IN THE ARENA: THE TEXAS SUPREME COURT’S STEADY REIN ON RAILROADS AND BIG BUSINESS, 1880 – 1900

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Like the pre-Lochner United States Supreme Court, the late nineteenth century Texas Supreme Court did not see its role as one of protecting big business from government regulation. Texas courts did not, as a rule, use judicial activism to defend \textit{laissez-faire} economics. Rather, like many other courts, state and federal, the Texas Supreme Court allowed the other two branches of government a relatively free hand in regulating business in general and railroads in particular. This is not to say that the Texas court was anemic or passive. In fact, the Texas Supreme Court went well beyond merely deferring to legislative regulation. It exercised its own decision-making authority to defend what Paul Kens calls “the rights of the community.” In those days, most of these rights were enshrined in the judge-made common law, particularly the law of torts. Here the Texas courts began to use judicial power to carefully adapt common law rules to protect ordinary people from new industrial behemoths and their powerful corporate masters. This development of the tort law in Texas illustrates one way in which Paul is correct in saying that pre-Lochner courts across the nation saw their decisions \textit{not} as balancing the “rights” of big business against the regulatory power of \textit{government}, but as balancing them against the common law \textit{rights of the broader community}.

In Texas, this new jurisprudence was ushered in by a new generation of self-consciously professional “common law” judges. Between 1881 and 1883, all three seats on the Texas Supreme Court changed hands. Emblematic was Governor O.M. Roberts’ appointment of John W. Stayton as associate justice in 1881. Stayton’s career on the
court would span thirteen years, half of them as chief, and his scholarship would become legendary. He was said to have read forty pages of law every day of his adult life, excepting only Sundays.¹

The new Chief Justice elected in 1882, Asa Willie, was also a more modern man than his incumbent opponent Robert S. Gould. A well-connected railroad lawyer, Willie won by aggressively working the Democratic convention and its delegates, thus denying Chief Justice Gould the party nomination tantamount to election. Gould, however, never accepted this explanation. The convention occurred at a time when eastern railroad tycoon Jay Gould was a major bogey man among Democrats, especially in the agrarian states of the South and West. For the rest of his life, Judge Gould believed himself the unfortunate victim of an inauspicious surname. Given more recent Supreme Court history, his self-justification is not altogether implausible.²

When Chief Justice Willie resigned the bench after only six years in office, Governor “Oxcart” John Ireland elevated Justice Stayton to take his chair. Stayton’s opinions, and those of his successor as chief, Reuben Reid Gaines, laid the groundwork for much of modern Texas law. Together, Stayton and Gaines symbolized the professionalization of the bench and bar that occurred in the late nineteenth century. They witnessed the establishment not only of the University of Texas School of Law in 1883, but of the Texas Bar Association in 1882 as well.³

Some statistical comparisons demonstrate the change in the court that occurred around 1883. In 1882, when Robert S. Gould was chief justice, the old court, with the sole exception of its new member, Stayton, evidenced a clear mistrust of large jury verdicts, particularly but not exclusively in railroad tort cases.⁴ These railroad cases were
still dwarfed in number, however, by the more common real estate and contract disputes. But in 1883, the first year of the Willie court, these proportions and the court’s attitudes both began to change. The largest single category of case by far was still real estate, but commercial sales and common carrier cases were beginning to increase, an indication of heightened economic activity and a growing transportation industry. More importantly, the court now began *upholding* substantial verdicts against railroads in personal injury tort cases.\(^5\)

Then, after 1883, the mix of cases heard by the Court continued to change dramatically. In 1882 and 1883, only 10 to 13 percent of the opinions had dealt with railroads or telegraph operators. But by 1884, the number of cases involving railroad and telegraph companies mushroomed to about 20 percent, and it stayed at that level throughout the 1880’s and 1890s until it reached 25 percent in 1895. And railroad and telegraph cases continued to comprise about 25 percent of the court’s docket for the remainder of the nineteenth century. The new transportation and communication technologies not only generated legislative regulation--they became a major subject of judicial scrutiny through the litigation they produced.

