KEEPING LEGAL HISTORY "LEGAL" AND JUDICIAL ACTIVISM IN PERSPECTIVE: A REPLY TO RICHARD PILDES

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I. INTRODUCTION

The apparently innocent phrase "legal history" has demonstrated itself to be extremely treacherous territory. It encompasses both history and law, each a full discipline in itself. Ordinary law teachers who tire of the case method and practitioners who look to do something with their golden years venture there at their peril, for, untrained in historical method, they may concentrate entirely on evolution of doctrine and ignore historical context. The results of that approach, if published at all, look something like a law brief, but set in an earlier era. Entering the country from the far border, we have the historian who, with inadequate legal training, decides that what the judges say makes no difference at all, primarily because the historian does not understand it. For such a person, context is everything. The result of that kind of endeavor ignores the fact that whether or not we believe that judges generally admit the real reasons for what they are doing, we cannot know whether judges are right or wrong, dissembling or forthright, without examining closely what they have to say. As Karl Llewellyn, who certainly did not take judicial language at face value, remarked: "Now the first thing you are to do with an opinion is to read it.... It is a pity, but you must learn to *read.* To read each word. To understand *each* word."[1] Ideally, therefore, legal history should reflect both the relevant state of legal institutions and doctrines and their interaction with their context.

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1. K.N. Llewellyn, *The Bramble Bush* 39 (Oceana Publications, Inc., 1930).

Professor Richard Pildes certainly does not fit either of these stereotypes; but in spite of his well merited credentials and reputation, his piece, *Democracy, Anti-Democracy, and the Canon*,[2] demonstrates that both Homer and Pildes can nod.[3] *The Canon* displays superb historical scholarship, but its end result is seriously marred by a failure to take Llewellyn's advice to heart. It recounts one of the great tragedies of American history, the loss of black voting rights in the South between 1890 and 1910. *The Canon* gives us a painfully clear picture of the methods the Southern oligarchs used to disfranchise blacks and poor whites as well. It goes on to say, however, that the true death-knell of black rights was sounded when the Supreme Court held in 1903 that federal courts did not have jurisdiction to grant equitable relief for voting abuses. According to *The Canon*, this little-known case, *Giles v. Harris*,[4] represents a major turning point in American jurisprudence, "one of the most momentous decisions in United States Supreme Court history and one of the most revealing."[5] *The Canon* focuses enormous erudition on the historical context of *Giles*. The author appears to have read and analyzed in depth, and presents for our inspection, every possible source, except one—the case of *Giles v. Harris*. When one finishes the essay, one knows everything about the disgraceful disfranchisement of black voters at the beginning of the twentieth century, except the state of the law analyzed in the various opinions in *Giles*. Because of this lack of analysis, it turns out that *The Canon* also misses some of the most important issues of social and historical context of the case, as well as another case that really did make a difference.

To be sure, *The Canon* gives us the broad outline of *Giles*. Giles was a black man who had sought to register to vote under the newly restrictive clauses of the Alabama constitution of 1901, and had been refused. He filed a bill for injunctive relief in federal court, asking that the state be required to register him as a voter and that the Alabama registration system be found unconstitutional. In a short opinion, the newly appointed Oliver Wendell Holmes glossed over the jurisdictional issues and went to the merits of the case. Accepting the bill at face value, he said, the Court could not require Giles's registration under exist-

2. Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 Const. Comm. 295 (2001) ("*The Canon*").

3. Cf. Horace, Ars Poetica, line 359 "Quandoque bonus dormitat Homerus."

4. 189 U.S. 475 (1903).

5. Pildes, *The Canon* at 297 (cited in note 2).

ing Alabama law because of his own allegation, which had to be accepted as true for purposes of this appeal, that that law violated the federal Constitution. On the other hand, Holmes held that the federal courts could not give equitable relief to enforce political rights, and therefore the general remedy of declaring the restrictive sections of the Alabama constitution contrary to federal law and supervising the reformulation of the Alabama electoral system was not available. According to *The Canon*, this denial of remedy marked the case's place in history, and put the federal stamp of approval on the disfranchisement of blacks in the South.

