A GOOD JUDGE OF HISTORY

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To many lawyers, the law is a toolbox. Somewhere in the collection of constitutions, statutes, and case law lie the tools that can be used to solve a legal problem. The job is to pick out the right combination, master the task at hand, put the tools back in the box, and move on to the next problem without many questions being asked.

But Justice James L. Robertson saw the law differently. To be sure, he could skillfully locate the right tools. But he wanted to know more. He wanted to know who made the tool, how it had been used in the past, what Oliver Wendell Holmes said about the tool, whether another tool might have done a better job, and what the use of the tool might say about our society and the future path of the law.

Fortunately for future generations, in 2019 he put some of this into a book, HEROES, RASCALS, AND THE LAW: CONSTITUTIONAL ENCOUNTERS IN MISSISSIPPI HISTORY, published by the University Press of Mississippi.[1] The constitutional problems he chose to address traced the course of Mississippi history. They include whether a slave would be freed,[2] whether a state court could declare a state law unconstitutional,[3] whether the state would honor its bond obligations when a bank collapsed,[4] whether a crop lien statute was valid,[5] whether the state could regulate railroad

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[1] *See generally* JAMES L. ROBERTSON, HEROES, RASCALS, AND THE LAW: CONSTITUTIONAL ENCOUNTERS IN MISSISSIPPI HISTORY 1 (2019).

[2] *See generally* Harry v. Decker, 1 Miss. (1 Walker) 36 (1818); *see* ROBERTSON, supra note 1, at 15 ("*Only People Were Slaves*").

[3] *See generally* Runnels v. State, 1 Miss. (1 Walker) 146 (1823); *see* ROBERTSON, *supra* note 1, at 57 ("*Judicial Review Comes to Mississippi*").

[4] *See generally* State v. Johnson, 25 Miss. 625 (1853); *see* ROBERTSON, *supra* note 1, at 95 ("*Mississippi Bank Wars*").

[5] *See generally* Marye v. Dyche, 42 Miss. 347 (1869); *see* ROBERTSON, *supra* note 1, at 151 ("*Agricultural Liens and Related Policy Products of Police Power*").

tariffs,[6] whether it could limit the hours a lumber mill could work its employees,[7] whether a common law rule restricting donative transfers would survive,[8] whether the governor could call out the National Guard to enforce the law in a county corrupted by bootleggers,[9] and whether the state could, in effect, allow a city to pledge its credit to the benefit of a private company when the constitution certainly appeared to say that could not be done.[10]

Justice Robertson saw a state constitutional issue every time he turned a corner. He saw constitutional issues the way the rest of us see color. In the epilogue, he even lists the issues that might bear on a short trip to the grocery store and then to a doctor. The list includes the police power at a stop sign, the authority to impose a sales tax, the freedom of the press exercised by a newspaper, the need beforehand to waive the right to a jury trial if a medical test was botched, and the doctor's right to prevent a patient from carrying a gun into the office in her purse.[11] He believed he saw these things because he had gained an "appreciation of the enormous effect that constitutions and courthouses have on our social existence, indeed, our everyday lives."[12]

The book's "nine tales" occasionally offer lessons, but the book disclaims any attempt to list them. With characteristically good humor, he writes: "I disdain historians who begin with a thesis, a purpose, a conclusion, and then bend the facts accordingly, excluding the inconvenient ones. I thought you had to have a law degree to be[] licensed to do that."[13]

Two of his tales can be used to illustrate his method. Most of the book demonstrates how Mississippi's courts have correctly interpreted and applied various provisions in the state constitution

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[6] *See generally* Stone v. Natchez, J. & C.R. Co., 62 Miss. 646, 653 (1885); *see* ROBERTSON, *supra* note 1, at 203 ("*Advent of Regulatory State in Mississippi*").

[7] *See generally* State v. J.J. Newman Lumber Co., 59 So. 923 (Miss. 1912); *see* ROBERTSON, *supra* note 1, at 257 ("*The Police Power of the State Moves to Piney Woods*").