These trends further accelerated throughout the 1890s. When Chief Justice Stayton died suddenly in 1894, Justice Gaines was the logical choice to replace him as chief.\(^6\) The man who took Gaines’ vacated associate justiceship was Leroy G. Denman of San Antonio, who served until 1899 as one of only two justices appointed by Governor James Stephen Hogg, Texas’ self-proclaimed champion of the common man against railroads and big business.\(^7\)
Somewhat more controversial was Hogg’s other Supreme Court appointee, Thomas Jefferson Brown, who was appointed in 1893. Brown, according to a contemporary, “was among the ablest and most efficient of those leading citizens of Texas who succeeded in curbing railroad aggression in several directions…Several persons connected with corporations in Texas…did not welcome the appointment of Justice Brown.” In 1889, four years before his appointment, he had been the first member of the legislature to co-author a bill for the creation of a Railroad Commission. The following year, a constitutional amendment was passed and then in 1891, the legislature established a Railroad Commission to regulate transportation rates and operations.8

These judges of the 1890s, Gaines, Denman, and Brown, increasingly had to deal with new issues, including prohibition, women’s rights, worker’s rights, railroad regulation, and trust busting. And yet, in the 1890s the Court protected community rights against big business with greater unanimity than ever before. Amazingly, for the eighteen years between 1883 and 1900, there were no dissents or concurring opinions whatsoever, a record of almost unheard of consenus. And this consensus held at just the time when the rapid growth of American industry, lower farm prices, and massive immigration into northern cities, created substantial economic and social uncertainty that manifested itself in the populist movement. Deflation in farm prices was particularly acute, and Texas, still an agrarian state, was particularly hard hit by the recession that lingered from 1893 to 1896.9 As a result, the populist protest movement that swept through the South and West in the 1880s and early 1890s was stronger in Texas than anywhere else.

As Paul has already noted, the growing populist movement and its ability to persuade state and federal legislatures to regulate big business produced a counter-
revolution in the 1890s within the most conservative branch of government, the bench and bar. But while the eastern state bar associations, the A.B.A., and the contributions of corporate and railroad lawyers to the new national law reviews were combining to launch a judicial counter-attack against legislative regulation that would culminate in *Lochner*, that campaign met serious opposition within the bars of the agrarian southern and western states like Texas. For example, at the 1896 Meeting of the Texas Bar Association, Seymour D. Thompson railed against “government by lawyers” and warned that the entire rule of law was in danger of collapse unless the bar stopped undermining public confidence in the system by inventing novel legal theories to help monied interests avoid laws designed to protect ordinary people. This battle among members of the bar (and their clients) played itself out in tort cases seeking compensation for victims of new industries and in constitutional cases challenging government regulation of big business.

In Texas, Stayton and Gaines were able to craft a remarkable consensus within the Supreme Court that would demonstrate that the common law was flexible enough to deal with these new political and economic realities, but not so flexible as to undermine the foundations upon which it was based. Above all else, the institutional credibility of the judiciary had to be maintained, and to do so required walking this fine line between rigidity and progress. One side of this balance was achieved by deferring to legislative regulation of big business. The other involved modest adjustments to the common law to provide *some* remedy for farmers and workers injured by the new-fangled machinery of industry.

As to the legislative side of the balance, the Railroad Commission demanded by populists was upheld at least twice in Texas appellate courts. First, in the 1894 case of
The populist legislative program also included new laws against combination, monopoly, and other predatory practices of large corporations. As the Supreme Court would later describe the situation, in the year 1888 the agitation “seems to have become general, and in 1889 many legislatures, including our own, made laws for the purpose of punishing and repressing such conspiracies.” In 1889, two years before creation of the Railroad Commission, the legislature enacted Texas’ first anti-trust law as a result of this public outcry, and the federal Sherman Act was passed the following year.¹⁵

The Texas anti-trust law was quickly challenged in Houck and Dieter v. Anheuser-Busch Brewing Association.¹⁶ In that case, Busch sued its distributors Houck and Dieter to make them pay for beer they bought. The distributors responded that they themselves had been damaged in excess of the price of the beer because Anheuser-Busch
reneged on an agreement appointing Houck and Dieter as exclusive Budweiser distributors in El Paso County. Anheuser Busch’s rejoinder was that it had broken that agreement because passage of the new anti-trust law had made it an illegal restraint of trade. In response, Houck and Dieter then had to claim that the anti-trust law was itself unconstitutional. Chief Justice Gaines made short work of that argument and held that the statute was fine…They had to pay for the beer.

However, while Gaines had no intention of exhibiting the judicial activism required to strike the act down as unconstitutional, he was not averse to limiting its application so as to ameliorate its effects upon certain classes of business. In Queen Insurance Company v. State, Gaines required an uncharacteristically long opinion to explain why the 1889 anti-trust statute in no way limited or affected the activities of the growing insurance industry.

