard-line proslavery in that election as his Southern Democrat opponent Breckinridge, he did favor giving permission for the expansion of slavery into the northern states via "popular sovereignty," and he did manage a large slavery plantation inherited by his wife and children from 1848 until his death in 1861. For his management, he received one-third of the profits of the plantation each year. Deborah Keating, *Stephen A. Douglas*, *in* CIVIL WAR ON THE WESTERN BORDER: THE MISSOURI-KANSAS CONFLICT, 1854–1865, THE KANSAS CITY PUBLIC LIBRARY http://www.civilwaronthewesternborder.org/encyclopedia/douglas-stephen (last visited Oct. 23, 2017).

Fuller lived in Chicago and did not own slaves. He never served in the Union army and was accused by political opponents of having been a Copperhead during the war, based on his supposedly soft votes while serving in the Illinois legislature. WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876, at 226 (2004).

15. *See infra* text accompanying notes 31–39 (discussing the "northern style race riots").

16. So far as I know, no previous scholar has suggested that presiding on original jurisdiction over a trial for "contempt of court," the federal charge imposed upon this murder by lynching, shaped the Court's jurisdiction in the immediately subsequent decades. *See* text accompanying *supra* note 3 and *infra* note 47.

17. *See* ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., 9 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910–1921, at 725–26 (Paul A. Freund & Stanley Katz eds., 1984) (This Article only cites to Part II of this book written by Benno C. Schmidt, Jr. and will be referred to hereinafter as SCHMIDT in each *supra*). Schmidt writes that in the twentieth-century White Court, "it was the best of times black people had as yet seen." *Id.* at 726. This statement undervalues

presented a symposium on these cases in 1998 and after reflecting upon the other symposium papers and the cases, one scholar concluded, "[i]n the end . . . the[se] Progressive era decisions remain a puzzle."[18]

In the years 1909–1912, Justices Brewer, Fuller, Peckham, Moody, and (pro-civil-rights) Harlan all left the Court.[19] And, there was considerable further turnover during the early twentieth century. T.R. appointed Justices Oliver Wendell Holmes (GOP Mass., 1902–1932), William Day (GOP Ohio, 1903–1922), and William Moody (GOP Mass., 1906–1910).[20] President Taft (GOP Ohio, 1909–1913) appointed Justices Horace Lurton (Dem. Tenn., 1909–1914), Charles E. Hughes (GOP N.Y., 1910–1916), Willis Van Devanter (GOP Wyo., 1910–1937), Joseph Lamar (Dem. Ga., 1910–1916), and Mahlon Pitney (GOP N.J., 1912–1922), and promoted Justice Edward White to Chief Justiceship in 1910.[21] President Wilson (Dem. N.J., 1913–1921), who imposed racial segregation on federal civil service jobs and halted the postbellum practice of appointing blacks to patronage jobs,[22] appointed Justices James McReynolds (Dem. Tenn., 1914–1941), Louis D. Brandeis (Dem. Mass., 1916–1939), and John Clarke (Dem. Ohio, 1916–1922).[23] Economic, rather than racially sensitive, concerns seemed to dominate the presidential selection process of those years: T.R.'s picks had been dominated, in his words, by a desire to find "a liberal-minded man, a man with sympathy for the position of labor . . . a man who is not . . . scared . . . from exercising the proper control over corporations."[24] Taft, by contrast, sought men with the right sort of conservative "creeds on property."[25] In contrast to the Fuller Court, however, neither the Court under Chief Justice White nor the Court under later Chief Justice Taft gave rise to someone like the first Justice John Marshall Harlan, who stood out as the voice for racial justice on the Fuller Court. Although the appointment of Progressive Justice Charles Hughes to the White Court was particularly important, personnel changes alone cannot

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contributions of both the Chase and Waite Courts, but there can be no doubt that the White Court proved a dramatic improvement over the Fuller Court. *See also* JOHN R. HOWARD, THE SHIFTING WIND: THE SUPREME COURT AND CIVIL RIGHTS FROM RECONSTRUCTION TO BROWN 161 (1999).

18. Mark V. Tushnet, *Progressive Era Race Relations Cases in Their "Traditional" Context*, 51 VAND. L. REV. 993, 1000 (1998).

19. *Justices 1789 to Present*, *supra* note 5.

20. *Id.*

21. *Id.*

22. SCHMIDT, *supra* note 17, at 937–38.

23. *Justices 1789 to Present*, *supra* note 5.

24. SCHMIDT, *supra* note 17, at 7 (citing Letter from Theodore Roosevelt to W. H. Moody (June 5, 1907) (on file with Alexander Bickel)); HOWARD, *supra* note 17, at 162.

25. SCHMIDT, *supra* note 17, at 5–6. Note that Taft did not believe he was basing his decisions on views of property. *Id.*

fully account for that Court's clearly discernible judicial shift on race, modest though it was.[26]

One must consider the changing times as at least part of the equation.[27] Among more educated or affluent whites and among some union women, the women's suffrage movement was in full swing, and Progressivism was in flower among white middle class voters. Despite his privately expressed views on inherent racial inequality, (Progressive) President Theodore Roosevelt used his Justice Department to bring several cases on behalf of minority rights, as was adumbrated above, although most were blocked by the conservative Fuller Court.[28] In terms of working class life during this period, both industrialization and immigration were at peak levels.

Unfortunately, the latter trend, immigration, seemed to have triggered a rash of northern race riots during the period of 1898–1908, in which mobs of working class whites attacked and even killed random black Americans and set fire to black neighborhoods. These northern pogroms had been preceded by a severe outbreak of post-Reconstruction style violence in 1898 in Wilmington, North Carolina, which aimed to discourage black voting and to drive elected black leaders to resign from office and leave the city. Somewhere between 14 and 60 blacks were murdered and some 1400 others moved out of the city.[29]

In 1898–1899, racial violence moved north, beginning with a flurry of coal mine riots in three different Illinois towns. Armed union members on strike confronted management's armed guards defending Southern blacks who had been recruited as strikebreakers. These clashes produced the deaths of several blacks, but (for what it is worth) the mob fury was plainly job related.[30]

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26. *Cf.* HOWARD, *supra* note 17, at 160–67. Howard attributes the Court's relatively progressive record of 1911–1917 to new personnel, specifically, the presence of Charles Evans Hughes, who had the intellectual heft and commitment to racial justice to outweigh the strong intellectual force of Oliver Wendell Holmes. *Id.* at 165–67. The latter (despite his reputation as a "liberal") was so strongly committed to deference to local majorities that he frequently voted against black litigants. *Id.* at 167. Howard is no doubt correct as to the direction of Hughes's influence, but Hughes left the Court in 1916, a year prior to the White Court's striking down a segregation ordinance in *Buchanan v. Warley*, 245 U.S. 60 (1917). *See infra* text accompanying notes 86–101.