[8] *See generally* All Persons v. Buie, 386 So. 2d 1109, 112 (Miss. 1980); s*ee* ROBERTSON, *supra* note 1, at 301 ("*The Coming of the Common Law in Mississippi*").

[9] *See generally* State v. McPhail, 180 So. 387 (Miss. 1938); *see* ROBERTSON, *supra* note 1, at 371 ("*The Governor and the 'Gold Coast'*").

[10] *See generally* Albritton v. City of Winona, 178 So. 799 (Miss. 1938); *see* ROBERTSON, *supra* note 1, at 423 ("*Balancing Industry with the Constitution*").

[11] ROBERTSON, *supra* note, 1 at 477-78 (2019).

[12] *Id.* at 483.

[13] *Id.* at 487.

in ways that have allowed the state to progress.[14] But in two of his stories the courts simply ignored the seemingly clear language of the constitution. In one case, Robertson deems the result "morally and constitutionally bankrupt."[15] In the other, he admits no harm seems to have been done.[16]

THE UNION BANK

This tale centers on statements in both state and federal constitutions which said that the state cannot make a law "impairing the obligations of contracts."[17] Their historical purpose was to reassure foreign lenders it was safe to deal with American borrowers.

In 1837, the Mississippi legislature chartered the Mississippi Union Bank and authorized it to issue $5 million in bonds backed by the full faith and credit of the state.[18] The legislation did not become effective until after publication of a summary of the legislation three times in the state's newspapers and then ratification by a successive legislature in 1838. As it turned out, not only was this done but the state's voters in the fall of 1837 chose the 1838 legislature while the issue was pending, which presumably indicated their consent.[19] Governor Alexander McNutt signed the bill, and it became law. [20]In August 1838, foreign investors bought the bonds in London.[21] They shipped $5 million in gold to Vicksburg.[22] The state celebrated its arrival.[23] The bank lent the money to borrowers, which were typically farmers, who used it to buy land and gave the bank notes backed by mortgages as security.

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[14] *See generally id*.
[15] *Id*. at 99.
[16] *Id*. at 452-54, 459.
[17] U.S. CONST. art. I, § 10, cl. 1. *See also* MISS. CONST. of 1832, art. I, § 19.
[18] *See* ROBERTSON, *supra* note 1, at 95-96, 101, 113, 115.
[19] *Id*. at 113.
[20] *Id*. at 113-14.
[21] *Id*. at 114-15.
[22] *Id*. at 115.
[23] *Id*.

While all this was happening, the nation suffered a financial collapse triggered by President Andrew Jackson's fiscal policies.[24] A second collapse in the Fall of 1839 only made things worse.[25] The income the state needed to pay off the bonds came from property taxes. [26] However, the collection process was so poor that no taxes at all were paid on half of the state's land, and as land values fell, the tax revenue correspondingly declined.[27]

In early 1841, Governor McNutt declared the bank insolvent and announced that the debt would not be repaid.[28] Over the years, he and others gave various excuses for the default.[29] They said the state did not have enough money to repay, that fraud was involved in the sale, that one legislature could undo anything a previous legislature had done, and even that poor Mississippians should not be taxed to pay rich foreign investors.[30] The political advantages of repudiation to Governor McNutt and his allies were obvious.[31]

The matter came to Mississippi's highest court twice. A legislative committee debunked the allegation of fraud, and the court in 1842 held, in an opinion by Chief Justice William Lewis Sharkey, that the legislature had lawfully authorized the bank.[32] In 1852, Hezron Johnson, a wealthy New York investor, sued to collect on a bond.[33] The court, in an 1853 opinion by Chief Justice Cotesworth Pickney Smith, held that the state was liable on the guaranty and therefore had to pay.[34] Justice William Yerger concurred with a detailed rebuttal of the state's excuses for nonpayment.[35] It was an unpopular view; when Yerger then sought reelection, the opinion ultimately cost him his job.[36]

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[24] *Id.* at 114.
[25] *Id.*
[26] *Id.* at 117.
[27] *Id.*
[28] *Id.*
[29] *Id.* at 117-22.
[30] *Id.*
[31] *See id.* at 117.
[32] Campbell v. Mississippi Union Bank, 7 Miss 625, 678-79 (1842).
[33] *Id.* at 126-27; *Johnson*, 25 Miss at 629.
[34] *Johnson*, 25 Miss at 764-69.
[35] *Id.* at 769-882.
[36] *See* ROBERTSON, *supra* note 1, at 139-40.