II. WHAT A CLOSE READING OF *GILES* REVEALS

The Canon contains little discussion of Holmes's legal analysis or of the dissents. As far as *The Canon* is concerned, Holmes refused equitable relief, and Southern blacks lost the right to vote. The latter must have ensued from the former, and the Court should have decided some other way. One can certainly concur that the disfranchisement of black voters in the South was a national disgrace, but because it does not analyze *Giles* carefully, *The Canon* not only overemphasizes the importance of the case, but also fails to find *Mills v. Green,* the case that was the key to the situation.[6]

The Canon briefly criticizes Holmes's jurisdictional holding, but otherwise takes no notice of the complicated procedural posture of the case, which is the most questionable part of the Holmes decision and the essential issue of the dissents. *The Canon* does not explain that the trial judge had dismissed the case for lack of jurisdiction, and under federal procedure of the time a direct appeal to the Supreme Court, in the form of a certificate from the trial judge, was available, but limited to the question of jurisdiction.[7] The Court was prohibited from considering the merits, since no trial had taken place. It was not clear here whether the trial court had dismissed because it thought it had no jurisdiction to grant the equitable relief requested, or because the required jurisdictional amount had not been alleged in the bill.

The Canon's inattention to procedural detail is exemplified by a misstatement of Holmes's holding on the subject of jurisdic-

6. *Mills v. Green*, 159 U.S. 651 (1895); see text accompanying note 23.
7. 15 Stat. 827, Fifty-First Congress, Sess. II, Ch. 517, Sec. 5 (1891).

tional amount. *The Canon* states, "Holmes found . . . that the complaint did allege the requisite amount in controversy . . . ."[8] In fact, Holmes found that the jurisdictional amount was *not* pleaded,[9] and that jurisdiction was the only issue raised by the certificate of appeal. According to Holmes, however, direct appeal to the Supreme Court could be founded on other sections of the applicable judiciary act, and therefore he could treat the certificate as opening the entire record.

Holmes based this holding on dubious logic. He announced:

> But, assuming that the allegation should have been made in a case like this, the objection to its omission was not raised in the Circuit Court, and as it could have been remedied by amendment, we think it unavailing.
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> * * *
>
> Although the certificate relates only to the jurisdiction of that court as a court of the United States, yet, as the ground of the bill is that the constitution of Alabama is in contravention of the Constitution of the United States, the appeal opens the whole case under the act of 1891, c. 517, § 5 (26 Stat. 827). The plaintiff had the right to appeal directly to this court. The certificate was unnecessary to found the jurisdiction of this court, and could not narrow it. As the case properly is here we proceed to consider the substance of the complaint.[10]

This statement contains some dubious propositions. First and foremost, subject matter jurisdiction of a court has to appear affirmatively from the record. A court of appeal has no right to assume the matter could be rectified by amendment.[11] Perhaps jurisdiction does not exist and the plaintiff could not properly so represent.

The second problem is that Holmes had no authority for his assertion that the jurisdictional certificate opened the whole record. The statute could most logically be read to indicate the opposite. This case was before the Court pursuant to a certificate under Section 5 of the Act of 1891:

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8. Pildes, *The Canon* at 305 n.44 (cited in note 2).
9. 189 U.S. at 485.
10. Id. at 485-86.
11. See id. (Harlan, J., dissenting).

> That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:
>
> In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.[12]

This language would seem to be fairly exclusive: Only jurisdiction should be considered on certificate from the district or circuit court. That exclusivity seems to be emphasized by the procedure for certification of issues provided by section 6 regarding certification by the newly created circuit courts of appeals:

> [I]n every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.[13]

This section provides in the most specific terms for opening the entire record after certification of a single issue by the circuit courts of appeal, and is found in the section immediately following that on which Holmes relied. It seems to be a fairly clear case of *expressio unius est exclusio alterius*. If Congress had wanted to provide for opening the entire record upon jurisdictional certification pursuant to section 5, both the issue and the means for dealing with it were apparent. The statute did not give the Court this power, and Holmes offered no other authority.

Holmes was, therefore, probably wrong, as *The Canon* accurately notes, to open the entire case, but there were extenuating circumstances. Perhaps as a consequence of failing to look closely at procedural issues, *The Canon* ignores that a different holding in *Giles* would not necessarily have led to a different re-

12. 26 Stat. at 827.
13. Id. at 828.

sult. Since no trial had occurred in the case, if the Court had decided the jurisdictional matter in favor of the plaintiff, the whole case would simply have gone back for trial before the same unfriendly judge who had dismissed it. What findings of fact, conclusions of law, or formulation of remedy (in the unlikely event he decided any was necessary) would they get out of him? Whatever he decided, the inevitable appeals would have ensued, this time possibly to the circuit court of appeals, because the issue would not be jurisdictional, and then finally to the Supreme Court again. The Alabama Constitution of 1901 would have had more time to settle, and the problems of what remedy to formulate and what political power would enforce it would have become even more acute.