27. *Cf.* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 67 (2004). Klarman debunks the idea that the "times" were supportive of racial reform: "The political nadir of race relations at the national level may have come in the 1912 presidential election and its aftermath." *Id.* Presidential candidates Taft and T.R. both endorsed Southern home rule on race, and Woodrow Wilson, who won, was a committed Southern Democrat, having resided in the South for the first twenty-eight years of his life.

28. *See supra* note 12 and accompanying text.

29. KLARMAN, *supra* note 27, at 11, 15, 38; LeRae Umfleet, *The Wilmington Race Riot—1898*, N.C.PEDIA (Sept. 17, 2010), http://ncpedia.org/history/cw-1900/wilmington-race-riot.

30. John A. Lupton, *Virden, Pana, and Carterville (Illinois) Mine Riots (1898–1899)*, *in* 2 ENCYCLOPEDIA OF AMERICAN RACE RIOTS 671, 671–75 (Walter Rucker & James Nathaniel Upton eds., 2007).

The race-based riots of the first decade of the twentieth century accompanied the increasing stream of black migration into the North.[31] Whether these riots were motivated by an underlying sense of competition over jobs,[32] or by a cultural clash between rural blacks and staid Midwestern townsfolk,[33] or simply by amorphous racial hostility,[34] their common pattern was an immediate triggering by the formation of a would-be lynch mob, agitated over a black-on-white crime. The first riot was in 1900 in New York City, and was set off by the killing of a white, plainclothes policeman by a black man acting in self-defense; many blacks were injured to the point of hospitalization.[35] This type of race riot—i.e., one not aimed at disenfranchising blacks or at strikebreakers, but triggered by a lynch mob—then recurred in Evansville, Indiana, in 1903;[36] Springfield, Ohio, in 1904 and 1906;[37] Greensburg, Indiana, in 1906;[38] and Springfield, Illinois, in 1908.[39] The same pattern spread to the South, occurring in 1900, in New Orleans, Louisiana[40]; in 1904, in Statesboro, Georgia[41]; and in 1906, in Atlanta, Georgia.[42] Then in July of 1910, a new round of race riots broke out in numerous cities in response to the heavyweight championship victory of black boxer Jack Johnson over

31. Black migrants to the North numbered 49,000 in the 1870s; 62,000 in the 1880s; 132,000 in the 1890s; and 143,000 in the 1900–1909 decade. KLARMAN, *supra* note 27, at 12.

32. This is the thesis of KLARMAN, *supra* note 27, at 64.

33. This is the thesis of BRIAN BUTLER, AN UNDERGROWTH OF FOLLY: PUBLIC ORDER, RACE ANXIETY, AND THE 1903 EVANSVILLE, INDIANA RIOT 6–14 (2000). The account of the Springfield, Illinois riot, by Roberta Senechal, lends Butler's thesis some support but ultimately rejects it. Her conclusion seems to point the finger at amorphous racial hostility, which she phrases in terms of white resentment at black success, harbored not by foreign immigrants or by Southern migrants, but by natives of Illinois who held secure jobs. Roberta Senechal, *The Springfield Race Riot of 1908*, PERIODICALS ONLINE, http://www.lib.niu.edu/1996/iht329622.html (last visited Mar. 29, 2014).

34. *See* Senechal, *supra* note 33.

35. Ann V. Collins, *New York City Riot of 1900*, *in* 2 ENCYCLOPEDIA OF AMERICAN RACE RIOTS, *supra* note 30, at 474–76.

36. BUTLER, *supra* note 33, at 7; Jack Blocker, *Vice and Violence*, H-NET REVIEWS (2002), http://www.h-net.org/reviews/showrev.php?id=5848 (reviewing BUTLER, *supra* note 33).

37. JOHN HOPE FRANKLIN & ALFRED A. MOSS, FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 316 (7th ed. 1994); *Springfield, Ohio, Racial Conflicts*, OHIO HIST. CONNECTION, http://www.ohiohistorycentral.org/w/Springfield,_Ohio,_Racial_Conflicts?rec=2100 (last visited Mar. 29, 2014).

38. PETER M. BERGMAN, THE CHRONOLOGICAL HISTORY OF THE NEGRO IN AMERICA 347 (1969); FRANKLIN & MOSS, *supra* note 37, at 316.

39. FRANKLIN & MOSS, *supra* note 37, at 316–19; Senechal, *supra* note 33. This riot received extensive press coverage and provoked the formation of the NAACP. FRANKLIN & MOSS, *supra* note 37, at 318–19.

40. WILLIAM IVY HAIR, CARNIVAL OF FURY: ROBERT CHARLES AND THE NEW ORLEANS RACE RIOT OF 1900, at 152–53, 175–77 (1976).

41. FRANKLIN & MOSS, *supra* note 37, at 313.

42. HOWARD, *supra* note 17, at 159; Gregory Mixon & Clifford Kuhn, *Atlanta Race Riot of 1906*, NEW GA. ENCYCLOPEDIA (Oct. 29, 2015), http://www.georgiaencyclopedia.org/articles/history-archaeology/atlanta-race-riot-1906.

"Great White Hope" Jim Jeffries. This wave of riots produced twenty-six deaths.[43]

Apart from the three lynching-related cases—*Riggins* (1905), *Shipp I* (1906), and *Shipp II* (1909)—the Fuller Court produced *no* other decisions truly favorable to black Americans.[44] The Fuller Court basically ratified the South's disfranchisement of blacks and exclusion of them from jury access. They did so by turning down appeals from Southern blacks in numerous cases of blatant denials of rights over a twenty-year period.[45] The Supreme Court under Chief Justice White, by contrast, immediately produced a different outcome in the next peonage case: *Bailey v. Alabama (Bailey II)* (1911).[46] This decision was followed by several pro-civil-rights decisions in the ensuing decade.

The timing of this critical turning point makes it hard to resist the surmise that the Supreme Court's taking upon itself, in 1909, the trial and conviction for contempt of court of the Shipp co-conspirators was an unusually intense experience for the Justices. At no other time has the U.S. Supreme Court conducted a criminal trial.[47] *Shipp II* took place a year after the sizable Springfield, Illinois, race riot that received extensive, nation-wide publicity. Then, the year after the lynching trial at the Court, came the national wave of race riots in July 1910, provoked by the victory of black boxer Jack Johnson in "The Fight of the Century."[48] Six months later, in January 1911, the White Court handed down *Bailey II*.

It is also therefore hard to resist the surmise that a lingering effect from the *Shipp II* decision, exacerbated by judicial awareness of a decade of race rioting that had spread to the Northern states, pushed the Court's turn toward decisions upholding constitutional rights for black Americans. Lynch law and mob rule directly threatened the very structure of legal order. At some point (one suspects) the Justices had to resist. At the time of *Bailey II* (1911), the first time since 1884 that the Court in a non-lynching case supported black rights,[49] five Justices, who had participated in the 1909 conviction of Shipp

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43. *Racism Takes a Blow in Reno*, INT'L BOXING HALL OF FAME, http://www.ibhof.com/pages/archives/johnsonjeffries.html (last visited May 22, 2014); JP, *A Boxer's Unforgivable Brashness: The Champ Who Dared to be Black*, SELVEDGE YARD, (Jan. 9, 2011), http://selvedgeyard.com/2011/01/09/a-boxers-unforgivable-brashness-the-champ-who-dared-to-be-black/.

