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# The Dean Takes His Stand: Julian Monnet's 1912 Harvard Law Review Article Denouncing Oklahoma's Discriminatory Grandfather Clause

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# THE DEAN TAKES HIS STAND

## Julien Monnet's 1912 *Harvard Law Review* Article Denouncing Oklahoma's Discriminatory Grandfather Clause

HARRY F. TEPKER\*

### *I. Introduction*

Three years after becoming the first dean of the law school at the University of Oklahoma—the same year that the first class graduated—and after ensuring that “[t]he study of law at the University of Oklahoma was off to a promising start,”<sup>1</sup> Julien C. Monnet published an article in the *Harvard Law Review* on the controversial “grandfather clause” of the Oklahoma Constitution.<sup>2</sup> Immediately after statehood, Oklahoma had moved swiftly to exclude blacks from politics.<sup>3</sup> The “grandfather clause” allowed persons who were eligible to vote in 1866 and their lineal descendants to register to vote without passing a literacy test as a qualification.<sup>4</sup> The purpose of the measure was to exclude black voters without excluding too many white voters, and Oklahoma’s law

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1. 1 DAVID W. LEVY, *THE UNIVERSITY OF OKLAHOMA: A HISTORY* 222 (2005).

2. See Julien C. Monnet, *The Latest Phase of Negro Disfranchisement*, 26 HARV. L. REV. 42 (1912-1913), reprinted in 62 OKLA. L. REV. 407 (2010). Dean Monnet’s article has been cited in many works over the years, including recent law review publications. See, e.g., Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 90 & n.152 (2008); David P. Currie, *The Constitution in the Supreme Court: 1910-1921*, 1985 DUKE L.J. 1111, 1134 n.117; *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1161 n.140 (1977); A. Leon Higginbotham, Jr., *The Life of the Law: Values, Commitment, and Craftsmanship*, 100 HARV. L. REV. 795, 810 n.72 (1987); Mary Ellen Maatman, *Speaking Truth to Memory: Lawyers and Resistance to the End of White Supremacy*, 50 HOW. L.J. 1, 17 n.88 (2006); Susanah M. Mead, *Evolution of the “Species of Tort Liability” Created by 42 U.S.C. 1983: Can Constitutional Tort Be Saved from Extinction?*, 55 FORDHAM L. REV. 1, 19 n.96 (1986); Richard H. Pildes, *Keeping Legal History Meaningful*, 19 CONST. COMMENT. 645, 651-52 & n.23 (2002).

3. See Monnet, *supra* note 2, at 42.

4. See *id.* (quoting OKLA. CONST. of 1907, art. 3, § 4a (1910)).

school dean said so in no uncertain terms.<sup>5</sup> Soon after publication of Monnet's article, the issues discussed therein came before the Supreme Court of the United States, which upheld the Dean's views.<sup>6</sup> As Benno Schmidt wrote, "For the first time, in the *Grandfather Clause Cases* in 1915, the Supreme Court applied the Fifteenth Amendment and what was left of the federal civil rights statutes to strike down state laws calculated to deny blacks the right to vote."<sup>7</sup>

The Dean's excellent reputation was of no use when word of his article spread throughout the state. The *Daily Oklahoman*, Oklahoma City's largest newspaper, published a story quoting the Dean's article nearly in its entirety.<sup>8</sup> Thus, the state's leadership knew that the Dean had the courage—or temerity—to assert an opinion on an issue central to the struggle between two active and strong political parties.<sup>9</sup> And he did so from a position in a university already suffering from partisan crossfire.<sup>10</sup> His friends reported that he acted "[i]n complete disregard of the scorn heaped upon him,"<sup>11</sup> but afterward he confined his defense of the Constitution to the law school.<sup>12</sup> The Dean's many, admiring students would remember his "basic legal tenet—'The

5. See *id.* at 52. As Dean Monnet noted, Oklahoma's law also exempted persons who had been residing in foreign countries in 1866, whether voting or not, from the literacy test requirement. See *infra* text accompanying notes 53-58.

6. See *Guinn v. United States*, 238 U.S. 347, 364-65 (1915); *Myers v. Anderson*, 238 U.S. 368, 381-82 (1915) (collectively known as the *Grandfather Clause Cases*) (invalidating under the Fifteenth Amendment "grandfather clauses" designed to disenfranchise blacks through literacy tests while exempting whites from taking the tests).

7. ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., 9 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910-21, at 725 (Paul A. Freund & Stanley N. Katz eds., 1984).

8. See *Grandfather Clause; Is It Constitutional?* Dean Monnet Discusses Law, DAILY OKLAHOMAN, Nov. 17, 1912, at B-1.

9. See BICKEL & SCHMIDT, *supra* note 7, at 928 (noting that "there was vigorous two-party politics in Oklahoma, and blacks made up less than 9 percent of the population, lending credence to the objections of Oklahoma Republicans that, as one put it in a letter to President Taft, the Grandfather Clause was 'adopted for the express purpose of disfranchising negro voters, not because they are black, but because they vote the Republican ticket'").

10. See generally LEVY, *supra* note 1, at 150-73.

11. KENNY A. FRANKS & PAUL F. LAMBERT, THE LEGACY OF DEAN JULIEN C. MONNET: JUDGE LUTHER BOHANON AND THE DESEGREGATION OF OKLAHOMA CITY'S PUBLIC SCHOOLS 7 (1983); see also DAVE R. MCKOWN, THE DEAN: THE LIFE OF JULIEN C. MONNET 242 (1973) (noting that Monnet's Harvard article "went over like an inebriated bum at a meeting of the Women's Christian Temperance Union").

12. See MCKOWN, *supra* note 11, at 245.

Constitution, it must be enforced.”<sup>13</sup> Unfortunately, a dean’s fidelity to constitutionalism was not then an academic freedom.<sup>14</sup> “That he retained his position [as dean] is perhaps something of a miracle . . . [F]or three years the Dean had to endure the obloquy and reproach which continued to shower down on him.”<sup>15</sup>

## II. *Brushing Aside a Thin Gauze of Words*

At the outset of the twentieth century, the U.S. Supreme Court seemed to have abandoned the task of enforcing<sup>16</sup> the Fifteenth Amendment,<sup>17</sup> even when litigants challenged state voter-registration schemes believed—apparently even by the Justices themselves—to be a “fraud upon the Constitution of the United States.”<sup>18</sup> As Professor Schmidt observed, “The Supreme Court’s response to black disfranchisement was to confess judicial impotence.”<sup>19</sup> Nevertheless, in 1912, the Dean’s position was that Oklahoma’s “grandfather clause” violated the Fifteenth Amendment of the U.S. Constitution.<sup>20</sup> He offered not only an argument, but a prophecy: “[I]f the Oklahoma case reaches the Supreme Court of the United States in a form that demands a decision on the constitutionality

13. FRANKS & LAMBERT, *supra* note 11, at ix, 3.

14. See MCKOWN, *supra* note 11, at 242 (“He indubitably proved that one could be both correct and righteous and still fail to win friends and influence people, especially politicians nursing a deep racial prejudice. Alas, there were far too many of this stamp in Oklahoma.”).