These observations cast light on the curious posture of the litigation in *Giles*. There are indications that everyone except Harlan was in a great hurry to get rid of this case. The Court dispensed with oral arguments,[14] certainly an unusual action for a matter of great importance. The pleadings appeared to be careless. Plaintiff's counsel, as *The Canon* points out, was a well experienced person hired with Booker T. Washington's money. He surely knew about pleading jurisdictional amount. The attorney for Alabama, if he had wanted to delay, could have raised the issue of jurisdictional amount in the trial court, thereby making amendment by plaintiff, immediate trial on the merits, and a lengthy appeal process more likely. One sentence in either the complaint or answer could have changed the course of the litigation, but neither of two presumably competent lawyers included it.

There may be a reason for what appears to have been sloppy lawyering. Plaintiff's lawyer was attempting to persuade the Court that the Civil Rights Act of 1871[15] extended equitable relief to voting rights violations. That Act provided for equitable relief and had its own jurisdictional clause that did not require a specific amount in issue. The problem was that the Act did not specifically extend equitable relief to voting rights, but mentioned it only generally, and there was already federal precedent against plaintiff's position.[16] Nevertheless, plaintiff's election not to allege the jurisdictional amount may have arisen from a desire to emphasize the importance of the 1871 Act.

14. 189 U.S. 494 (Harlan, J., dissenting).
15. 17 Stat. 13, Sec. 1 (1871).
16. See the discussion accompanying and following footnote 23.

Holmes's discussion of this jurisdictional issue is instructive. The only precedent he gives for not dismissing for failure to plead the jurisdictional amount is that "[i]n *Mills v. Green* . . . no notice was taken of the absence of an allegation of value in a case like this."[17] This kind of thing is nonsense, and Holmes knew nonsense when he saw it. The fact that a court did not notice something does not set a precedent for not noticing it again. Furthermore, in *Mills* the plaintiff lost in the Supreme Court on other grounds. Although it would surely be customary to resolve a jurisdictional issue first on an appeal, there was no absolute need to resolve the matter since plaintiff was going to lose anyway. The curious reverse side of this coin is that if the *Giles* case had been decided differently, it would not have merited so much as a footnote even in Professor Pildes's canon. It would have been a mere procedural prelude to the dispositive opinion, the one that would have undoubtedly followed, at some length, the trial and possible intermediate appeal of the case on the merits.

There were three dissents in *Giles*, by Brewer, Brown (with no opinion), and Harlan, to which *The Canon* devotes almost no attention.[18] Ironically, *The Canon* characterizes Harlan as a "great dissenter,"[19] but then ignores his dissent. But Harlan's dissent is not a dissent as to result—he also would have affirmed for lack of jurisdiction, but only on the issue of jurisdictional amount. That issue, he thought correctly, could not be waived by any of the parties. Harlan did say, however, that he disagreed with Holmes on the merits, and that he agreed with Brewer's opinion that courts could give relief in such cases. He did not, however, say what kind of relief. Even Harlan, then, is not on record as advocating equitable relief.[20]

The Brewer dissent is more instructive. Brewer objected that Holmes was not addressing jurisdictional issues, which were all that could be addressed on a direct certificate to the Supreme Court. He thought the complaint stated a federal cause, but he did not reach a conclusion as to whether injunctive relief could be granted. Neither Brewer nor Harlan could cite a precedent for such action. The cases on record finding federal jurisdiction

17. 189 U.S. at 485.

18. The total discussion of the dissents consists of : "Holmes' opinion for the 6-3 divided Court," (p. 305) and "Still, there were dissenting voices, not just that of the great dissenter Justice Harlan, who indeed did so here again, . . ." (p. 312).

19. Pildes, *The Canon* at 312 (cited in note 2).

20. 189 U.S. at 504.

in such matters were all cases granting money damages for deprivation of voting rights.[21] Brewer did not reach the issue of equitable relief: "Whether the plaintiff's remedy was at law or in equity, cannot be considered on this appeal."[22] As far as Brewer was concerned, the federal courts had subject matter jurisdiction, and the case should have been sent back for trial. The question of remedy was not one of jurisdiction, and therefore would have to be addressed through the normal appeals process after trial.

The Brewer opinion, with its list of federal precedents for granting money damages in voting rights cases, raises another interesting question. After the Supreme Court decision in *Giles*, the plaintiff brought suit in state court for damages and, predictably, lost in the Alabama Supreme Court. With substantial decisions upholding a federal cause of action for such damages, why on earth did Giles bring suit in the forum where success was least likely?

The refusal of anyone on the Court to say specifically that equitable relief was appropriate was no mere technicality, for if all anyone was saying was that money damages were available in this case, the ineffectiveness of that remedy to achieve the broader aim of avoiding disfranchisement of blacks was already established. Bringing such cases one by one with the oligarchs in the background ready to reimburse their political hacks on the rare occasions when a Southern jury penalized them would accomplish nothing. That was why the *Giles* plaintiff sought a different, broader remedy.