But the state still refused to pay.[37] Not only that, but in 1875, the Reconstruction legislature amended the state constitution to affirm the repudiation of the debt, and the repudiation was carried over into the 1890 constitution and is in place today.[38] In 1999, the Mississippi Supreme Court considered the issue again and held that the statute of limitations barred any further suit.[39]

To tell this story, Justice Robertson begins with biographies of ten of the key players, including the governors, lawyers for both sides, and the opinion-writing justices.[40] He borrows from sources as diverse as a famous history of Mississippi's "flush times" in the early 1830s,[41] Lewis Carroll's description of Wonderland,[42] and a paraphrase of Shakespeare.[43] He fractures the chronology and meanders through such subjects as the need for railroads after the Indian Removal Act of 1830,[44] the wisdom of appointing judges for life,[45] and the irony that the state could assert a statute of limitations defense when that is no defense to a suit by the state.[46]

Justice Robertson classifies the arguments for repudiation as nothing but "sanctimony and bombast."[47] Robertson says Mississippi was well aware of the requirements of the Contracts Clause because, in 1848, the U.S. Supreme Court had invalidated another piece of state anti-bank legislation because it violated that clause.[48] He demonstrates the weakness of the fraud claim by observing that if there really had been a fraud, the remedy would have been to rescind the transaction and pay the money back, which no one offered to do. He further points out that, while the state was claiming to be unable to repay, it never made any attempt to collect on the notes owed to the bank at the time of its collapse or to

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[37] *See id.* at 131.

[38] MISS. CONST. of 1890, art. 14, § 258.

[39] Grant v. State, 686 So. 2d 1078, 1092 (Miss. 1996).

[40] *Id.* at 100-104.

[41] *See* ROBERTSON, *supra* note 1, at 110 (citing JOSEPH G. BALDWIN, THE FLUSH TIMES OF ALABAMA AND MISSISSIPPI 62 (1853)).

[42] ROBERTSON, *supra* note 1, at 137 (citing LEWIS CARROLL, THROUGH THE LOOKING-GLASS (1871)).

[43] *Id.* at 138 ("The evil that men do lives after them.").

[44] *Id.* at 105 (citing 4 Stat. 411-12 (1830)).

[45] *Id.* at 139.

[46] *Id.* at 140.

[47] *Id.* at 99.

[48] *Id.* at 134-35 (citing Planters' Bank v. Sharp, 47 U.S. (6 How.) 301, 324 (1848)).

foreclose on the mortgages.[49] Both Alabama and Louisiana incurred similar debts but repaid them.[50]

While he offers no formal classification, in the end it is clear that he regarded Justices Sharkey, Smith, and Yerger to be "heroes." In Robertson's view, Justice Yerger "may have been the best of the bunch" because the opinion that cost Justice Yerger his job was "as strong as goat's milk."[51] On the other hand, he appears to believe Governor McNutt was the "rascal" of the story: McNutt, who had taken an oath to "take care that the laws be faithfully executed[,]" refused to honor a law that he had personally signed into law after it was passed.[52] And Robertson has little patience with historians who have tended to credit claims of the repudiators. They should, he says, "be made of sterner stuff."[53]

It was all, he says, "purely political."[54] He cries, "Madam Mississippi, have you no shame?!"[55] He concludes with regret that "no constitution is much more of a practical reality than the people are willing to let it be[,]" an observation that he recognizes undermines the rule of law, especially when a judgment of the state's highest court goes unenforced. [56] He wonders whether this sin escaped punishment because it was dwarfed by the sins of slavery, secession and redemption, which we can hope will not be repeated.[57]