44. *See supra* note 9.

45. For a comprehensive list, see GOLDSTEIN, *supra* note 6, at 184–88. For a description of the rejected appeals cases of southern blacks, see *id*. at 127–41.

46. 219 U.S. 219 (1911) (finding Alabama peonage laws unconstitutional).

47. Mark Curriden, *A Supreme Case of Contempt*, A.B.A.J. (June 2009), http://www.abajournal.com/magazine/article/a_supreme_case_of_contempt.

48. JP, *supra* note 43.

49. There were a couple of jury selection cases in the early 1900s where the Fuller Court went so far as to remand to the state courts to ask them to consider whether the jury selection system

and his co-lynchers for contempt of court, remained on the Court: Justices Harlan, McKenna, Holmes, Day, and White.[50] Newly added to their ranks in 1910 was the progressive on race, Justice Charles Evans Hughes.[51]

## II. JUDICIAL GOOD NEWS FOR BLACKS ON PEONAGE, SEGREGATION, AND VOTING (1911–1917)

Alonzo Bailey first brought his case to the U.S. Supreme Court in 1908, the year before the lyncher Shipp's contempt of court trial there.[52] Bailey was the imprisoned victim of an Alabama law that presumed guilt (subject to rebuttal by factual evidence) for the crime of fraudulent larceny from the breaking of a labor contract that paid wages in advance.[53] After having committed himself to work for one year beginning December 26, 1907, and receiving $15 at signing with the promise of $12 per month pay (from which $1.25 would be deducted to pay back his advance, until it was fully paid), Bailey walked away from the job in February 1908.[54] The law made Bailey's departure prima facie evidence of intentional larcenous fraud and did not allow his testimony for rebuttal as to his actual motives.[55] Jailed prior to the criminal trial, Bailey sued for a writ of habeas corpus on the grounds the law violated both the Thirteenth Amendment and the federal Anti-Peonage Law.[56] His plea was rejected by the Alabama courts and, despite support in an amicus brief from Teddy Roosevelt's Justice Department, Bailey's 1908 lawsuit on a writ of error to the Fuller Supreme Court lost in a 7-2 decision written by Justice Holmes, with a dissent by Justice Harlan (Justice Day concurred).[57]

When the case again reached the Court under Chief Justice White in 1911,[58] the results were diametrically the opposite: a 5-2 (with two seats vacant) decision for Bailey, with Justice Holmes, the *Bailey I* opinion author, now in dissent (along with Justice Lurton).[59] By this time, Bailey had been

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(deployed by those very state courts) had been racially biased, but the U.S. Supreme Court itself did not find racial bias in any jury case from 1884 through 1922. In 1883, the Waite Court had thrown out a murder indictment on the grounds of racial bias in jury selection in *Bush v. Kentucky*, 107 U.S. 110 (1883). The 1884 (Waite Court) case upholding black civil rights was *Ex Parte Yarborough*, 110 U.S. 651 (1884). *See* GOLDSTEIN, *supra* note 6, at 121–22.

50. *Justices 1789 to Present*, *supra* note 5.

51. *See id.*; *see also supra* text accompanying note 26 (discussing Hughes's racial liberalism).

52. Bailey v. Alabama (*Bailey I*), 211 U.S 452 (1908).

53. *Id.* at 455 (Harlan, J., dissenting).

54. *Bailey II*, 219 U.S. 219, 227–29 (1911).

55. *Id.* at 233, 236.

56. *Id.* at 227–29.

57. *Bailey I*, 211 U.S. at 455 (majority opinion).

58. *Bailey II*, 219 U.S. at 219.

59. Chief Justice White's vacated Associate Justice seat was to be taken by appointee Van Devanter and retired Justice Moody's seat was to be taken by Justice Lamar, but these appointees

tried, found guilty of fraud, and sentenced for the $13.75 he still owed his employer. Bailey was to pay a fine and court costs totaling $76.40, or if unable to pay, which was the situation, to serve 136 days of imprisonment at hard labor.[60] The Court ruled unconstitutional the law under which Bailey was arrested and imprisoned. The Court found it violated the Thirteenth Amendment (as well as federal statute) by virtue of imposing compulsory labor to pay off a debt, rather than leaving the lender the normal remedy of a lawsuit for damages to recover a debt.[61]

This law was part of a web of Southern laws that subjected workers, particularly but not exclusively black workers, to forced labor. One such law made it criminal to fall into the grouping "'[r]ogues and vagabonds, idle or dissolute persons,' including . . . '[p]ersons who neglect their calling,' [or] 'all able-bodied male persons over eighteen years of age who are without means of support.'"[62] This 1905 Florida statute imposed on such "criminals" a $250 fine (which generally they could not pay) or six months on the chain gang.[63]

The chain gang system of convict labor was often described by muckraker journalists as worse than chattel slavery. Workers were shackled to one another by chains even during sleep, forced to work vigorously and at pain of frequent and savagely brutal whippings from the leaser of the labor, and promptly killed if they attempted escape. Annual death rates of workers under this system were typically twenty percent and in some places reached fifty percent.[64]

Related laws on the books kept blacks in unofficial bondage, including laws forbidding one employer from enticing a worker away from another employer who had the worker under a contract. Lack of an annual contract subjected laborers to the vagrancy laws just described.[65] Another set of laws in the peonage web, which was to come before the Court in *United States v. Reynolds*[66] in 1914, comprised so-called "criminal surety laws."[67] These laws permitted convicts, too poor to pay their fines, to avoid the chain gang by contracting themselves into servitude for a fixed period to a private person who would pay their fine. Again, combined with dragnet vagrancy laws, this

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did not take their seats until the day that *Bailey II* was handed down. BICKEL & SCHMIDT, *supra* note 17, at 861. The participating Justices numbered seven. *Id.*

60. *Id.*

61. *Id.* at 865.

62. *Id.* at 823–24 (quoting 1905 Fla. Laws Secs. 3370, 3571).

63. *Id.* at 823.

64. *Id.* at 826.

65. *See supra* notes 62–64 and accompanying text.