The justices were finessing the equitable remedy issue because of a far more important case than *Giles*. One of the reasons to read an inapposite case carefully in legal research, as well as to read dissents even though their opinions have not prevailed, is that both the inapposite case and the dissents may cite the really important case, and that is true here. As we read both the Holmes opinion and the dissents, we find the whole discussion occurs under the shadow of a case styled *Mills v. Green*.[23] It turns out to be the case *The Canon* really should have discussed.

In 1894 South Carolina had passed a statute calling for a constitutional convention in September, 1895. That convention would, in fact, put in place the final restrictions on black voting

21. *Wiley v. Sinkler*, 179 U.S. 58 (1900); *Swafford v. Templeton*, 185 U.S. 487 (1902).
22. 189 U.S. at 488-89.
23. 159 U.S. 651 (1895).

rights in that state.[24] The South Carolina registration law in question allowed registration on only ten days a year, in March, and required that all voters be in possession of their registration papers at all times. Plaintiff had been prevented from registering during the critical ten days, and he claimed these restrictions were unconstitutional. The *Mills* plaintiff and other similarly placed South Carolina citizens sued for injunctive relief.[25]

The District Court granted plaintiff's relief, but was reversed by the Circuit Court of Appeals for the Fourth Circuit in an opinion written by none other than the Chief Justice of the United States, Melville Weston Fuller, as circuit justice.[26] In his opinion Fuller held that equitable relief was not available to enforce political rights:

> It is well settled that a court of chancery is conversant only with matters of property and the maintenance of civil rights. The court has no jurisdiction in matters of a political nature, nor to interfere with the duties of any department of government, unless under special circumstances, and when necessary to the protection of rights of property, nor in matters merely criminal, or merely immoral, which do not affect any right of property.[27]

Wait a minute, some will say. Why isn't the right to vote a civil right? Well, under the narrow definition the nineteenth century courts were imposing, it just wasn't, and in fact Fuller had a plethora of authority to back him for this proposition. The case upon which he relied most heavily was the Illinois case of *Fletcher v. Tuttle*,[28] in which the plaintiff complained of being deprived of voting rights. The Illinois court held voting rights were political, not civil, rights:

> From the foregoing statement of these two bills it seems to be perfectly plain that the entire scope and object of both is the assertion and protection of political, as contradistinguished from civil, personal or property rights. In both the complainant is a legal voter, and a candidate for a particular elective

24. Pildes, *The Canon* at 301 (cited in note 2).

25. Curiously enough, and perhaps buttressing *The Canon*'s point that laws disfranchising blacks also disfranchised poor whites, the voters in *Mills* did not allege their own race or the racial bias of the registration laws. See concurring opinion of Judge Hughes, 69 Fed. at 862. Judge Hughes thought this changed the constitutional analysis, since he thought a Fifteenth Amendment claim was not stated. Fuller, however, did not pick up on this point, nor did the Supreme Court in affirming.

26. *Green v. Mills*, 69 F. 852 (1895).

27. 69 Fed. at 858.

28. 37 N.E. 683 (1894).

> office, and by his bill he is seeking the protection and enforcement of his right to cast his own ballot in a legal and effective manner . . . .[29]

The court went on to draw this distinction between civil and political rights:

> As defined by Anderson, a civil right is, "a right accorded to every member of a distinct community or nation," while a political right is a "right exercisable in the administration of government." Anderson's Law Dict. 905. Says Bouvier: "Political rights consist in the power to participate, directly or indirectly, in the establishment or management of the government. These political rights are fixed by the Constitution. Every citizen has the right of voting for public officers, and of being elected; these are the political rights which the humblest citizen possesses. Civil rights are those which have no relation to the establishment, support or management of the government. They consist in the power of acquiring and enjoying property, or exercising the paternal and marital powers, and the like. It will be observed that every one, unless deprived of them by sentence of civil death, is in the enjoyment of his civil rights,—which is not the case with political rights; for an alien, for example, has no political, although in full enjoyment of his civil rights." 2 Bouv. Law Dict. 597.[30]

In his concurring Circuit Court of Appeals opinion in *Mills*, Judge Robert Hughes made a point which Holmes appeared to have picked up in *Giles*. Hughes contended that courts could not restrain other branches of government from exercising their functions generally, but could grant individual relief for maladministration. Thus Mills could have enforced his right to vote individually, but could not bring the general action he sought here: "I repeat that in the case at bar it may have been competent for the court to grant individual relief. But the bill asked more. It asked similar relief for all citizens of the county situated like the complainant."[31]

This decision was appealed to the Supreme Court. There, Justice Gray duly issued an opinion for a unanimous court that really was the kind of disingenuous nonsense that *The Canon* seems to consider the *Giles* opinion to be. In both *Mills* and *Giles* the plaintiffs had alleged that they wished to vote in spe-