15. *Id.* at 245 (“Because of the scars accumulated out of this experience, there is no record that the Dean ever again entangled himself in the political thickets of Oklahoma. To the very great loss to education in general and to legal education in particular, there likewise is no evidence that he ever again contributed an article for publication.”).

16. See, e.g., *Giles v. Harris*, 189 U.S. 475 (1903) (upholding the dismissal of a challenge to allegedly fraudulent state voter-registration procedures, in part because the requested relief—an order to register a particular voter—was not a remedy for sweeping fraud); *Williams v. Mississippi*, 170 U.S. 213 (1898) (upholding Mississippi’s requirement that a voter show an understanding of the Constitution to the satisfaction of registrars); see also BICKEL & SCHMIDT, *supra* note 7, at 927; MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 37-38 (2004).

17. The Fifteenth Amendment provides:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XV.

18. *Giles*, 189 U.S. at 486.

19. BICKEL & SCHMIDT, *supra* note 7, at 923.

20. See Monnet, *supra* note 2, at 47-48.

of the act[.] . . . it will be held invalid.”<sup>21</sup> Three years later, the Dean’s prophecy was fulfilled in the landmark case of *Guinn v. United States*.<sup>22</sup>

The University of Oklahoma College of Law still displays many photographs of Dean Monnet for all faculty and students to see. There is still a statue just outside the south entrance. As many have noted, he never smiles. His face is not expressive, but the same cannot be said of the Dean’s Harvard article. To sustain his thesis and his prediction, Monnet made several points. First, though the Fifteenth Amendment conferred the right to vote on no one, it restricted the broad powers of the states by denying them the authority to draw lines among citizens based solely on “race, color, or previous condition of servitude.”<sup>23</sup> Second, Oklahoma’s “grandfather clause” was arbitrary and unreasonable,<sup>24</sup> despite the Oklahoma Supreme Court’s contrary opinion in *Atwater v. Hassett*.<sup>25</sup> Monnet believed that the clause probably violated the Equal Protection Clause of the Fourteenth Amendment,<sup>26</sup> even under the deferential principles employed by federal courts of the era.<sup>27</sup> Third, but most decisively, though the “grandfather clause” did not mention race explicitly, it could not be understood as anything but a denial of the right to vote on the basis of race and was therefore in violation of the Fifteenth Amendment.<sup>28</sup> Monnet pointedly questioned, “[I]s it not a trespass upon the dignity of a court to expect it to refuse to brush aside so thin a gauze of words?”<sup>29</sup> Finally, and anticlimactically, the Dean observed that it was not clear if the law supplied a remedy for the constitutional violation.<sup>30</sup>

As Dean Monnet noted, Oklahoma’s “grandfather clause” was only the “latest phase” in a regional pattern of deliberate exclusion of black citizens from the political process that began with Mississippi’s infamous convention and constitution of 1890.<sup>31</sup> Some of the southern states enacted laws with the aim of excluding blacks without excluding whites—although they did not say

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21. *Id.* at 59.

22. 238 U.S. 347 (1915) (holding that Oklahoma’s constitutional amendment—the “grandfather clause”—violated the Fifteenth Amendment of the U.S. Constitution).

23. See Monnet, *supra* note 2, at 43-48 (quoting, *inter alia*, U.S. CONST. amend. XV, § 1).

24. See *id.* at 49-53.

25. 1910 OK 299, 111 P. 802 (upholding Oklahoma’s “grandfather clause”).

26. The Equal Protection Clause of the Fourteenth Amendment provides, in pertinent part, “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

27. See Monnet, *supra* note 2, at 49-53.

28. See *id.* at 56-57.

29. *Id.* at 57.

30. See *id.* at 59-60.

31. See *id.* at 42.

so explicitly.<sup>32</sup> Other statutes were designed to achieve the same objectives by delegating “wide discretionary powers” to state officials.<sup>33</sup> The Dean contended that Oklahoma’s amendment was “the most sweeping attempt yet made constitutionally to include all whites and exclude all blacks from the privilege of voting.”<sup>34</sup> Oklahoma’s approach was a “definite classification, which itself accomplishe[d] the purpose.”<sup>35</sup> There was no need to depend on the discretion of local officials.<sup>36</sup>

As required by the conventions of good scholarship, the Dean placed his argument in context. It is true, he explained, that “suffrage comes not from the nation but from the state,”<sup>37</sup> and that “[s]trictly speaking the United States can have no national electorate.”<sup>38</sup> Even so, Monnet continued, the Fifteenth Amendment restricts state power and discretion. The federal government has “full power to protect the exercise of the franchise from any act of the state tending to deny or abridge it on the ground of race.”<sup>39</sup> The Dean also noted the factor that would eventually lead him to despair about a potential remedy: the Fifteenth Amendment’s impact is confined to race discrimination by state officers.<sup>40</sup> In 1912, as in 2010, this principle was “well-settled,” but its “application [was] not always clear.”<sup>41</sup> The issue of justiciability added another dimension to the problem because “mere passage of an unconstitutional law by the legislative authority . . . gives a right of redress to no one, for the reason that such an act as yet is legally harmless.”<sup>42</sup> Nevertheless, the Dean confidently asserted that constitutional law “stops short of . . . absurdity.”<sup>43</sup> Congress has a real and practical power to enact preventive and remedial legislation, he said.<sup>44</sup> Moreover, “under the Fifteenth Amendment the actions of the officers who actually reject a voter’s application to register or vote are the acts of the state and may be dealt with accordingly.”<sup>45</sup> Thus, he explained that the state itself need not be sued

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32. *Id.*

33. *Id.* at 43.

34. *Id.*

35. *Id.*

36. *See id.*

37. *Id.* at 45.

38. *Id.* at 46.

39. *Id.*

40. *Id.*

41. *Id.* at 47.

42. *Id.* at 47-48.

43. *Id.* at 48.