BALANCING INDUSTRY WITH THE CONSTITUTION

The words of the constitution fare no better in at least one of Robertson's other tales. In that tale, the words, adopted in 1890 to try to prevent another Union Bank fiasco, were found in §183 which prohibits any locality from making an "appropriation, or loan its credit in aid of" a private corporation.[58]

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[49] *Id*. at 120-21, 130.
[50] *Id*. at 96.
[51] *Id*. at 129, 140.
[52] *Id*. at 131-32.
[53] *Id*. at 131.
[54] *Id*. at 132.
[55] *Id*. at 140.
[56] *Id*. at 141.
[57] *Id*.
[58] MISS. CONST. of 1890, art. VII, § 183. A similar prohibition applied to the State. *Id*. at art. XIV § 258.

The Great Depression hit Mississippi hard.[59] Only stumps remained where the pine forests of south Mississippi had been. [60]The 1927 flood had swept away much of the Delta.[61] In 1931, cotton prices slumped to a level they had not seen since 1894.[62] In 1932, one quarter of the State's land was sold for taxes.[63] In 1936, per capita income in Mississippi was $212, one third of the $636 national average.[64] The state needed more good jobs.

Hugh L. White, who as mayor of Columbia had persuaded a factory to locate there, won election in 1935 with a promise to "Balance Agriculture with Industry," or "BAWI."[65] He asked a group of Jackson lawyers, some with names still familiar today such as Creekmore, Watkins, and Wells, to design a scheme that would encourage other factories to relocate to Mississippi towns.[66]

The scheme they developed sounds a lot like "credit in aid of" a private company. Instead of issuing bonds to get money to invest in a private company, the scheme allowed a city to issue bonds to buy land.[67] That land could then be used to build a city-owned factory for leasing to a private company.[68] The city would tax its property owners to pay off the bonds, which would be guaranteed by the full faith and credit of the city.[69] Elaborate procedural restrictions sought to ensure the soundness of the scheme.[70] A state Industrial Commission had to grant permission to issue the bonds, which it would do only if it received a petition signed by 20% of the qualified electors that demonstrated that the city had a tax base sufficient to pay off the bonds and enough workers to fill the new jobs.[71] Then, at least half of the voters had to participate in an election and approve the bonds by a two-thirds vote.[72]

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[59] ROBERTSON, *supra* note 1, at 423.
[60] *Id.*
[61] *Id.* at 423-24.
[62] *Id.*
[63] *Id.* at 423.
[64] *Id.* at 432.
[65] *Id.* at 424.
[66] *Id.* at 427. More specifically, Hiram H. Creekmore, William Hamilton Watkins, W. Calvin Wells, and others.
[67] *Id.* at 426.
[68] *Id.*
[69] *Id.*
[70] *See id.* at 432-34.
[71] *Id.* at 433.
[72] *Id.* at 433-34.

Winona followed the procedures in hopes of attracting a textile plant.[73] Its voters approved the bonds by a vote of 262 to 113, small numbers that say more about the small number of eligible voters than they do about the size of the town.[74] A lawyer who normally represented bondholders then brought a "friendly test case" to establish the legal validity of the bonds.[75] Justice Robertson believes the lawyer, W.E. Morse, was an "unsung hero" because, despite the seeming conflict of interest, he mounted a vigorous case.[76]

Justice Robertson finds it difficult to believe that the scheme did not violate the "credit in aid of" prohibition in §183.[77] The language, he says, "seemingly afforded no room for legal creativity."[78] He adds, "[b]oth a teacher and student in an eighth-grade English would surely say that what the city was doing was giving its credit to aid the bedspread company."[79] In fact, in the year before Governor White's election, the Mississippi Supreme Court had held that Booneville could not issue bonds to build and then lease a garment factory.[80]

But when the Winona case came to that court, the court upheld the bonds.[81] While it recited Section 183 it simply declared that the statute did not violate that section.[82] As Justice Robertson puts it, the court "never objectively and in writing confronted, construed, or applied state Section 183."[83] The closest it got was to distinguish the Booneville case by saying that under the new legislation Winona, unlike Booneville, retained the right to ensure that its lease was used for the public purpose of reducing unemployment and promoting agriculture and industry.[84]