29. Id. at 686.
30. Id. at 686.
31. 69 Fed. at 865.

cific elections in the near future, a supposedly necessary allegation to satisfy nineteenth century notions of mootness. Justice Gray sidestepped the issue of equitable remedy and held that since the election in which plaintiff alleged he wished to vote had now passed through no fault of either party, no relief could be granted because the issue was moot.[32]

There are a number of reasons why *Mills* is a far more important case than *Giles*. First, the Fuller opinion indicates that the views on equitable relief in voting rights cases had already crystallized in 1895, and their expression in the Circuit Court of Appeals had been unanimously affirmed, albeit on the basis of other logic, by the Supreme Court. The *Giles* doctrine was not a Holmes invention, and there was probably nothing that the newest justice could have done to change the situation in 1903.

Second, although even *The Canon* recognizes that the likelihood of successful judicial intervention was remote in *Giles*, the chances for success were much greater in *Mills*. In *Mills* the disfranchisement scheme was fairly new and not yet embedded in the state constitution. Injunctive relief maintaining black voter registration and restraining the implementation of a new system would have been conceptually much easier to award and enforce than dismantling a complex system that had already operated for several years, which was what the plaintiffs in *Giles* confronted. The District Court in *Mills*, in fact, was ready to give injunctive relief.

It is possible to imagine a scenario in which a coalition of blacks and poor whites, not yet definitively purged from the voting rolls and energized by judicial victories and injunctive relief, would turn out en masse to defeat efforts to subjugate them. Furthermore, as *The Canon* points out, in 1896 Congress was still actively enforcing voting rights.[33] In 1895, therefore, there remained a firm political support for black voting rights, which might have needed only a Supreme Court decision to solidify. It is much more difficult to imagine uprooting a system thoroughly imposed on a cowed populace in 1903. In *Mills* the battle was just beginning; in *Giles* it was already lost.

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32. This kind of reasoning did not become definitively obsolete until *Moore v. Ogilvie*, 394 U.S. 814 (1969); see the discussion at note 38.

33. "Thus, the House was aggressively wielding its power to enforce the Fifteenth Amendment throughout this period. As late as 1896, it remained virtually undisputed in the House that it had the power to conclude, in the context of judging elections, that state registration statutes were unconstitutional." Pildes, *The Canon* at 309 (cited in note 2).

Mills shows the Court in a far worse light than *Giles*. The Court could easily have reasoned its way around the mootness issue if it had wanted to reach the merits. Holmes was able to do that a few years later in *Giles* without attracting the slightest attention.[34] The defendant was an officer of the state that had called the unconstitutional election and, even if the convention was past, the abuses complained of still existed. In fact, the holding in *Mills* made it difficult for the Supreme Court ever to reach the merits in any voting rights case, for given the normal delays in the federal judicial process, a suit seeking the vote in any particular election would always be moot. In fact, a suit in federal court for money damages for wrongful denial of the right to vote in South Carolina's Congressional elections of 1894 was tried on the merits and did not reach the Supreme Court until 1900.[35]

This point suggests the issue on which *Giles* really was ground-breaking, and in a positive sense. The plaintiff in *Giles*, in order to avoid mootness, had alleged that he wished to vote in the Congressional elections of 1902. Those elections, as was the case in *Mills*, had already passed. Homes did not let this deter him:

> Perhaps it should be added to the foregoing statement that the bill was filed in September, 1902, and alleged the plaintiff's desire to vote at an election coming off in November. This election has gone by, so that it is impossible to give specific relief with regard to that. But we are not prepared to dismiss the bill or the appeal on that ground, because to be enabled to cast a vote in that election is not, as in *Mills v. Green*, 159 U.S. 651, 657, the whole object of the bill. It is not even the principal object of the relief sought by the plaintiff. The principal object of that is to obtain the permanent advantages of registration as of a date before 1903.[36]

Of course, voting in any one election was not the object of the litigation in *Mills* any more than it was in *Giles*. The object, as Judge Hughes pointed out, was the wholesale registration of (presumably black) voters. Holmes is distinguishing without a difference, but in doing so he was getting to the real issue. Although Holmes may deserve some lumps for writing the *Giles* opinion, he ought to receive a good deal of credit for this hold-

34. See text accompanying note 36.
35. *Wiley v. Sinkler*, 179 U.S. 58 (1900).
36. 189 U.S. at 484.

ing. What he is doing here actually foreshadows the "capable of repetition, yet evading review" doctrine of *Southern Pacific Terminal Co. v. Interstate Commerce Commission.*[37] He was creating a doctrine that could have eased the way for many future voting rights cases. I say "could have," because, perhaps due to the obscurity of the *Giles* decision, the old saws of *Mills* were not removed from our jurisprudence until *Moore v. Ogilvie*[38] extended the "capable of repetition" doctrine to voting rights in 1969. Even there, the dissent was still protesting that relief could not be granted because the election had passed.[39]

In summary, a close reading of *Giles* tells us that it was basically concerned with procedural issues of no lasting consequence. Examining all the opinions in *Giles*, however, shows us that the substantive doctrine it supposedly announced was already embedded in federal jurisprudence. The Supreme Court had demonstrated eight years earlier in *Mills* that it would not get involved in the issue of black voting rights.