44. *See id.*

45. *Id.*

because individual officers acting under the authority of the state are accountable in federal court.<sup>46</sup>

Dean Monnet revealed his passionate objections—in the technical tones and terms of a scholar—when he assessed whether the “grandfather clause” violated the Equal Protection Clause of the Fourteenth Amendment.<sup>47</sup> He did not need to do this. His analysis was a digression from his central argument rooted in the Fifteenth Amendment. The Dean acknowledged, “It is not . . . under the Fourteenth but under the Fifteenth Amendment that these disfranchising acts have usually been sought to be overthrown.”<sup>48</sup> Hence, his Fourteenth Amendment argument seems designed to attack—in forceful terms—the decision of the Supreme Court of Oklahoma in *Atwater v. Hassett*.<sup>49</sup> In *Atwater*, Chief Justice Robert Lee Williams said that Oklahoma’s “grandfather clause” was “based upon a reason; that is, that any person who [had been] entitled to vote under a form of government on or prior to [January 1, 1866, was] still presumed to be qualified to exercise such right.”<sup>50</sup>

Oklahoma’s populism, like the populism of the era throughout the South, embraced a narrow concept of equality that stopped far short of racial equality. The author of the opinion in *Atwater*, Chief Justice Williams, adhered to the populist view that blacks should be excluded from politics. In one of his many lectures from the bench, he conveyed his disenchantment with the egalitarian precepts of populism: “Neither the Constitution nor Congress makes people equal. Some Socialists might preach the doctrine, but even God Almighty didn’t make people equal.”<sup>51</sup> Tragically, the chief justice was expressing a view dominant in Oklahoma.<sup>52</sup>

Responding to the conclusion of Chief Justice Williams, the Dean employed an apparently gentle tone—temporarily. He conceded that the “based upon a reason” claim seemed sound, but pointed out that the rationale was “much weakened” when one considered the fact that “the right [was] given to a

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46. *See id.*

47. *See id.* at 49-53.

48. *Id.* at 53.

49. 1910 OK 299, 111 P. 802.

50. *Id.* ¶ 34, 111 P. at 812.

51. EDWARD EVERETT DALE & JAMES D. MORRISON, PIONEER JUDGE: THE LIFE OF ROBERT LEE WILLIAMS 298 (1958), *quoted in* Harry F. Tepker, Jr., *The Judges of the Court of Appeals, in THE FEDERAL COURTS OF THE TENTH CIRCUIT: A HISTORY* 319, 357 (James K. Logan ed., 1992).

52. Williams would resign from the Oklahoma Supreme Court in 1914 to run for governor. Tepker, *supra* note 51, at 356. His decision in *Atwater* seems consistent with both his political philosophy and his own political self-interest.



former voter ‘under any form of government.’”<sup>53</sup> Accordingly, the Dean suggested that Williams’s assertion was “not wholly convincing.”<sup>54</sup>

Then Dean Monnet began a more forceful and biting attack on Chief Justice Williams’s argument that offspring of exempted individuals deserved an exemption from the duty to take a literacy test. In *Atwater*, Williams wrote, “The virtues and intelligence of the ancestor will be imputed to his descendants, just as the iniquity of the fathers may be visited upon the children unto the third and fourth generation.”<sup>55</sup> Oklahoma’s highest court, Monnet objected, stated “a principle opposed to American tradition and ideals.”<sup>56</sup> He argued, “Inheritance of governmental rights finds no sanction in American history or life. As the American electorate is the true ruler in this country, the adoption of the principle of inheritance in the choice of such ruler means a return to the rejected European system.”<sup>57</sup> More relevant to equal protection themes, the Oklahoma court’s presumptions were an offense against reason according to Monnet:

Can it be seriously contended that residence abroad is a rational qualification for voters as against residence at home? For it must be remembered that under the clause it is not even necessary that the foreigner be one who was permitted to vote in his own country or who lived in a nation having an electorate.<sup>58</sup>

When the Dean advanced this argument, it was the era of *Plessy v. Ferguson*.<sup>59</sup> Judges in the federal courts did not resist racism in state law.<sup>60</sup> Judges were not yet using the Fourteenth Amendment as a basis for “strict scrutiny” of legislation that either used “suspect classifications” or burdened “fundamental rights.” That well-known principle developed much later,<sup>61</sup>

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53. Monnet, *supra* note 2, at 51.

54. *Id.*

55. *Atwater*, ¶ 34, 111 P. at 812.

56. Monnet, *supra* note 2, at 51.

57. *Id.*

58. *Id.* at 52.

59. 163 U.S. 537 (1896) (holding that “separate but equal” places of public accommodation did not violate the Fourteenth Amendment’s Equal Protection Clause), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

60. See MICHAEL J. KLARMAN, UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY 82-87 (2007) (summarizing *Plessy*-era Supreme Court and lower federal court decisions deferring to “[a]n overwhelming consensus among whites [that] favored preserving ‘racial purity’” and state-initiated disenfranchisement practices).

61. See, e.g., *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942) (using an early form of “strict scrutiny” as a judicial means to strike down a state’s sterilization policy in order to protect the “basic civil rights of man” against “invidious discriminations”).

though with the benefit of at least a hint or portent in *Guinn*, Oklahoma's "grandfather clause" case.<sup>62</sup> When Monnet wrote, the Equal Protection Clause was still the argument of last resort, and judges tended to view an equal protection theory as a confession that a lawyer had little else in an argument to trust.<sup>63</sup> Dean Monnet surely knew this, but the equal protection theme allowed him to make a point—with passion, emphasis, and even indignation: "The equal protection of the Fourteenth Amendment does not prevent classification, and the question is, 'Is the classification or discrimination prescribed thereby purely arbitrary, or has it some basis in that which has a reasonable relation to the object sought to be accomplished?'"<sup>64</sup>

The early-twentieth-century standards of equal protection jurisprudence required little explanation from state governments, even for restrictions on voting.<sup>65</sup> So, when a state law-school dean concluded that the state's explanations were irrational and that the "grandfather clause" violated equal protection, Oklahoma political elites—and a powerful chief justice—felt the sting. The Dean committed an aggravated offense against the state's political order, because he was right:

These classifications are wholly arbitrary. They are not founded on any distinction referring to the suffrage itself. By no sort of reasoning can it be made to appear that residence in a foreign nation is a special qualification for voting in this, or that such non-residence is a better preparation for the franchise than residence in our own country, or that a voter is necessarily better qualified than another because he had an ancestor who voted.<sup>66</sup>

Monnet argued that Oklahoma was not only unreasonable, it was "extreme." For example, no other state had adopted the "most radical feature[]" of the Oklahoma scheme—permanence.<sup>67</sup> The Dean had additional problems with the apparent rationale of the law:

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62. See discussion *infra* Part III.