66. 235 U.S. 133 (1914)

67. *Id.*).

made it possible to trump up charges against blacks and then sentence them to involuntary servitude.[68]

Muckrakers, conscientious Southern judges, and the Theodore Roosevelt Administration (assisted behind the scenes by funding for publicity and litigation from Booker T. Washington and his allies)[69] launched a campaign at the turn of the century against the peonage system, stimulated *inter alia* by revelations that white immigrants by the hundreds also were getting caught up in its snares.[70] Federal Justice Department prosecutions, which numbered more than one hundred between 1901 and 1905, ran into something of a brick wall at the Fuller Court. The most this Court would concede (in the *Clyatt* case in 1905)[71] was that the 1867 federal Anti-Peonage Law was not unconstitutional. Despite the issuance of scathing reports from Assistant Attorney General Charles Russell in the 1906–1908 period, the Fuller Court used technicalities to set free a convicted perpetrator of peonage (*Clyatt*); to let a victim of an unconstitutional peonage law be held in jail for three years (*Bailey I*)[72]; and to set free southern white gangs convicted of violently intimidating blacks into abandoning well-paying jobs (*Hodges*).[73]

This pattern changed noticeably under the White Court with *Bailey II*,[74] and the Taft Administration then continued the pursuit of peonage convictions, succeeding again with *United States v. Reynolds* in 1914.[75] The Taft Justice Department began the prosecution, which became bogged down during the change of administration to Democratic President Woodrow Wilson, no friend of black civil rights. President Wilson's Justice Department did carry the case to completion, by way of a brief that carefully distinguished between the private criminal surety system and the state-run, chain-gang convict leasing system, which the Wilson Administration wanted to leave in the discretion of the states.[76]

68. SCHMIDT, *supra* note 17, at 823.

69. Pete Daniel, *Up from Slavery and Down to Peonage: The Alonzo Bailey Case*, 57 J. AM. HIST. 654, 654, 658–65, 667–69 (1970).

70. SCHMIDT, *supra* note 17, at 835.

71. Clyatt v. United States, 197 U.S. 207, 218 (1905).

72. *Bailey I*, 211 U.S 452 (1908).

73. Hodges v. United States, 203 U.S. 1 (1906). For further details, see GOLDSTEIN, *supra* note 6, at 139–41.

74. According to Schmidt, *Bailey II* produced an "outpouring of commentary." SCHMIDT, *supra* note 17, at 886.

75. 235 U.S. 133 (1914). In 1942, a *Bailey*-type law from Georgia again came before the Court and was struck down unanimously in *Taylor v. Georgia*, 315 U.S. 25 (1942). WILLIAM M. WIECEK, 12 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953, at 643 (Stanley N. Katz ed., 2006).

76. SCHMIDT, *supra* note 17, at 876–86.

The *Reynolds* case began with the conviction of Ed Rivers (a black man) in Alabama for the crime of petty larceny.[77] He was fined $15 plus court costs of $43.75, for a total of $58.75. Since he was indigent, he was sentenced to fifty-eight days hard labor to pay the court what he owed. A private individual, J.A. Reynolds, paid the $58.75 to the court, for which he received a commitment from Rivers to work for him for nine months and twenty-eight days (approximately five times the duration of his hard labor on the chain gang). Rivers would additionally receive $6 per month plus room, board and clothing. After a month, Rivers quit the job and was then jailed for failure to perform his "surety contract." This time the judge imposed court costs of $87.05, which resulted in a sentence of 115 days on the chain gang, double his original sentence. To avoid the second sentence, Rivers accepted a second surety contract with an F.W. Broughton for fourteen and a half months labor at $6 per month.[78]

At this point, the case brought Broughton and Reynolds into a group of eleven persons indicted by a federal grand jury convened by the U.S. Attorney General. The attorney general of Alabama and the U.S. Attorney General were eager to have a quickly resolved test case to settle the issue of the constitutionality of the criminal surety system, but negotiations for such a test case dragged on for two years amongst the attorneys, defendants' counsel, and a member of Congress from Alabama, asWoodrow Wilson came into the Presidency and appointed a new Attorney General. Eventually, Reynolds and Broughton conceded their participation in a criminal surety arrangement but contended that the Alabama system did not violate the Thirteenth Amendment, since it involved servitude as punishment for a crime rather than as payment for a debt (which would be forbidden by the *Bailey II* precedent).[79]

Justice Day wrote the opinion in *United States v. Reynolds* for a unanimous Court. The man who served as surety to the state, who received a promise of labor in return, was really receiving the labor of someone who was under compulsion to labor in order to pay off his debt to the private surety person. Therefore the logic of *Bailey II* covered this case, and thus, criminal surety systems violated the Thirteenth Amendment. Justice Holmes, who had dissented in *Bailey II* wrote a brief, grudging concurrence that referred to victims of the southern surety system (nearly all of whom were black people, although he did not state this fact) as "impulsive people with little intelligence or foresight."[80]

While Presidents Theodore Roosevelt and William H. Taft were united with the Supreme Court in opposing peonage, Congress remained in the grip

77. 235 U.S. at 139.
78. *Id.*
79. SCHMIDT, *supra* note 17, at 876–86.
80. *Reynolds*, 235 U.S. at 150 (Holmes, J., concurring).

of the mentality of the worst elements of the South. It refused Taft's Justice Department's requests to broaden the Federal Anti-Peonage Law in 1911, so that indebtedness would not be a required element to prove peonage such that there would be a specified federal penalty for any coercing of labor by a private person, on the grounds that it imposed involuntary servitude.[81]

Similarly, even after the *Shipp II* trial at the Supreme Court in 1909, and after active lobbying by the newly formed NAACP, Congress continued refusing to pass anti-lynching legislation. Theodore Roosevelt had advocated such legislation as early as 1906, but President Taft, while willing to denounce the lawlessness of lynching, did so from the passive position that it would be cured only by self-reform at the local level on the part of sheriffs, judges, and juries.[82]

Peonage was not the only civil rights problem on which the White Court took a progressive turn. The post-bellum Chase Court (of the 1860s–early 1870s) had dealt with a "separate but equal" argument with a level of insight not to be seen again for many decades, except in dissents by Justice Harlan. In *Railroad Co. v. Brown*,[83] the Chase Court ruled that the railroad company's provision requiring physically *identical* facilities for whites and blacks, while forcing them to be separated, failed to satisfy the federal law covering the District of Columbia: "[N]o person shall be excluded from the cars on account of color."[84] Justice Davis's opinion for the unanimous court linked railroad racial segregation to the era of black servitude, thereby implicating enforcement powers under the Thirteenth Amendment.

This sensible insight was lost on the Fuller Court majority, against which Justice Harlan then dissented in *Plessy v. Ferguson*.[85] Even before *Plessy*, as early as 1890, the Fuller Court had already indicated its preference for separate but equal in interstate travel decisions (over Justice Harlan's dissents). It upheld a state mandate of segregated railroad cars against claims that this interfered with the dormant commerce power of Congress.[86] The

81. SCHMIDT, *supra* note 17, at 856.

82. Theodore Roosevelt, *Sixth Annual Message: December 3, 1906, American Presidency Project,* http://www.presidency.ucsb.edu/ws/?pid=29547 (last visited Oct. 11, 2017); *see also* ELIZABETH DALE, CRIMINAL JUSTICE IN THE UNITED STATES, 1789–1939, at 117–18 (2011); KLARMAN, *supra* note 27, at 67; *President Taft on Lynching*, BOSTON EVENING TRANSCRIPT, Apr. 12, 1912, at 10.