III. HOLMES REDUX

At first and casual reading, it may seem that *The Canon* has succumbed to the temptation to engage in big-game hunting, a sport that all red-blooded law professors enjoy. How many of us want to waste ink chastising Justice Samuel Blatchford when we can knock a giant off a pedestal? Thus we may carelessly accuse *The Canon* of yielding to the temptation of the glamor and fun of going on safari to take shots at tawny lion Holmes rather than staying at home to set traps for mouse Gray who wrought havoc in the larder.

A more careful reading, however, suggests that *The Canon* merely demonstrates the unease that many modern liberals suffer with Holmes. It is not clear from *The Canon* whether Pildes is more annoyed with the Court or with Holmes. *Giles* was, after all, a 6-3 decision (actually 7-2 if you count the fact that Harlan would also have dismissed for lack of jurisdiction). If Holmes had chosen this moment to write the first of his eloquent dissents, it would have been just that, a dissent. All that would have changed was the margin of majority.

37. 219 U.S. 498 at 515 (1911).
38. 394 U.S. 814 (1969).
39. Id. at 820 (Stewart, J., dissenting).

The Canon attacks the Holmes opinion, but nowhere does it suggest that Holmes was wrong as a matter of doctrine. In fact, the *Mills* decision indicated that Holmes was doctrinally correct. To be sure, Holmes was writing for the court of last resort. If he had wanted to write an opinion granting relief, and succeeded in persuading a majority of justices that a remedy should be given, there was no tribunal to gainsay him. But I suggest that political realities did not coincide with such a view. If there had been an established tradition of equitable enforcement of political rights, the Holmes decision would have been pusillanimous indeed. Under such circumstances giving relief would have had a fair chance of acceptance in the legal community, a fact which might indeed have created a moral force in the general community and perhaps even support in the political process. On the other hand, if, as was the case, the Court was going to have to create such a remedy out of whole cloth, its chances of acceptance anywhere were close to non-existent, and the danger to the Court's prestige and power was grave.

The Canon suggests that a decision granting relief might possibly have had some sort of effect in North Carolina and Alabama, where the majorities in favor of curtailing voting rights were slim at best.[40] It does not say how this would have happened, since the essay admits that no political authority was prepared to back the Court. I doubt the proposition. Whether they had political majorities or not, the oligarchs had their disfranchising constitutions firmly in place in North Carolina in 1900 and Alabama in 1901, and rooting them out in 1903 would not have been easy. *The Canon* remarks that "[e]ven nearly a century later, Holmes was not far off the mark in envisioning a pervasive national presence in the South as the predicate to full black political participation,"[41] and makes the point that "[o]ne of the most robust observations political scientists have made is that electoral structures once put into place 'tend to be very stable and to resist change.'"[42]

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40. Even that contention is open to some doubt. Although *The Canon* builds a good case that the Alabama constitution passed only by virtue of electoral fiddling (Pildes, *The Canon* at 315-16 (cited in note 2)), it also makes the odd statement that in North Carolina the disfranchising constitution passed with a margin of "only" 58.6% of the white vote (Pildes, *The Canon* at 313 (cited in note 2)) with, presumably, 41.4% against. That a margin of 17.2% is narrow would be news to a great many political candidates around this nation.

41. Id. at 311-12.

42. Id. at 313, citing Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* 52 (Yale U. Press, 1994).

In all likelihood, if the Court had thrown out the Alabama and North Carolina electoral systems, the oligarchs would simply have reopened their bags of shoddy political tricks and rigged the system once again. The more or less ongoing nature of human personalities and social and political institutions would suggest such a continuity of events, just as one might reasonably speculate that Louis XVI and James II were going to come to grief regardless of the occurrence of the particular events that triggered the French and English Revolutions. Of course, some latter-day Joan of Arc might have descended from the northeast Alabama hills as a successful champion of democracy. Playing "what if" with history is always tricky. In the absence of the proof of the actual events, no one would be likely to imagine that a fifth-rate artist from Vienna would overthrow German democracy and lead the world to cataclysm, or that a fifth-rate actor in the early stages of Alzheimer's Disease would become the leader of the world's greatest power and a principal agent in the demise of the second greatest. When it comes to dangerous partners in guessing games, history's muse Clio does not even take a back seat to Puccini's Princess Turandot. But it rests with the proponent of such unlikely events to give us a reasonable scenario for their occurrence, and *The Canon* makes no attempt to do so.