63. See, e.g., *Buck v. Bell*, 274 U.S. 200, 208 (1927) (rejecting an equal protection argument in the context of forced sterilization of mentally impaired persons).

64. Monnet, *supra* note 2, at 49. Dean Monnet also quoted renowned constitutional law scholar Thomas Cooley: "All regulations of the elective franchise must be reasonable, uniform, and impartial; they must not have for their purpose directly or indirectly to deny or abridge the constitutional right of citizens to vote. If they do, they must be declared void." *Id.* (quoting THOMAS COOLEY, *CONSTITUTIONAL LIMITATIONS* 758 (Alexis C. Angeli ed., 6th ed. Boston, Little, Brown & Co. 1890)).

65. See cases cited *supra* note 16.

66. Monnet, *supra* note 2, at 52.

67. See *id.*

It will hardly be seriously contended that an enactment requiring a property or educational qualification for all voters, but providing that the same should not apply to democrats, or masons, or those in the state residing north of the Canadian River, would be constitutional, not to speak of lineal descendants of such persons; yet such distinctions are hardly more artificial and arbitrary than the distinctions actually made.<sup>68</sup>

Thus, even under deferential standards of equal protection, the clause was “perhaps the most vulnerable to attack on constitutional grounds,” according to Monnet.<sup>69</sup> Without hesitation or qualification, Dean Monnet concluded that Oklahoma’s discriminatory clause “amount[ed] to a denial of the equal protection of the laws, for it is through the instrumentality of suffrage that our greatest protection comes.”<sup>70</sup> Dean Monnet then expressed scorn for Oklahoma’s policy and the chief justice’s reasoning (perhaps in terms similar to what a law student would have heard after making a poorly prepared argument in response to Socratic interrogation). Monnet borrowed and adopted a federal court’s denunciation of another state’s argument as his own final word about Chief Justice Williams’s claim that the “grandfather clause” was “based upon a reason”: “The statement is appalling, the outrage stupendous, the result close to the border land that divides outrage from crime. It is not necessary to discuss it further; likely the least said about it the better.”<sup>71</sup>

Next, Dean Monnet turned to the central Fifteenth Amendment issue. He acknowledged that “[a] case somewhat confidently relied on by advocates of the modern grandfather clause [was] *Williams v. Mississippi*.”<sup>72</sup> In that case, a white grand jury indicted a black man for murder.<sup>73</sup> Relying on an equal

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68. *Id.* at 53.

69. *Id.*

70. *Id.* This statement hints at the more modern principle that state restrictions on voting deserve special judicial attention. See *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627-28 (1969); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (both applying a formulation of “strict scrutiny” to state deprivations of the fundamental right to vote).

71. Monnet, *supra* note 2, at 53 (quoting *Mills v. Green*, 67 F. 818, 831 (C.C.D.S.C. 1895), *rev’d for lack of jurisdiction*, 69 F. 852 (4th Cir. 1895), *aff’d as moot*, 159 U.S. 651 (1895)); see also *supra* text accompanying note 50. The trial court’s opinion in *Mills* denounced as “appalling” the implications of South Carolina’s voter registration statute. See *Mills*, 67 F. at 831. The statute effectively ensured that if a voter failed to register or was disqualified from registering in 1882, he could never vote in any future election. *Id.*

72. Monnet, *supra* note 2, at 55 (citing *Williams v. Mississippi*, 170 U.S. 213 (1898)).

73. *Williams*, 170 U.S. at 213.

protection theory similar to that in *Strauder v. West Virginia*,<sup>74</sup> the defendant objected to the grand jury of only white men.<sup>75</sup> The jury was all white because jurors had to be electors,<sup>76</sup> and registration officials in Mississippi had broad, arbitrary power to exclude blacks from registering to vote.<sup>77</sup> Mississippi's constitution provided that electors must be able to read and write and to understand the Constitution of the United States to the satisfaction of registration officials.<sup>78</sup> Not surprisingly, after the adoption of the "understanding clause," black voter registration plummeted, while the levels of white voter registration decreased to a lesser degree.<sup>79</sup>

The defendant's attorney quoted the famous passage in *Yick Wo v. Hopkins* for the proposition that a facially neutral law may violate equal protection:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.<sup>80</sup>

In *Williams*, decided two years after *Plessy*,<sup>81</sup> the Court ignored its own words and distinguished *Yick Wo*: "[I]t has not been shown that [the] actual administration [of Mississippi's 'understanding clause'] was evil, only that evil was possible under [it]."<sup>82</sup> At this point in history, and for a long time thereafter, a judicial search for legislative motive was difficult and disfavored.<sup>83</sup>

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74. 100 U.S. 303 (1879) (holding that the categorical exclusion of black citizens from juries violated the right of a black criminal defendant to equal protection of the law).

75. See *Williams*, 170 U.S. at 213-14.

76. *Id.* at 214.

77. See *id.* at 223.

78. See *id.* at 217 n.1.

79. See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 85 (3d rev. ed. 1974); cf. ALBERT D. KIRWAN, *REVOLT OF THE REDNECKS, MISSISSIPPI POLITICS: 1876-1925*, at 71-76 (1951) (discussing the detrimental effect of Mississippi's "understanding clause" and poll tax requirements on both black and white voters, but demonstrating a greater impact on black voters overall).

80. *Williams*, 170 U.S. at 225 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (holding that racially discriminatory administration of a facially neutral law violated equal protection)).

81. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that "separate but equal" places of public accommodation did not violate the Fourteenth Amendment's Equal Protection Clause), overruled by *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

82. *Williams*, 170 U.S. at 225.