83. R.R. Co. v. Brown, 84 U.S. (17 Wall.) 445 (1873).

84. *Id.* at 452. This "law" was a provision in the company's charter the federal government had issued. *Id.*

85. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

86. Louisville N.O. &T. Ry. Co. v. Mississippi, 133 U.S. 587 (1890); Chesapeake & Ohio Ry. Co. v. Kentucky, 179 U.S. 388 (1890); Chiles v. Chesapeake & Ohio Ry. Co., 218 U.S. 71 (1910); *see also* GOLDSTEIN, *supra* note 6, at 131–32. In the late 1880s, the Interstate Commerce Commission was already declaring such discrimination reasonable under the Interstate Commerce Act of 1885 (although it did strictly interpret the "but equal" requirement and struck down the accommodations at issue). *See id.* at 185.

extreme tokenism of the Fuller Court's understanding of "equal" in "equal protection of the laws" was indicated in an 1899 decision in which the Justices upheld the decision of the school board of Richmond County, Georgia to close its only public high school for blacks.[87] The school board kept open one school for white girls and continued to subsidize a church-run high school for white males (in a context where three church-run high schools, not state assisted, were available for blacks to attend).[88]

With the Fuller Court having given its stamp of approval to legally mandated segregation in schools and in public transportation, Southern cities began to enact laws that would segregate residential neighborhoods by race. In December 1910, Baltimore, Maryland, enacted the first law. It was followed within a year by three cities: Mooresville and Winston-Salem in North Carolina, and Greenville, South Carolina. In 1913, pursuant to a Virginia state law created the year before explicitly permitting such municipal ordinances, five Virginia cities followed suit: Richmond, Norfolk, Roanoke, Ashland, and Portsmouth. Also in 1913, Atlanta, Georgia; Madisonville, Kentucky; Birmingham, Alabama; and Asheville, North Carolina, joined the trend. In 1914, Louisville, Kentucky, followed suit, and by the end of 1916, Dallas, Texas; St. Louis, Missouri; Oklahoma City, and New Orleans had also.[89]

The 1910s decade was also the period during which Southern legislatures acted to legislate Jim Crow rules for the minutiae of daily life: Laws established separate toilets, separate worker entrances and water buckets, separate waiting rooms for trains, separate nurses for white patients and black patients, etc.[90]

By April of 1916, a constitutional challenge to the Louisville, Kentucky, neighborhood segregation ordinance had reached the U.S. Supreme Court for oral argument, but the decision in that case, *Buchanan v. Warley*,[91] was not handed down until November of 1917. Justice Day had been ill during the argument, and there was also one seat vacant. In April 1917, the case was re-argued, with Day now back in his seat and with the formerly vacant seat filled by Justice Brandeis. Justice Hughes had left the Court and been-replaced by Justice Clarke. The law at issue in *Buchanan* prohibited blacks

87. Cumming v. Richmond Cty. Bd. of Educ., 175 U.S. 528 (1899).

88. *Id.*

89. SCHMIDT, *supra* note 17, at 791; STEPHEN GRANT MEYER, AS LONG AS THEY DON'T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS 20–22 (2000); Roger L. Rice, *Residential Segregation by Law, 1910–1917*, 34 J. SOUTHERN HIST. 179, 181–82 (1968).

90. DONALD G. NIEMAN, PROMISES TO KEEP: AFRICAN-AMERICANS AND THE CONSTITUTIONAL ORDER, 1776 TO THE PRESENT 109 (1991).

91. 245 U.S. 60 (1917).

from residing on blocks where a majority of the residents were white and vice versa.[92]

Three years earlier, the White Court handed down a transportation precedent that foretold a turn away from Fuller Court pro-segregation decisions. This decision, *McCabe v. Atchison Railway Co.*,[93] *had* dealt with an Oklahoma law requiring common carriers (in intrastate travel) to provide separate coaches for "white and negro races" that were equal in "comfort and convenience," but sleeping, dining, and parlor cars were permitted to be used "exclusively" by one race and did not have to be provided for the other race if this other race (i.e. blacks) did not use them in high enough numbers to make them profitable for the railroad.[94] The Court, in a 5-4 opinion penned by Justice Hughes, had rejected Oklahoma's defense of the law as a *practical* accommodation to social reality.[95] While the opinion accepted the authority of *Plessy v. Ferguson* as to the constitutionality of a "separate but equal" requirement in law, it rejected the claim of Oklahoma that states were free to legislate in favor of *unequal* facilities because of disproportionate group usage.[96] (In principle, this logic could be deployed against Southern states that provided no, or very few, high schools for black youths. Such a pattern was prevalent all over the South.) Hughes announced for five Justices that a constitutional right cannot "depend upon the number of persons . . . discriminated against."[97] Every "individual . . . is entitled to the equal protection of the laws."[98] The *McCabe* decision, however, had produced no injunction, because all nine Justices agreed that the case was unripe; none of the litigants indicated that he was attempting, or about to attempt, to travel first class on a train in Oklahoma. They did not yet stand to gain individually and concretely from any Court injunction on the subject.

*Buchanan v. Warley* followed *McCabe's* segregation limiting trajectory. With Hughes no longer on the Court, Justice Day wrote the decision.[99] The case arrived at the U.S. Supreme Court for the settlement of a dispute arranged by the Kentucky NAACP.[100] Warley (a black man) bought, but did not fully pay for, property on a majority white block from a friendly realtor, Buchanan. Warley then refused to make full payment because of legal incapacity to build a home for himself on the property (being prohibited from

92. *Id.* at 69–70.
93. 235 U.S. 151, 158 (1914).
94. *Id.*
95. *Id.* at 164. On the case result, however, the Justices were unanimous. *Id.*
96. *Id.* at 161.
97. *Id.*
98. *Id.* at 161–62.
99. *Buchanan*, 245 U.S. 60 (1917).
100. SCHMIDT, *supra* note 17, at 789.

residing on a majority white block).[101] Buchanan sued to get the money (technically, "specific performance of [the] contract") by a judicial declaration that the segregation law was void.[102] Kentucky courts upheld the ordinance on the grounds that separating the races promotes public welfare (the very ground that had succeeded in *Plessy*).[103] The White Court unanimously declared this residential segregation ordinance unconstitutional.[104]

Both the briefs for *Buchanan* and the Court's decision emphasize property rights, which were the Holy Grail to the majority of the Justices of the time. Justice Day's opinion for the Court cited *Holden v. Hardy*[105] for the principle that under the Fourteenth Amendment, the right to property "includes the right to acquire, use, and dispose of it."[106] This was both a fundamental constitutional right and one that, as a result of the Thirteenth and Fourteenth Amendments and the civil rights laws enacted to implement them, was now protected for both white and black people in the United States, he continued.[107] The precedent of *Plessy*, the Court insisted, was not to the contrary, because that case had not involved deprivation of a property right, but simply called for equal (although separate) accommodations in transportation.[108] Justice Day acknowledged "[t]hat there exists a serious and difficult problem arising from a feeling of race hostility . . . ."[109] Then, in language that would be directly quoted four decades later in the only Court opinion ever signed by all nine of the Justices,[110] he continued with the following:

> It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the U.S. Constitution.[111]

Unlike the Court's pro-civil-rights jury decisions of the early 1880s, *Buchanan* had an immediately lasting impact, at least in a de jure respect. The

101. *Buchanan*, 245 U.S. at 69–70.