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[73] *Id*. at 427-38.
[74] *Id*. at 438.
[75] *Id*. at 440.
[76] *Id*. at 440-41.
[77] *Id*. at 429.
[78] *Id*.
[79] *Id*. at 446.
[80] *Id*. at 441 (citing Carothers v. Town of Booneville, 153 So. 670, 671 (Miss. 1934)).
[81] *Id*. at 443-44.
[82] *See Albritton*, 178 So. at 809-10.
[83] ROBERTSON, *supra* note 1, at 450.
[84] *See Albritton*, 178 So. at 808-09.

That guaranteed "public purpose" proved to be important to the due process issue the court did discuss at length.[85] Because it had a guaranteed public purpose, the law was not imposing a tax "for purely private purposes," which was something it was believed that the federal constitution's due process clause prohibited.[86] In the BAWI statute, the legislature said that the purpose of the statute was to provide laboring men an opportunity to gain employment during the Depression, and that was enough of a reason for the court to find no due process violation.[87]

Justice Robertson then expands the story in several ways. He quotes state constitutional language, which could be used to justify the scheme, including the statements that the government is "instituted solely for the good of the whole,"[88] that the government is to ensure the people's "safety and happiness,"[89] and that the "police powers . . . shall never be abridged."[90] He denounces constitutional originalism as a "shibboleth[]" usually invoked to achieve a result.[91] He quotes Justice Louis Brandeis' statement that a state can be a "laboratory" of experiment. [92] Furthermore, he describes a speech that Mississippi Chief Justice Sydney McCain Smith gave at the University of Mississippi School of Law while the case was pending.[93] In this speech, the Chief Justice invoked Harvard Dean Roscoe Pound's "sociological jurisprudence" and said that the state must prevent "economic injustice," a claim Robertson calls a "stick of dynamite."[94] Robertson describes the subsequent opening of the "Winona Bedspread Company," the chenille fabric the company produced, and the company's employment of up to 330 workers (mostly women) before the company closed in the 1950s.[95] He then details the subsequent use of the building as a shoe factory

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[85] *Id.* at 430-42.

[86] ROBERTSON, *supra* note 1, at 431.

[87] *See Albritton*, 178 So. at 808-809.

[88] MISS. CONST. of 1890, art. 3, § 5.

[89] *Id.* at art. 3, § 6.

[90] *Id.* at art. 7, § 190.

[91] ROBERTSON, *supra* note 1, at 436, 442 (quoting chancellor as saying constitutions are not "sculpted idols" incapable of change).

[92] *Id.* at 428.

[93] *Id.* at 434-35.

[94] *Id.*

[95] *Id.* at 451-54.

until 1987.[96] This means the building provided a total of more than forty years of work for Winona laborers.[97]

The hero that emerges is not only W.E. Gore but also Chief Justice Sydney Smith, whose law school speech, according to Justice Robertson, was "philosophical and prophetic and in tune with contemporary jurisprudence"[98] as well as a predictor of Chief Justice Smith's subsequent Supreme Court opinion. While he does not label the dissenting justice, William D. Anderson, a rascal, Justice Robertson clearly believed that Anderson's denunciation of the scheme as "giving Soviet Russia an approving handshake" went a bit too far.[99] It is worth observing that Justice Anderson's criticism was not entirely irrational because the city's ownership of the plant certainly took a step, if only a small one, toward state ownership of the "means of production," a communist goal.

Ultimately, Justice Robertson believed that "the State would benefit far into the future were its young people schooled in those special moments" captured in his nine tales.[100] The lessons are there for both young and old. The rule of law holds our society together, but the law is a human institution, not a machine cranking out widgets of predictable results. There are many tools in the toolbox, and much depends on the skill and character of those who pick them up. Everyone can thank him for that lesson and for all he did during his exemplary life to make those results both predictable and just.

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[96] *Id*.
[97] *Id*.
[98] *Id*. at 434.
[99] *Id*. at 446-447 (quoting *Albritton*, 178 So. at 812.)
[100] *Id*. at 488.