Gaines painstakingly documented his understanding of the public debate that generated the anti-trust law, and he came to the conclusion that the law was motivated by a desire to control combinations to fix rates and prices only in the transportation and communication industries. This was another balancing act, an odd form of judicial restraint. Rather than interpreting the words of the statute by their literal meaning, Gaines was careful to restrict their application to only those industries the public complained of at the time the law was adopted. The Court would give the legislature free rein to satisfy popular demands for action, but it would construe the legislature’s enactments narrowly, requiring that attempts to circumscribe corporate power be so specific as to leave no doubt of the intention of both the legislature and the public.
Meanwhile, on the other side of the ledger, the Court was similarly progressive but moderate in expanding the common law remedies its own branch of government controlled against railroads and other big corporations. For example, in *Houston & Texas Central Railway Company v. Simpson*, a teenager had his right leg caught and crushed in a turn-table on the railroad’s property. Turn-tables were generally located at the end of a rail line and their function was to allow railroad employees to turn a locomotive around 180 degrees. The trial of the case resulted in a verdict of $3,500.00 for Simpson’s injuries. In upholding this rather large verdict by contemporary standards, the Court, for the first time, adopted the doctrine of attractive nuisance. This doctrine holds that while adult trespassers are unable to sue a landowner for injuries unless intentionally attacked, an “attractive nuisance” constitutes an exception in the case of children injured by mere negligence.

This case represents, in a sense, the beginning of modern tort law in Texas; the kind of tort law that takes cognizance of modern technological and psychological reality. While the Simpson boy was technically a trespasser on the railroad company’s land, and while landowners generally owe trespassers no duty of care, courts in other states had begun making exceptions for minors, and in this case Justice Stayton, speaking for a unanimous court, also rejected formalism in light of the realities of the situation. The later case of *Texas & Pacific Railway Company v. Gay* evidenced a similar solicitude toward adult victims of railroad accidents. The Gays won the suit and were awarded substantial damages. When the Supreme Court affirmed this verdict, it took the occasion to vent its concern over the callous corporate conduct that was causing more and more personal injuries. In discussing the damning testimony of the railroad’s own employees...
on the subject of post-accident modifications to their safety procedures, the Court went out of its way to allow the evidence, a decision particularly noteworthy in that such testimony was inadmissible in most other states and would soon come to be excluded in Texas as well.23

Again though, the court tempered liberality with moderation. While the Stayton/Gaines court liberalized common law liability standards to account for the realities of modern life, it guarded against overly liberal damage awards with equal vigor. A group of telegraph cases from the 1880s wonderfully illustrated the way this court, early on, charted a moderating course between the Scylla of denying any redress to the injured on the one hand, and the Charybdis of runaway jury awards against businesses on the other. These cases initiated two interconnected discourses within Texas law that remain confused and controversial: what to make of torts that arise between parties to a contract (now often known as “con-torts”); and how to understand mental anguish and other “intangible” damages.

In 1883, twin cases of the same name, Gulf, Central, & Santa Fe Railway Co. v. Levy,24 represented the first pronouncement by the Supreme Court that mental anguish damages might sometimes be recovered in the absence of physical injury. Just two years before, a lower court had allowed a similar claim on the simple theory that since it was foreseeable to the telegraph company that intense mental distress would result from its failure to deliver emergency messages, any injury of that sort sustained by the addressee was recoverable as actual damages. The court rejected the claim of the telegraph company that anguish unaccompanied by physical injury was not real damage in its own right.25
Then in 1885, the court, in *Stuart v. Western Union Telegraph Company*\(^\text{26}\), affirmed the liberal *Levy* rule but limited its application to suits by paying customers. In this case, Stuart had not received a telegram informing him that his brother had taken a turn for the worse and was on his deathbed. As a result, Stuart missed seeing his brother before death, and he also missed the funeral. The Supreme Court, citing a haphazard assortment of previous cases where some form of mental or emotional injury had been recognized here or there, emphatically rejected the argument that mental anguish was only compensable when accompanied by physical injury.\(^\text{27}\)

As Justice Stayton put it:

...the fact that it may be found difficult to ascertain the exact amount of compensation which ought to be made for an injury ... is not considered as any sufficient reason why compensation should not be given ... if one person be unlawfully wounded by another, the damages he may recover as compensation will not be restricted to such sums of money as may be equal to the value of time lost, money necessarily expended in treatment with a view to recovery, and other like matters; but the physical pain resulting from the wounding, enters into the estimate as a factor calling for compensation, more or less, as the pain may have been slight or severe, or of short or long duration. If such a wounded person’s condition, resulting from the unlawful act, be such as to cause mental suffering, this is also to be taken into estimate. Why?... Each of these elements for damages goes back to a common source of right to compensation – the act of the violator of a right secured by contract or the general law of the land; and whatsoever necessarily results to the injured person from the act ... must give legal claim for compensation...\(^\text{28}\)

It would be difficult to find a more persuasive, or an earlier, exposition of the justification for juries awarding pain and suffering and mental anguish as money damages in civil cases. It is ironic that almost precisely one hundred years after this statement by one of the Court’s most eminent jurists, the more political branches of government, responding to public pressure, began to undermine it.
The Stayton/Gaines Court felt free to use common law reasoning in this way to extend mental anguish recoveries from their traditional domain of intentional torts into the realm of ordinary negligence because of the fortuitous fact that Texas had inherited from Mexico a “fact based” rather than a “formulaic” system of pleading. This allowed the Court some latitude in applying existing remedial doctrines to new fact situations.  

Another example of how the court used this kind of legal elasticity to respond to new realities is the 1884 case of Jones v. George. In that case, Jones sued George on a theory of “breach of warranty.” Jones was a cotton farmer, and George was a druggist who sold him a patent medicine for killing worms. It turned out that it did not. Justice Stayton held that whether the suit was denoted as one on an implied warranty or on a breach of contract “the relief would be the same.” This case gave rise to an entire jurisprudence within the state of implied warranty liability in impure food, drug, and commodity situations.

The odd case of Wright v. Tipton, is an illustration of the simultaneous conservatism, paternalism, and increased solicitude towards women of the late nineteenth century Court. It also presents a good case study of how these attitudes facilitated judicial enforcement of legislative regulations of business. In 1887, in the throes of the debate over temperance, the legislature passed a law empowering women to prevent liquor sales to their husbands. In this case, Mrs. Tipton had sued Wright, a saloon keeper, alleging that he violated the statute by selling her husband liquor after her written notification not to do so. Wright, the saloon keeper, argued that the old common law rule required that Mr. Tipton join her as a plaintiff in the lawsuit. Mr. Tipton, the drinker, of course declined to do so. Justice Thomas Jefferson Brown, a tee-totaling populist, had no
problem disposing of that argument. The new 1887 statute, Brown held, “was intended to do just what the language expresses, that is, to give the wife the right to sue in her own name …”33 It is an instructive case indeed that brings together the social and political currents of women’s rights, temperance, prohibition, and judicial paternalism in an opinion of less than two pages.

In summary, then, from 1882 to 1900, the Texas Supreme Court presided over by Asa Willie, John Stayton, and Reuben Gaines compromised between hidebound adherence to tradition on the one hand and freewheeling judicial activism on the other. Pragmatism ruled. Throughout this period, the Court consistently faced the same challenge, adapting existing law to rapidly changing social and economic reality without undermining the institutional credibility that was its very foundation.

Lest we judge it by current standards and thus too harshly, we must remember that the Texas Supreme Court of the late nineteenth century, like some others had, could have struck down the state’s antitrust or railroad commission laws or used antiquated common law rules to stifle attempts to help children, widows, workers, and other victims of growing industrialization. But it chose not to do so. The fact that the Court also shielded itself from any serious conservative criticism by circumscribing how far juries and the legislature could go is understandable in terms of both the Court’s institutional constraints and the professional training of its justices.

That professional training was intense study of the common law tradition, which is to say the English tradition of judge-made case-law, in which courts must do any innovating only “interstitially.” In other words, as Justice Benjamin Cardozo said in 1921, an intellectually honest judge’s room for policy maneuvering is narrow. “He
legislates only between gaps. He fills the open spaces in the law,” yet “how far he can go without traveling beyond the walls of the interstices cannot be staked out for him on a chart.” The Texas Supreme Court of the 1880s and 1890s understood this. Even as it innovated, it knew its function was essentially conservative: to adapt legal rules only so far as necessary to protect the existing rule of law. Ironically, though, preserving the old order required assuring the public that elected legislators could still change it; and that individual justice could still be had, and community rights could still be vindicated, in the ancient way--from a jury of one’s peers.