102. *Id.* at 69.

103. SCHMIDT, *supra* note 17, at 794.

104. Justice Oliver Wendell Holmes drafted a dissent that focused on standing problems, but he chose (for reasons never revealed) not to issue it, so the opinion was both published and received as having been unanimous. SCHMIDT, *supra* note 17, at 804–10. So far as is known, no others dissented even privately, not even Chief Justice White, who had been part of the Court majority in *Plessy v. Ferguson*. *Id.*

105. 169 U.S. 366, 391 (1898).

106. *Buchanan*, 245 U.S. 74 (citing *Holden*, 169 U.S. at 391).

107. *Id.*

108. *Id.* at 80.

109. *Id.*

110. Cooper v. Aaron, 358 U.S. 1 (1958).

111. *Id.* at 16 (quoting *Buchanan*, 245 U.S. at 80–81).

wave of residential segregation ordinances petered out. Maryland tried another version right away, but it was struck down by Maryland courts (as also happened with three such laws in the 1920s in Virginia, Texas, and Indiana). Later laws from Richmond and New Orleans that reached the U.S. Supreme Court were given short shrift in per curiam rulings in 1930 and 1927, respectively.[112]

Unfortunately, as the legal reasoning of *Buchanan* was grounded in property rights, its societal impact was limited by property rights. Privately drawn, racially restrictive covenants replaced the residential segregation laws, and the former would be ruled enforceable by the Taft Court in *Corrigan v. Buckley* (1926).[113] The promise of *Buchanan* then lay dormant for another twenty-two years, until the Court overruled *Corrigan* in 1948 in *Shelley v. Kraemer*.[114]

Voting was the third topic to which the White Court turned in promoting civil rights for black Americans. Southern blacks, despite the frequency of KKK-style violence against them in the immediate post-bellum decades, voted in considerable numbers, which fact produced very close elections in the Southern states in the 1870s and 1880s. By the end of the 1890s, five Southern states had enacted statutes or state constitution provisions that, as applied (and as intended), produced almost total disfranchisement of their black citizens. By 1910, all eleven Confederate states, plus Oklahoma, had similarly disfranchised their black citizens. And at the federal level, the majority Democrat Congress and Presidency of 1893–1894 wiped off the books almost all voting rights enforcement laws. Despite the ensuing drastic drop in voting numbers in the South, later Republican Congresses did nothing to apply Section Two of the Fourteenth Amendment to reduce Congressional representation in the South to punish those states for these voting restrictions.[115]

Thus, the elected Congressional representatives of the northern states appeared to be comfortable, in the early decades of the twentieth century, with this de facto suspension of the Fifteenth Amendment for Southern blacks. This author's recent book provides the appalling details of the Fuller

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112. City of Richmond v. Deans, 281 U.S. 704 (1930) (per curiam); Harmon v. Tyler, 273 U.S. 668 (1927) (per curiam); SCHMIDT, *supra* note 17, at 816–17 (discussing the *Deans* and *Harmon* state-level decisions).

113. 271 U.S. 323 (1926).

114. 334 U.S. 1 (1948).

115. *See* GOLDSTEIN, *supra* note 6, at 118–88 (providing more details about the material in this this paragraph); J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1888–1910 (1974) (discussing voting patterns in the South); KLARMAN, *supra* note 24, 38–39 (discussing Section 2 of the Fourteenth Amendment).

Court's repeated demonstrations that it was utterly unwilling to uphold voting rights or jury rights (which were often tied to voting rights by statute) for black Americans.[116] In the voting rights arena, too, the White Court provided an unexpected contrast.

Southern state legislatures and constitutional conventions knew that the literacy requirements, "understanding" clauses and poll taxes, they were imposing at the turn of the century would disfranchise numerous white voters, along with blacks. To counteract this impact, the lawmakers adopted a number of workarounds available to whites—for instance, registration during a narrowly constricted time of year during which registrars would simply turn blacks away, irrespective of qualification, and after which new, absurdly stringent registration requirements would apply forever. Another of these mechanisms was the grandfather clause—e.g., adult male resident citizens would be eligible to vote only if they could read and interpret correctly the most opaque sections of the state constitution, or if they had been themselves eligible to vote before 1867, or their fathers or grandfathers had been eligible to vote then, or if they were foreign-born naturalized male citizens or their descendants. Such clauses were inserted into voting rules in the state constitutions of Louisiana (1898), North Carolina (1900), Georgia (1908), and Maryland (1908). Alabama (1901) and Virginia (1902) grandfathered in persons who had fought in the Civil War or prior wars. These two states, and some others in later statutes, concerned with eliminating the mixed-race offspring of white slave owners and their descendants, specified in the grandfather clauses the term "lawful" descendants.[117]

Oklahoma, one of the states whose grandfather clause reached the U.S. Supreme Court, entered the Union in 1907 and was a state with two viable political parties. In a transparent effort to disfranchise the black voters (9% of the electorate), because they voted Republican, the Democrats in 1910 pushed through, via a popular referendum prior to the general election, a constitutional amendment that restricted voting registration to two groups: those adult male residents who could "read and write any section" of the state constitution, and those male residents who themselves, prior to 1866, had been entitled to vote or had resided in a foreign country, or else were "lineal descendant[s]" of such a person. The Democratic governor instructed election inspectors to bar blacks from voting; the orders were followed; many thousands of blacks were kept from voting.[118]

Two prominent Oklahoma Republican officials pressed the U.S. Attorney General (under President Taft) to arrest and charge election officials with

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116. GOLDSTEIN, *supra* note 6, at 130–41, 166–71, 175–78, 184–88.

117. SCHMIDT, *supra* note 17, at 920–21. The phrase "lawful male descendants" appears in the Maryland clause struck down by the Court in *Myers v. Anderson*, 238 U.S. 368, 377 (1915).