Even assuming, however, that a decision opposing disfranchisement would somehow have affected the outcome in North Carolina and Alabama, there were still nine other ex-Confederate states where even *The Canon* does not profess to see hope.[43] If nine states instead of eleven had flouted a Supreme Court decision, there would have been some gain for democracy in the short run, but where would that have left the institution? Would it have had the power and the will to impose *Brown* and the other Warren reforms fifty years later?

Since a different opinion by Holmes would probably not have affected the outcome of *Giles, The Canon*'s criticism would be more properly directed at the Court than at Holmes, but the tone of the essay is one of almost personal animosity towards Holmes, characterizing his analysis as "fascinatingly repellent."[44] Given the level of dramatic intensity provided by most cases focussing on scope of review in jurisdictional appeals, such a com-

43. There were, of course, voting and civil rights abuses in states that did not secede, so that perhaps the number was greater than nine.

44. Pildes, *The Canon* at 298 (cited in note 2).

ment by a teacher of law might be a compliment; but *The Canon's* subsequent comments eliminate any such ambiguity. As an example, take this sentence: "With typical perverse delight, Holmes stared these claims in their face and represented them starkly: 'The white men generally are registered for good under the easy test and the black men are likely to be kept out in the future as in the past. . . . .'"[45] *The Canon* does not tell us that Holmes was merely summarizing the pleadings in this statement.[46] If that is what they said, why should they be misrepresented? We may ask further: In what ways was delight in perversity "typical" of Holmes? And why is this perverse? At least Holmes was setting out the real issues and consequences for the world to examine and, possibly, to act on in the political arena. Surely this is far better than the performance in *Mills* where the Court simply closed its eyes and ignored the harm it was doing.

The Canon then criticizes Holmes for skipping over the jurisdictional issues to get to the merits of the case. I can agree that it was probably legally indefensible to ignore the jurisdictional issues, but morally and politically it may have been preferable to tell the world where the Court stood as soon as possible. How would the situation have improved if the case had been sent back down on the jurisdictional issue, only to come back up for a review on the merits several years later? Nothing would indicate that the Court was going to do a *volte-face* on these issues any time soon.

The Canon bitterly denounces Holmes for the first point in his analysis: "As the first such 'final consideration,' there then follows the most legally disingenuous analysis in the pages of the U.S. Reports."[47] *The Canon* accuses Holmes of putting the plaintiff in *Giles* in a "Catch 22" situation. Holmes pointed out that the plaintiff had requested both that he be registered under the existing system, and that the existing system be ruled unconstitutional. These were inconsistent remedies, Holmes thought, since if the system were unconstitutional, it would be improper to implement it by requiring a registration under it. Holmes is, perhaps, regrettably emphatic in making this point. He may be reaching a bit to justify an opinion with which he felt morally uneasy. I think that even the most convinced Holmophile would not think that *Giles* was one of his better opinions, but I also

45. Id. at 305.
46. It does say he was "represent[ing]" the "claims." Id.
47. Id. at 306.

think we can absolve him of the "Catch 22" charge. It would not have made much sense to require Giles's registration under the existing system, and then to throw out the system as unconstitutional. On the other hand, even if it had been possible to find that the system was constitutional and that Giles met its complex qualifications and should be registered, registering Giles and others by inspecting their credentials individually would have had virtually no impact on the electoral process:

> It seems to us that unless we are prepared to say . . . the registration plan of the Alabama Constitution is valid, we cannot order the plaintiff's name to be registered. It is not an answer to say that if all the blacks who are qualified according to the letter of the instrument were registered, the fraud would be cured. In the first place, there is no probability that any way now is open by which more than a few could be registered . . . .[48]

In this quote, Holmes seems to be picking up the point Judge Hughes made in the concurring opinion in *Mills,*[49] that the courts could grant individual relief but not group relief; but, of course, feeding the cases one by one through the court system would have virtually no impact on the voting balance. Holmes was merely boiling the case down to what Giles really wanted, mass registration of black voters, and saying the Court could not accomplish it. We may not like this reality, or, with *The Canon*, think that it may not necessarily have been reality, but at least Holmes had the courage to face the issue, as even *The Canon* appears to admit.[50] The real "Catch 22" was *Millls v. Green,* where the Court said that there may be a justiciable issue, but we will never get to it because the election will always be over before the appeal reaches us.