83. See KLARMAN, *supra* note 16, at 34-35.

Dean Monnet distinguished *Williams* rather than attacking it. According to the Dean, in the Mississippi case, there was nothing resembling a “grandfather clause” at issue.<sup>84</sup> Because the “understanding clause,” on its face, was no different from a literacy test, which remained constitutional and legal until the Voting Rights Act of 1965,<sup>85</sup> the issue was whether discriminatory administration could be proven.<sup>86</sup> By contrast, in the Oklahoma case, the issue was not discriminatory administration—proven or not; the problem was the plain meaning of the clause.<sup>87</sup> Monnet contended that race discrimination was apparent on the face of the amendment:

Does it not, when taken by its four corners, manifest an emphatic intention to do the exact thing forbidden by the Fifteenth Amendment, but to do it by the use of other language and of different modes of expression? If there can be any doubt of this intention, debates on such provisions are a legitimate method of throwing light upon it . . . .<sup>88</sup>

Here, the Dean focused on the decisive heart of the controversy. Would the U.S. Supreme Court examine the constitutional amendment to find its “fair intendment?”<sup>89</sup> Dean Monnet turned to the history of Louisiana’s “grandfather clause” because Oklahoma maintained no record of legislative debates. He explained, “[The debates] of the Louisiana constitutional convention on the Louisiana provision, which Oklahoma followed to a considerable extent, are available, and these show clearly, unmistakably, and without reserve an intention to thwart the Fifteenth Amendment and to deny suffrage to the negro because he is a negro.”<sup>90</sup>

Not content to rest on the uncertain quest for the meaning of legislative history, Dean Monnet continued, “[I]s not the language itself discriminatory? . . . And where the intent and meaning of language are so clear, is not the substance to be looked at rather than the form, and is it not a trespass upon the dignity of a court to expect it to refuse to brush aside so thin

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84. See Monnet, *supra* note 2, at 56.

85. Compare *Lassiter v. Northampton Election Bd.*, 360 U.S. 45 (1959) (holding that literacy tests did not violate the Constitution), with *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (finding that Congress may ban literacy tests); see also Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971 to 1973bb-1 (2006)) (superseding race-based state-law voting restrictions).

86. Monnet, *supra* note 2, at 56.

87. See *id.*

88. *Id.*

89. *Id.* at 42.

90. *Id.* at 56-57.

a gauze of words?"<sup>91</sup> The Dean emphasized that there was no alternative explanation either in Oklahoma or in the many other southern states that had embraced the tactic of disenfranchisement.<sup>92</sup>

Finally, the Dean addressed the issue of a remedy. His analysis was Jeffersonian,<sup>93</sup> disappointingly so. He knew that Oklahoma's behavior, like the conduct of other southern states, violated the law, and he drew a sound conclusion: "It is not an inspiring spectacle to see a portion of the organic law of the land rendered nugatory by apathetic assent, and it is not calculated to inspire respect for constitutions."<sup>94</sup> But being a practical man, he did not know what to do. Monnet was skeptical that there was, as so often promised, a remedy for every violation of a right.<sup>95</sup> He placed little faith in the utility of a civil suit, a criminal prosecution, or a suit in equity: "It is doubtful, therefore, if anything adequate can be done in the courts. It is another example of the truth often clearly observable in the history of English law that the remedy lags behind the right in spite of the familiar maxim to the contrary."<sup>96</sup>

The Dean also saw little relief coming from the nation's politics. Congress could pass additional enforcement measures, reduce the number of representatives from the South, or try to vindicate constitutionalism by repealing the Fifteenth Amendment (on the theory that it is better not to retain a provision so widely defied and violated).<sup>97</sup> But, Monnet concluded, "Congress contemplate[d] no such action."<sup>98</sup> Also, he knew that "public sentiment in neither the north nor the south would sustain a policy of radical enforcement. Public sentiment in the north [was] apathetic, while in the south the racial feeling [was] so powerful that endless new expedients would be resorted to in order to maintain the supremacy of the white race."<sup>99</sup> Unconvincingly, the Dean added that "the southern states [were] making the most of a bad situation. They ha[d] no desire to show disrespect for the Constitution, but on the other hand [could not] be expected, without strenuous effort to discover methods of correction, to accept intolerable conditions."<sup>100</sup> Regrettably, his ultimate recommendation lacked the force of his indictment

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91. *Id.* at 57.

92. *See id.* at 57-59.

93. *See* MCKOWN, *supra* note 11, at 239 ("The Dean especially liked the work of James Madison and the philosophy of Thomas Jefferson.").

94. Monnet, *supra* note 2, at 62.

95. *See id.* at 59-60.

96. *Id.* at 60.

97. Monnet, *supra* note 2, at 60-61; *see also* KLARMAN, *supra* note 16, at 70-71 (describing ambivalence about the amendment in the North).

98. Monnet, *supra* note 2, at 61.

99. *Id.* at 62.

100. *Id.*

of the Oklahoma Supreme Court rationale: "Whether the Fifteenth Amendment was ever necessary to protect a race newly born to civil rights, it must be apparent even to a casual observer of southern affairs at the present time that a persistent attempt to enforce it fully in the light of its initial conception would be little less than a national calamity."<sup>101</sup>

### *III. The Fate of the Grandfather Clause in Oklahoma*

One year after publication of his article, the issues raised by Dean Monnet came before the U.S. Supreme Court in *Guinn v. United States*.<sup>102</sup> Almost three years after the article, a unanimous Court found the constitutional issue to be clear.<sup>103</sup> The Court's unanimity and its perception of clarity, however, obscured its own past conduct and its own responsibility for widespread defiance of the Fifteenth Amendment. Almost forty years earlier in *United States v. Reese*, the Court struck down a federal law enforcing the Fifteenth Amendment.<sup>104</sup> This federal statute had been used to prosecute election officials for denying the vote to a black man alleged not to have paid a poll tax.<sup>105</sup> The Court insisted that federal enforcement measures could not target poll taxes, literacy tests, or other techniques of black disenfranchisement, but only state statutes that explicitly drew lines on the basis of race.<sup>106</sup> So, initially at least, the Fifteenth Amendment did not seem to be a formidable obstacle to disguised devices for black disenfranchisement. Cases like *Williams v. Mississippi* only underscored the apparent reality that the Supreme Court had abandoned the task of enforcing the Fifteenth Amendment.<sup>107</sup>

*Guinn* "grew out of the most unlikely circumstances."<sup>108</sup> Two Oklahoma election officers were convicted of the federal crime of "having conspired unlawfully, wilfully, and fraudulently to deprive certain negro citizens, on account of their race and color, of a right to vote at a general election . . . in 1910."<sup>109</sup> The indictment in the case specified that the black citizens were

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101. *Id.* at 62-63.

102. 238 U.S. 347 (1915).

103. *See id.* at 363-64.

104. *See* 92 U.S. 214 (1876).

105. *Id.* at 215.

106. *See id.* at 218.

107. *See* 170 U.S. 213 (1898); *see also supra* note 16 and accompanying text.