118. SCHMIDT, *supra* note 17, at 928–29.

violating the remaining U.S. civil rights statutes. These, in general terms with no specific reference to voting, criminalized conspiracy to "injure" the exercise of constitutional rights. With Taft's approval, the U.S. Attorney General refused to prosecute, on the grounds that these provisions dealt with "civil" rights and not with the "political" right of voting. One of the Oklahomans frustrated in his request for federal action, John Embry, was a U.S. Attorney himself, so he went ahead on his own and brought charges against two local election officials, J.J. Beal and Frank Guinn. Taft's Attorney General was furious, but Embry threatened to resign publicly rather than withdraw the charges. The Taft Justice Department [mis]calculated that Oklahoma juries would be unlikely to convict and wanted to avoid the embarrassment of a public resignation, so it let the case proceed in the federal district court. There, for enforcing the combination of the literacy test and the grandfather clause, Guinn and Beal were both convicted of conspiring to injure black voters in the exercise of their constitutional rights.[119]

In the process of seeking to hold onto black Republican delegates at the 1912 GOP convention, and to keep them from electing a Progressive candidate, namely Theodore Roosevelt, Taft quietly shifted his position, and wrote the U.S. Attorney in Oklahoma to go ahead with similar grandfather clause prosecutions. The 1912 election in Oklahoma was fraught with tension because the Democratic governor threatened arrest for any federal official who "interfered" with the election laws of the state. The U.S. Attorney Homer Boardman wrote a much publicized letter threatening to arrest any (state) election official who kept blacks from voting. Another U.S. Attorney wrote the U.S. Attorney General warning "rioting and bloodshed" were probable on election day.[120] The Attorney General sent back word to hold arrests until after the election.[121] Such arrests did transpire and resulted in *United States v. Mosley*,[122] handed down by the Supreme Court on the same day as another grandfather clause case, *Guinn v. United States*.[123] Meanwhile, the grandfather clause of Annapolis, Maryland had also been ruled unconstitutional in federal district court and was headed to the U.S. Supreme Court as the civil case *Myers v. Anderson*,[124] eventually to be decided with *Guinn*.[125]

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119. *Id.* at 930–33.

120. *Id.* at 936 (quoting Letter from William R. Gregg, Attorney, United States, to George Wickersham, Attorney Gen. United States (Oct. 16, 1912)).

121. *Id.*

122. 238 U.S. 383 (1915).

123. Guinn v. United States, 238 U.S. 347 (1915).

124. 238 U.S. 368 (1915).

125. *Id.* Maryland's clause combined a property qualification with a grandfather clause exemption from it (along with a naturalized foreign citizens exemption from it). Anderson, along with two others, blacks who would have been entitled to vote in Maryland but for the combination property requirement and grandfather clause, sued Myers and other registration officers, for damages for

Once the openly pro-segregation, raised-in-Virginia, Democrat, Woodrow Wilson, won the presidential election of 1912, the lame duck GOP Justice Department had good reason to fear that the charges would be dropped. It requested an expedited hearing at the U.S. Supreme Court, which it received, but not in time to avoid the Wilson transition into office. The new officials, obdurate segregationist, Attorney General James McReynolds, and West Virginian Solicitor General, John W. Davis, nonetheless, proceeded with the case and even invited amicus briefs from the NAACP and others.[126]

One reason that McReynolds may have opted to carry on the litigation process is that if Guinn and Beall were simply pardoned, the Oklahoma law would remain unconstitutional. John W. Davis presented able arguments, as did the allied briefs, but there remained the chance that the Supreme Court would follow the egregious Fuller Court precedents of the *Williams v. Mississippi*[127] case and two *Giles* cases, *Giles v. Harris*[128] and *Giles v. Teasley*[129] to reverse the lower court.[130]

Although *Guinn* was argued in October 1913, it was not decided until June 21, 1915. Chief Justice Edward White's opinion for the Court came down as unanimous, and there is no known explanation for this exceptionally long delay. Between the argument and the decision announcement, Justice Lurton, who had been severely ill and in frail health beginning on December 3, 1913, died on July 12, 1914. He was replaced by Justice McReynolds, who had to recuse himself from participation in the decision because of his earlier role in the case as Attorney General. Scholar Benno Schmidt speculates that both Justice Lamar and Justice Lurton wanted to dissent in *Guinn* and *Myers*, but has no explanation as to why they did not (and rejects the suggestion from a son of the attorney who argued for Oklahoma that Chief Justice White purposely waited for Lurton to die so as to attain unanimity).[131]

Justice Lamar did live to write a dissent in the third black voting rights case handed down that day, *Mosley v. United States*.[132] He died shortly thereafter.[133]

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the act of refusing to allow them to register to vote. Like *Guinn*, the decision struck down Maryland's grandfather clause voting scheme, was unanimous, and was written by (Southerner) Chief Justice White. SCHMIDT, *supra* note 17, at 934–45.

126. SCHMIDT, *supra* note 17, at 936–42.

127. Williams v. Mississippi, 170 U.S. 213 (1898).

128. Giles v. Harris, 189 U.S. 457 (1903).

129. Giles v. Teasley, 193 U.S. 146 (1904).

130. *See* GOLDSTEIN, *supra* note 6, at 135–39 (discussing these earlier cases). For an explanation of how the Court might have followed them, see SCHMIDT, *supra* note 17, at 958–59.

131. SCHMIDT, *supra* note 17, at 945–49.

132. 238 U.S. 383 (1915).

133. SCHMIDT, *supra* note 17, at 955–58.

The unanimous decisions in both *Guinn* and *Myers* rejected the grandfather clauses for having no other logical motive than to disfranchise black voters who were otherwise as qualified, or unqualified, as the white voters being grandfathered into the system.[134] The at-issue, broadly worded civil rights statutes for criminal and civil liability were ruled applicable to Fifteenth Amendment rights, along with other constitutional rights, with the Court referring to the *Mosley* decision of the same day for its statutory interpretation reasoning.[135] In both decisions, the Court not only struck down the grandfather clauses but also struck down the literacy and property qualifications to which they were attached.[136]

Therefore, if the two states wanted to disfranchise blacks, they would need to enact new laws. Oklahoma did so promptly by grandfathering in all persons who had voted in 1914, when the newly unconstitutional grandfather clause had been treated as in effect. All other voters were required to register during twelve days, from April 30 to May 11, 1916, or, according to scholar Michael Klarman, "be forever disfranchised."[137] Without a Justice Department eager to attack such laws, this one stayed in effect until 1939.[138]

Besides eliminating the literacy qualification in Oklahoma and eliminating the property qualification in Maryland, the Justices in these 1915 decisions were also, to some degree, undoing the goal of those Congressional Democrats who, in 1894, had removed from the federal code those statutes from the Reconstruction Era that had explicitly enforced voting rights.[139] This judicial interpretation moved protection of voting rights by the federal government via civil liability into Section 1979 of the Revised Statutes, and via criminal liability into Section 19 of the Criminal Code. The first of these made actionable for civil damages any act under color of law that deprived someone of "rights . . . secured by the Constitution and laws."[140] The second made it criminal to "conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States."[141] This aspect of the *Guinn* and *Myers* decisions was by implication the target of Justice Lamar's

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134. Guinn v. United States, 238 U.S. 347, 367–68 (1915); Meyers v. Anderson, 238 U.S. 368, 382–83 (1915).

135. 238 U.S. 383 (1915).

136. *Id.*

137. KLARMAN, *supra* note 27, at 86. The decision to strike down the law was made in *Lane v. Wilson*, 307 U.S. 268 (1939).