The Canon criticizes Holmes for facing the reality that a massive Court plan for voter registration would be unenforceable, but in the very next paragraph appears to concede the truth of the statement:

> The Court transformed this resistance into the sweeping doctrinal principle that equity cannot enforce "political rights." Thus, Holmes, concluded, relief "from a great political wrong,

48. 189 U.S. at 487.

49. See the text accompanying note 31.

50. "Giles' complaint, Holmes baldly states, is 'that the great mass of the white population intends to keep the blacks from voting.' But from this it follows, he asserts, that if 'the conspiracy and the intent exist, a name on a piece of paper will not defeat them.'" Pildes, *The Canon* at 306 (cited in note 2).

> if done, as alleged, by the people of a state and the State itself, must be given by them or by the legislative and political department of the United States." Holmes had every reason to know this would not be forthcoming, given the political context at the time—indeed, it is the very fear that any Court order would not be supported by the other branches of the national government that underlies the Court's self-abnegation.[51]

If "Holmes had every reason to know" that he could not issue an enforceable decree, it is hard to see why he was wrong to recognize that fact publicly.

IV. CONCLUSION: OF JUDICIAL ACTIVISM AND RESTRAINT

It seems to me that we face a question here about our basic attitudes concerning judicial activism and restraint. Those of us who applaud the accomplishments of the Warren Court—and I am one of them—have come to have a very rosy view of judicial activism. Support for either judicial activism or judicial restraint is defensible, but neither is defensible if its exercise is to be determined by political outcome. It is neither politically nor philosophically appropriate for conservatives to advocate, as many do today, "judicial restraint" in enforcing rights on the liberal agenda, but to push for an activist roll-back of personal and political rights now firmly embedded and supported in our national polity. Neither, however, can liberals applaud the activism of the Warren Court, but then deny conservatives the right to a similar activism because the Court has changed political complexion.

Those of us who rejoiced in the Warren activism should not forget that perhaps the most activist opinion in the history of the Court was *Dred Scott v. Sandford*.[52] Through much of its history, and notably in Holmes's time, the federal courts have possessed neither the political views nor the talent to give liberals much faith in judicial activism. For every *Marbury* there is a *Dred Scott,* for every Marshall a McReynolds *and* a Butler.

Poor old Ollie! It seems that every year his reputation diminishes. Richard Epstein and the conservatives excoriate him

51. Id. at 306-07.
52. 60 U.S. (19 How.) 393 (1856).

for his dissent in *Lochner,*[53] while liberals detest judicial restraint in cases like *Giles* and *Buck v. Bell,*[54] which arguably laid the foundation for modern Frankfurterism. Really, however, in *Giles* he was merely being faithful to his own principles of judicial restraint. We cannot accuse him of dissembling or legal misinterpretation (except in regard to the issue of the effect of the jurisdictional certificate), and certainly not of dodging the issues. We merely wish he had come out differently. Soon the only thing for which he will be favorably remembered is the funding of the Holmes Devise Series.

Meanwhile, we would all do well to heed a voice from the more recent past. In 1961 Philip Kurland wrote a delightfully catty, witty, and insightful review of Karl Llewellyn's COMMON LAW TRADITION in which he makes the following observation:

> In view of the fact that the book might be appropriately subtitled "In Praise of Judges," it is further and ample evidence of the current trend among realist jurisprudes, of whom Llewellyn is the self-proclaimed leader with a large following. In the 1930's, the new jurisprudence, derived from Austin, Holmes, and Cardozo, led the way in the demotion of the judiciary from the high state of grace it then held: it made men of gods. The realist jurisprudence thus contributed to the transfer of effective law-making power from the bench to the legislature and executive, and more particularly to the latter in the form of administrative agencies. The very leaders of this group who once regarded the notion of the supremacy of the judiciary as anathema are now in the forefront of the movement to restore the judiciary to its place of power. The pendulum has completed its arc and is now being hurried in its return.[55]

The enthusiasm for the judiciary of which Kurland speaks was generated by the successful activism of the Warren Court, which was then in full sway, and I fully partook of that emotion. Today, however, we liberals have pushed the pendulum too far. It has exceeded its arc, and some of us have forgotten to let go. The pendulum stands out horizontally from its pivot point with

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53. See, e.g., Richard Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. Chi. L. Rev. 703, 734 (1984), who doubts that Holmes's dissent is "coherent."

54. 274 U.S. 200 (1927).

55. Philip B. Kurland, *A Teacher's View* (symposium review of Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals (1960)), 28 U.Chi.L.Rev. 580, 582 (1961).

the stragglers still clinging to it desperately. They look down on a surreal landscape of judicial activism of which the most outstanding feature is *Bush v. Gore*. Be careful what you wish for, Professor Pildes.