1 Handbook of Texas Online, s.v., “Stayton, John William” by Craig H. Roell; “In Memoriam of John W. Stayton” 87 Tex. Reports v-xvii.
3 Handbook of Texas Online, s.v., “Stayton, John William” by Craig H. Roell; “In Memoriam of John W. Stayton” 87 Tex. Reports v-xvii.
4 See Houston & Tex. Ry. Co. v. Fowler, 56 Tex. 452 (Tex. 1882); and Bonner’s dissent in T. & P. Ry. Co. v. O’Donell, 58 Tex. 27 (Tex. 1882) and his majority opinion in the similar case of P.J. Willis Bros. v. McNeil, 57 Tex. 465 (Tex. 1882) reversing a large damage award because evidence of the plaintiff’s circumstance “inflamed the members of the jury.”
5 For example, in Heldt v. Webster, 60 Tex. 207, (Tex. 1883) Stayton, who had dissented in Fowler and McNeil, reversed a verdict for a plaintiff in a malicious prosecution case where the judge instructed the jury that the plaintiff’s acquittal of criminal charges created a presumption in his favor that the prosecution by the defendant was groundless and thus malicious. He also reversed a summary judgment for the railroad defendant in Texas & St. Louis RR. Co. v. Young, 60 Tex. 201 (Tex. 1883), where the trial judge found that the railroad had no duty to maintain the cattle guards on its line because a statute merely gave the landowner the right to construct and maintain such guards. See also Tex & Pac. Ry. Co. v. DeMilley, 60 Tex. 194 (Tex. 1883); Tex. & Pac Ry. Co. v. Kirk, 62 Tex. 227 (Tex. 1883); and Ormond v. Hayes, Receiver, 60 Tex. 180 (Tex. 1883).
7 “In Memoriam of Leroy G. Denman,” 107 Tex. 672-676; The Handbook of Texas Online, s.v., “Denman, Leroy Gilbert.” by Leroy G. Denman.
9 www.dallashistory.org/cgi-bin/webbs_config.pl?noframens=15399 [accessed March 26, 2006]
10 For example, For example, at the 1892 meeting of the American Bar Association, three speeches were made warning delegates of the dangers of overly democratic government with respect to the legislative expropriation of private property. In an 1893 speech to the New York Bar Association, newly appointed Supreme Court Justice David Brewer made his own pro-business views known. Simply put, he believed
that it was the job of a strong judiciary “to restrain the greedy hand of the many from filching from the few that which they have honestly acquired.” “Proceedings of the New York State Bar Association” (1893), p. 37 as cited in Lief H. Carter and Christine B. Harrington, Administrative Law and Politics: Cases and Comment (Longman: New York, 2000) 70.


13 38 S.W. 750 (Tex. 1897), at headnote 9.

14 154 U.S. 362, 14 S.Ct. 1047 (1894).

15 In fact, one contemporary commentator explained that, “the formation of gigantic combinations for these purposes (of monopolization) in late years has created alarm and excited the liveliest interest in the public mind. The amount of discussion which it has invoked, considering the time during which it has progressed, is probably without parallel.” Queen Insurance Company v. State, 86 Tex. 250; 24 S.W. 397 (Tex., 1893) at 266, citing Beach on Private Corporations, Volume 2, Section 856.

16 88 Tex. 184; 30 S.W. 869 (Tex. 1895).

17 86 Tex. 250; 24 S.W. 397 (Tex., 1893).

18 Ibid., 86 Tex. 250, at 266.

19 60 Tex. 103 (Tex. 1883).


21 Houston and Texas Central Railway Company v. Simpson, 60 Tex. 103 (Tex. 1883), at 106.

22 88 Tex. 111; 30 S.W. 543 (Tex. 1895).

23 Ibid. at 117.

24 59 Tex. 542 (Tex. 1883); 59 Tex. 563 (Tex. 1883).


26 66 Tex. 580, 18 S.W. 351 (Tex., 1885).

27 Ibid. at 352.

28 Stuart v. Western Union Telegraph Company, 66 Tex. 580 at 587-588 (concurring opinion of Stayton, j.)


30 61 Tex. 345 (Tex., 1884).

31 Ibid. at 350.

32 92 Tex. 168; 46 S.W. 629 (Tex. 1898)

33 Ibid. at 171.