108. BICKEL & SCHMIDT, *supra* note 7, at 927.

109. *Guinn v. United States*, 238 U.S. 347, 354 (1915). Here, the Dean had made his only mistake of prophecy: he had predicted that a criminal prosecution would do no good for blacks injured by Oklahoma's law, and would be "even more likely to terminate unsuccessfully because of local prejudice and feeling." Monnet, *supra* note 2, at 60.

entitled to vote under state law and the Fifteenth Amendment.<sup>110</sup> Republicans had pressed for prosecutions, as had civil rights organizations.<sup>111</sup> Despite contrary orders from Republican President Taft, who was reluctant to enforce the Fifteenth Amendment, an insubordinate U.S. Attorney went forward with the prosecution.<sup>112</sup> Eventually, despite many facts and circumstances that might have derailed the case, both the Taft administration and, subsequently, the Democratic Wilson administration pressed the case before the U.S. Supreme Court.<sup>113</sup> During oral argument, Solicitor General John W. Davis “put the constitutional objections to the Grandfather Clause with elegant force. Whatever Davis may have lacked in zeal for the ultimate goal of black suffrage was overcome by his aversion to what he thought a patent evasion of the Constitution.”<sup>114</sup> The case was argued in October 1913, but it took over a year and a half for the Court to render judgment in a unanimous opinion written by Chief Justice Edward White.<sup>115</sup>

The Court’s opinion noted some of the political circumstances surrounding Oklahoma’s adoption of the only permanent “grandfather clause” in undramatic, even neutral phrases: The people had approved an amendment to the state’s constitution.<sup>116</sup> In the congressional election immediately following, two election officers had refused to allow black citizens to vote.<sup>117</sup> The officers had been indicted and tried before a district court that had advised the jury, accurately, that “by the 15th Amendment the States were prohibited from discriminating as to suffrage because of race, color, or previous condition of servitude.”<sup>118</sup> The trial court had further instructed the jury that Congress had exercised its enforcement authority to pass a statute providing as follows:

All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, . . . municipality, . . . or other territorial subdivision, shall be entitled and allowed to vote at all such elections without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or

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110. *Guinn*, 238 U.S. at 354.

111. See BICKEL & SCHMIDT, *supra* note 7, at 927-32.

112. See *id.* at 932.

113. See *id.* at 934-39.

114. *Id.* at 939.

115. *Id.* at 947. In reality, the opinion might not have been as clear and unanimous as it seemed. See *id.* at 945-47 (discussing the theory that the delay in rendering an opinion may have been due to divisions within the Court).

116. See *Guinn v. United States*, 238 U.S. 347, 355 (1915).

117. *Id.*

118. *Id.*



Territory, or by or under its authority, to the contrary notwithstanding.<sup>119</sup>

Finally, the trial court had charged the jury that

if [the defendant officers] knew or believed these colored persons were entitled to vote, and their purpose was to unfairly and fraudulently deny the right of suffrage to them, or any of them entitled thereto, on account of their race and color, then their purpose was a corrupt one, and they cannot be shielded by their official positions.<sup>120</sup>

The case presented two questions, as stated by the Court of Appeals for the Eighth Circuit, which had certified the issues for Supreme Court review.<sup>121</sup> Both addressed the apparent conflict between the “grandfather clause” and the Fifteenth Amendment.<sup>122</sup>

After summarizing the arguments of the parties, the Court approached the Fifteenth Amendment issue in technical and legalistic language.<sup>123</sup> Little in the opinion is remembered for grace, eloquence, or the capacity to inspire. The Justices saw the differences between the parties as “much narrower than [they] would seem to be.”<sup>124</sup> When the awkward language is sorted out, it appears that the Justices reached a rather simple conclusion: if the Oklahoma law did not violate the Fifteenth Amendment, it would be hard to imagine what law would. The Court observed that Oklahoma’s constitutional provision “involve[d] an unmistakable, although . . . somewhat disguised, refusal to give effect to the prohibitions of the Fifteenth Amendment by creating a standard which . . . call[ed] to life the very conditions which that Amendment was

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119. *Id.* at 355-56 (quoting REV. STAT. § 2004 (originally enacted as Act of May 31, 1870, ch. 114, § 1, 16 Stat. 140) (current version at 42 U.S.C. § 1971 (2006))).

120. *Id.* at 356.

121. *Id.* at 356-57. The Eighth Circuit asked,

1. Was the amendment to the constitution of Oklahoma . . . valid?

2. Was that amendment void in so far as it attempted to debar from the right or privilege of voting for a qualified candidate for a Member of Congress in Oklahoma, unless they were able to read and write any section of the constitution of Oklahoma, negro citizens of the United States who were otherwise qualified to vote . . . , but who were not, and none of whose lineal ancestors was, entitled to vote under any form of government on January 1, 1866, or at any time prior thereto, because they were then slaves?

*Id.*

122. *See id.*

123. *See id.* at 360-63.

124. *Id.* at 361.

adopted to destroy and which it had destroyed.”<sup>125</sup> Though the terms of the Oklahoma law did not mention race, it was clear to the Justices that race discrimination was the sole motivation for the “grandfather clause,” as Dean Monnet had argued in his article.<sup>126</sup> Focusing on the meaning of the Fifteenth Amendment, the Justices made several points. First, the provision “[did] not take away from the state governments in a general sense the power over suffrage which ha[d] belonged to those governments from the beginning” of the Republic.<sup>127</sup> The Court also bowed deeply in the direction of federalism doctrine and its foundational importance, stating that the states’ power over voting qualifications was essential to “the division of state and national authority under the Constitution.”<sup>128</sup> According to the Court, the Fifteenth Amendment contemplated no change in these principles, without which “both the authority of the nation and the State would fall to the ground.”<sup>129</sup>

Second, however, it was equally clear to the Justices that broad state discretion was subject to the limit imposed by the Fifteenth Amendment. The Court maintained that neither the federal government nor the state governments could abridge or deny voting rights because of race, color, or previous condition of servitude.<sup>130</sup>

The next step in the Court’s analysis was to assess Oklahoma’s purpose. The Court did so without considering legislative history, but it did not ignore the past altogether.<sup>131</sup> The Court noted that the “grandfather clause” itself did not refer to race.<sup>132</sup> Instead, it drew lines based on a date in the past: January 1, 1866.<sup>133</sup> If a person could vote on that date, the law did not require him to take a literacy test.<sup>134</sup> Moreover, a lineal descendant of such a person was not obligated to take a literacy test.<sup>135</sup> Even persons residing in foreign countries on that date or descendants of such persons were exempt from the test.<sup>136</sup> The key passage in the Court’s opinion is not particularly memorable, but it has the virtue of clarity, and it even ends with a touch of sarcasm directed against Oklahoma and the state’s supreme court:

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125. *Id.*

126. *See id.* at 364-65; *see also supra* text accompanying notes 28-29.