138. KLARMAN, *supra* note 27, at 86.

139. Act of Feb. 8, 1894, Ch. 25, 28 Stat. 36. For a lengthy discussion of the removal of statutes that enforced voting rights, see SCHMIDT, *supra* note 17, at 951–55.

140. 42 U.S.C. § 1983 (1996) (for an up-to-date version); *see* SCHMIDT, *supra* note 17, at 951–55.

141. SCHMIDT, *supra* note 17, at 951 (quoting 18 Stat. 1073 (1875)).

dissent in *United States v. Mosley*, where he objected at length to the Court's undoing of Congress's known intention of 1894.[142]

Mosley, a member of a county election board in Oklahoma had, with a fellow board member, deliberately refused to include in the 1912 vote tally any votes from precincts known to have allowed sizable numbers of blacks to vote (by ignoring the grandfather clause law). The two had done so under instructions of the Democratic Governor and State Election Board, and had then been prosecuted by the Republican U.S. Attorney. Mosley and his colleague, in contrast to Guinn and Beal, had succeeded in having their demurrer to the indictment upheld in federal district court, on the grounds that the broadly worded Section 19 of the U.S. Criminal Code did not explicitly apply to voting and should not be inferred to do so. Justice Holmes wrote for the (7-1) majority in *Mosley,* to the effect that the plain words of the statute (Section 19) can clearly embrace a joint undertaking by two or more persons to interfere with blacks' efforts to vote. Irrespective of past intentions of Congress, "we cannot allow the past [to determine] the present."[143]

To anyone familiar with the Fuller Court line of race-related decisions, these progressive moves by the White Court on peonage, residential segregation, and voting rights appear as a startling break. The Court's regressive momentum on race was certainly halted in the second decade of the twentieth century. However, the White Court did not have revolutionary ambitions. Other race-related decisions disappointed black litigants and provided a sobering reminder of the limits on what the White Court was willing to accomplish.

## III. THE BAD NEWS FOR BLACKS UNDER THE WHITE COURT

The segregation-limiting *McCabe* decision of 1914 and the *Buchanan* decision of 1917 were bookended by two decisions that honored both private and state-mandated segregation practices: *Butts v. Merchants and Miners Transportation Co.* (1913)[144] and *South Covington & Cincinnati Street Railway Co. v. Kentucky* (1920).[145] In the first, the Court rejected the claim under the Civil Rights Act of 1875 of Mary Butts, a black woman who bought a first class ticket for a voyage from Boston to Norfolk, Virginia, but was relegated (as were other non-whites) to second class accommodations. The Court ruled unanimously. Despite the Act's having been declared unconstitutional in 1883 solely on the grounds that it interfered with state authority over in-state

142. *Mosley*, 238 U.S. at 383–93 (Lamar, J., dissenting).
143. *Id.* at 388; SCHMIDT, *supra* note 17, at 953–54.
144. 230 U.S. 126 (1913).
145. 252 U.S. 399 (1920).

commerce (such that the reasoning did not plainly cover areas within the plenary control of Congress, such as travel on the high seas), the Act, nonetheless, contained no special language directed at interstate commerce, commerce in the territories, or on the high seas. Therefore, its regulations of commerce all fell as a whole.[146] If Congress wanted to forbid segregated facilities specifically in interstate commerce, it would need to legislate anew.

In the *South Covington* streetcar decision, the Court's 6-3 majority opined that Kentucky's law requiring common carriers within the state to separate the races by, at a minimum, a "good and substantial wooden partition" did not impose an undue burden on interstate commerce.[147] It is difficult to see this claim as plausible in light of the following circumstances: At issue was a single car streetcar that ran only a six-mile distance, partly in Kentucky and partly in Ohio, charged only a single price for the whole length of the trip, carried a load of whom eighty percent of the passengers traveled interstate, and had to cope with the rule of a contrary Ohio law that prohibited racial segregation on streetcars.[148]

The dates of the cases, discussed herein, indicate that personnel changes on the Court do little to explain the variation in outcomes; racial-progressive (and author of the 1914 *McCabe* opinion) Justice Hughes was on the Court for the 1913 *Butts* decision and did not dissent.[149] For the 1920 decision upholding Kentucky's segregated streetcar law as applied to an interstate line, Justice Brandeis had already joined Justice Holmes on the Court, and their two votes, if added to the dissent of Justice Day (along with the allied Justices Van Devanter and Pitney), would have changed the outcome. They chose to align with the majority.

## IV. CONCLUSION

In sum, limited as it was, the White Court's nonetheless dramatic shift toward support for the civil rights of black Americans is not fully explained in the extant scholarship. Scholars have reached no consensus as to why the White Court broke, in the way that it did, from the pattern set by the Fuller Court. I have argued here that the shift was a response to a two-fold crisis faced by the Court. The Southern aspect of the crisis peaked in the *Shipp II* trial of 1909. There, the Justices themselves had to confront directly the depth of the lawlessness encouraged by their own lenience (in the Fuller Court years) toward Southern states' flouting of the Thirteenth, Fourteenth,

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146. *Butts*, 230 U.S. at 138.

147. S. Covington & Cincinnati St. Ry. Co., 252 U.S. at 404.

148. *See id.* at 399–400.

149. SCHMIDT, *supra* note 17, at 771–72 (describing private correspondence to the effect that Holmes cast a dissenting vote in conference, but chose not to write one, so his reasoning is not known). There were no officially recorded dissents to *Butts*. *Id.* at 771.

and Fifteenth Amendments. The Northern aspect of the crisis was the development of a new form of mob violence, the racial pogrom—anti-black violence aimed not at a concrete political goal (such as keeping blacks from voting) but simply at hurting or even killing black people. These racial pogroms erupted in the first decade of the twentieth century, peaking in the immediate response to the Jack Johnson boxing match in 1910. I find it plausible that these two shocks would have triggered in the Justices the (accurate) perception that lawlessness is contagious, and that the time had come for the Court to make clear that there are legal limits in this country on what whites could do to blacks (as in the peonage cases) and on what Southern state laws could mandate against blacks (as in the voting rights cases of 1915 and in the limits put on segregation in *McCabe*, 1914, and *Buchanan*, 1917).

The White Court, however, also indicated in *Butts* (1913) and in *South Covington* (1920) that it was not interested in undoing *Plessy v. Ferguson* (1896), nor in pushing racial integration onto interstate transportation without a clear lead from Congress. The furthest the Justices were willing to go on the transportation subject was the line drawn in *McCabe* (1914), a highly formal line at that: under the Fourteenth Amendment states could not legislate that it was permissible for common carriers to provide separate and *unequal* facilities for the races (even if usage of first class facilities was highly disproportionate by race). If the railroad companies did so on their own, however, the Fourteenth Amendment did not limit them; it limited only action by states.

The constitutional crisis of the early twentieth century did lead to a decisive shift in the meaning of the Constitution as to black Americans, but that shift was of moderate dimensions. Not until the mid-twentieth century would all three branches come together to imbue the three postbellum amendments with the force needed to appreciably change society.