127. *Guinn*, 238 U.S. at 362.

128. *Id.*

129. *Id.*

130. *Id.*

131. *See id.* at 364.

132. *Id.* at 364-65.

133. *Id.*

134. *Id.* at 364 (quoting OKLA. CONST. of 1907, art. 3, § 4a (1910)).

135. *Id.*

136. *Id.*

It is true [Oklahoma's law] contains no express words of an exclusion from the standard which it establishes of any person on account of race, color, or previous condition of servitude prohibited by the Fifteenth Amendment, but the standard itself inherently brings that result into existence since it is based purely upon a period of time before the enactment of the Fifteenth Amendment and makes that period the controlling and dominant test of the right of suffrage. In other words, we seek in vain for any ground which would sustain any other interpretation but that the provision, recurring to the conditions existing before the Fifteenth Amendment was adopted and the continuance of which the Fifteenth Amendment prohibited, proposed by in substance and effect lifting those conditions over to a period of time after the Amendment, to make them the basis of the right to suffrage conferred in direct and positive disregard of the Fifteenth Amendment: And the same result, we are of opinion, is demonstrated by considering whether it is possible to discover any basis of reason for the standard thus fixed other than the purpose above stated. We say this because we are unable to discover how, unless the prohibitions of the Fifteenth Amendment were considered, the slightest reason was afforded for basing the classification upon a period of time prior to the Fifteenth Amendment. Certainly it cannot be said that there was any peculiar necromancy in the time named which engendered attributes affecting the qualification to vote which would not exist at another and different period unless the Fifteenth Amendment was in view.<sup>137</sup>

Of some historical note, the Justices hinted at an approach that emerged later in constitutional history. The Court concluded that the case involved "the establishment of a right whose exercise lies at the very basis of government."<sup>138</sup> Given the importance of the right to vote, the Court explained that "a much more exacting standard is required than would ordinarily obtain where the influence of the declared unconstitutionality of one provision of a statute upon another and constitutional provision is required to be fixed."<sup>139</sup> The Chief Justice used opaque language, but it was still a portent of the "strict scrutiny" analysis of later years.<sup>140</sup> He suggested that even if a court must

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137. *Id.* at 364-65.

138. *Id.* at 366.

139. *Id.*

140. *See supra* note 70.

defer to the state's power on literacy tests generally, it must not do so if a law's effect was intended racial exclusion.<sup>141</sup> Ultimately, Oklahoma lost because it could not provide a plausible explanation for drawing lines based on January 1, 1866.

*Guinn* is an exceptional case of the *Plessy* era. Throughout the end of the nineteenth century and the beginning of the twentieth, southern Democratic politicians, with the aid of the Supreme Court, fulfilled campaign promises to restrict the African American's place in society.<sup>142</sup> The effective exclusion of blacks from southern politics resulted in the parallel and intended consequence of legally mandated segregation on streetcars, in waiting rooms, in hospitals, in prison, in housing, and in cemeteries.<sup>143</sup> The laws imposed segregation even in the most trivial places—for example, at drinking fountains.<sup>144</sup> The Oklahoma Legislature made its proud contribution in 1915, the same year the Supreme Court decided *Guinn*, by mandating segregation in telephone booths.<sup>145</sup>

*Guinn* was not the end of the story, even in Oklahoma, because the Sooner State was stubbornly committed to its policy of thinly disguised racism. After *Guinn*, the state legislature passed a statute exempting persons who had voted in the 1914 general election from the need to register to vote.<sup>146</sup> All other persons were required to register within a twelve-day period in 1916 or they would be permanently disenfranchised.<sup>147</sup> The statute was signed by Governor Robert Lee Williams in 1916,<sup>148</sup> the same Robert Lee Williams who had ruled on the “grandfather clause” in *Atwater*.<sup>149</sup> No blacks had voted in 1914 because the “grandfather clause” was still in effect.<sup>150</sup> Thus, the same citizens barred by the unconstitutional “grandfather clause” would face permanent disenfranchisement if they did not act promptly. The law was a transparent evasion of *Guinn*, but it took two decades before the evasion was challenged.

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141. See *Guinn*, 238 U.S. at 366.

142. See WOODWARD, *supra* note 79, at 82-93.

143. See *id.* at 97-102.

144. See *id.* at 98.

145. *Id.* at 101-02.

146. 26 OKLA. STAT. ANN. § 74 (1937) (originally enacted as Act of Feb. 26, 1916, ch. 24, § 4, 1916 Okla. Sess. Laws 34), *invalidated by* *Lane v. Wilson*, 307 U.S. 268 (1939).

147. See *Lane*, 307 U.S. at 275-76.

148. Williams served as governor from 1915 through 1919. See Oklahoma Governors Since Statehood, <http://www.ok.gov/governor/govlist.htm> (last visited Mar. 7, 2010).

149. See *Atwater v. Hassett*, 1910 OK 299, 111 P. 802; see also *supra* text accompanying notes 50-52.

150. Recall that the clause remained effective until 1915. See *Guinn v. United States*, 238 U.S. 347 (1915).

In 1938, the 1916 statute came before the U.S. Court of Appeals for the Tenth Circuit,<sup>151</sup> which would eventually render better decisions and make its own contributions to the fight for racial equality under the law.<sup>152</sup> Unfortunately, the Tenth Circuit also once rendered judgments that perpetuated the shame of race discrimination. The case of *Lane v. Wilson* was one such case.<sup>153</sup> When the case was argued, one of the four judges on the circuit was the former Oklahoma chief justice and governor, Robert Lee Williams.<sup>154</sup> Of course, he did not sit on the panel that rendered judgment.<sup>155</sup> Nevertheless, the Tenth Circuit upheld the political work of their colleague. In an opinion that strains credulity, the appellate panel ruled that blacks who had been barred from voting and whites who had not voted, for whatever reason, in the 1914 elections “were on the same footing.”<sup>156</sup> Therefore, according to the court, there was no discrimination.

The petitioner (plaintiff below) appealed to the U.S. Supreme Court, which was not persuaded by the arguments of Oklahoma or the analysis of the Tenth Circuit.<sup>157</sup> Justice Felix Frankfurter wrote the opinion of the Court and explained the problem with Oklahoma’s attempt to make an end run around *Guinn* and the Fifteenth Amendment: “The Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race.”<sup>158</sup> Even Frankfurter, a dedicated advocate of judicial self-restraint, thought that the facts “[left] no escape from the conclusion that the means chosen as substitutes for the invalidated ‘grandfather clause’ were themselves invalid under the Fifteenth Amendment.”<sup>159</sup>

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151. *Lane v. Wilson*, 98 F.2d 980 (10th Cir. 1938), *rev’d*, 307 U.S. 268.

152. *See, e.g., Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970) (anticipating disparate-impact theory in Title VII law); *Brown v. Bd. of Educ.*, 98 F. Supp. 797 (D. Kan. 1951) (ruling for the school board, but including findings of fact helpful to the plaintiffs in subsequent litigation before the U.S. Supreme Court). The significance of both the *Jones* and *Brown* cases in American legal history is discussed in Tepker, *supra* note 51, at 363-66, 398-99.

153. *See* 98 F.2d 980.

154. *See generally* DALE & MORRISON, *supra* note 51, at 279-300.

155. *See Lane*, 98 F.2d 980.

156. *Id.* at 984.

157. *See Lane v. Wilson*, 307 U.S. 268 (1939).

158. *Id.* at 275.

159. *Id.* at 277.

#### IV. Legacy

In our own time, it is difficult to weigh the contributions of a man like Dean Monnet with both respect and appropriate perspective. There is a tendency to embellish. Praise from the legal profession or Oklahoma political elites seems self-congratulatory or even defensive, as if designed to cover up past complicity in past discrimination.

Dean Monnet's article was a defense of law and constitutionalism. It was a response to the conduct of many states justly alleged to be "a fraud upon the Constitution of the United States."<sup>160</sup> It was also an expression of hope and confidence that the Supreme Court might yet do a better job of upholding the law. It made an important contribution to the quest for justice, even if it was not a prophetic tract on the need for racial equality. He proposed no blueprint or reform designed to progress toward a liberal, integrated society. As a man of his time and place, he expressed some sympathy for what he perceived to be the plight of white citizens in southern communities. Some of his words—skeptical, conservative, even fearful—provoke a justifiable impatience in modern readers.

Perhaps Julien Monnet is best understood as an Atticus Finch, the fictional protagonist of *To Kill A Mockingbird*,<sup>161</sup> who understood his duty to the law, even if, because of paternalism or a prevalent regional habit of stereotyping, he did not understand the depth and intractability of the law's injustice to his black neighbors. Recently, there is a pattern in American legal scholarship to discount the contributions of men like the fictional Finch. Does he really deserve a symbolic place as "a role model for the legal profession"?<sup>162</sup> Today, some academics and social critics—with the advantage of a retrospective view—argue that he does not.<sup>163</sup> Finch lacked outrage. He was inclined to accommodation. He showed insufficient zeal for reform. He was not a civil rights activist. It is not enough that Finch fought—at great risk to home, family, and future—to save a black man unjustly accused of raping a white girl. It is not enough that he did his duty. His fight must meet twenty-first-century standards and sensibilities. Critics opine that the fictional Finch ought to have done more. Such arguments use a modern reading of a 1960 novel depicting a Depression-era rape trial to show "how badly the brand of

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160. *Giles v. Harris*, 189 U.S. 475, 486 (1903).

161. HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

162. Malcolm Gladwell, *The Courthouse Ring: Atticus Finch and the Limits of Southern Liberalism*, NEW YORKER, Aug. 10 & 17, 2009, at 26, 27.

163. See, e.g., *id.*

Southern populism Finch represents has aged over the past fifty years.”<sup>164</sup> Of course! There is an absurdity and an intellectual arrogance when a historian uses moral standards established and prevalent in one age to retrospectively judge a person or a people of an earlier age.<sup>165</sup> As Henry Steele Commager once wrote, “The historian’s task is not to judge but to understand.”<sup>166</sup>

Finch’s fight against a race-baiting prosecution was a fictionalized act of professionalism and bravery to serve the law. He defended his client zealously, eloquently, and in good faith. There is honor in that act alone. In retrospect, despite possible anachronistic criticism based on the standards of many years later, a similar respect is owed to Julien Monnet: His article was professional and courageous. As the leader of an academic institution, he displayed the virtues of a legal scholar. He used the tools of logic and realism to see Oklahoma’s law for what it was. He took his stand, which was derived from a concern for constitutional integrity.

Dean Monnet could take personal and professional satisfaction that the U.S. Supreme Court vindicated his position—twice. Whether he did so is unknown. He predicted the results and accurately set forth a compelling rationale for them. The role his article played in the deliberations of the Justices is also unknown; however, it seems probable that the Justices noticed the testimony of the dean of the state’s law school about the inescapable meaning and purpose of the “grandfather clause”—and his response to the rationale of a disturbing decision of the Oklahoma Supreme Court—in the pages of the *Harvard Law Review*. Both the Monnet article and the *Guinn* opinion set aside the principle that legislative motivation ought not to be a basis for constitutional judgments; both found the facts clear and unmistakable. The Justices did not venture to discuss equal protection issues, but they were unanimous in not finding any basis in reason for the clause, just as Dean Monnet had argued.

*Guinn* probably made little practical difference to black residents in Oklahoma.<sup>167</sup> Still, as Michael J. Klarman has observed in a comprehensive, skeptical assessment of the Supreme Court’s decisions on race discrimination,

Court decisions can matter in ways other than producing concrete changes in social practices. Perhaps the civil rights victories of the Progressive Era should be seen as “more symbols of hope than

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164. *Id.* at 28.

165. See HENRY STEELE COMMAGER, *THE SEARCH FOR A USABLE PAST* 314-22 (1967) (summarizing historians’ professional arguments in favor of restraint and perspective when rendering moral judgments).

166. *Id.* at 316.

167. KLARMAN, *supra* note 16, at 460.

effective bulwarks against the racial injustice that permeated American law.” Success for any social protest movement requires convincing potential participants that its goals are feasible. . . . At a time when the oppression of southern blacks seemed immutable, perhaps “[Chief Justice White’s] Court shook the illusion that this arrangement was permanent.”<sup>168</sup>

Apart from questions about the social worth of *Guinn* or *Harvard Law Review* articles generally, Monnet’s fine argument promoted a vision of law “calculated to inspire respect for constitutions.”<sup>169</sup> This professional dedication alone helps to explain one reason why he is remembered as “a highly competent, efficient, and principled dean.”<sup>170</sup> Julien Monnet taught his students to care, above all, about the quality of law—as all deans, students, judges, and lawyers should.

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168. *Id.* at 93.

169. Monnet, *supra* note 2, at 62.

170. LEVY, *supra* note 1, at 222.