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BOOK REVIEW

EVELYN L. WILSON, *THE JUSTICES OF THE SUPREME
COURT OF LOUISIANA 1865–1880*
(Vandeplas Publ'g 2015)
Reviewed by Georgia Chadwick*

Keywords: Supreme Court of Louisiana, Slaughter House Cases, Suffrage, Citizenship, Civil War

Evelyn Wilson makes a useful and practical contribution to the history of the Louisiana Supreme Court with her book, *The Justices of the Supreme Court of Louisiana 1865–1880*. Wilson, the Horatio C. Thompson Endowed Professor at Southern University Law Center in Baton Rouge, examines in detail eighteen of the nineteen men who were appointed to the Court at the end of the Civil War through a few years after Reconstruction officially ended in Louisiana. Through the lens of great political upheaval, Professor Wilson examines the critical work of these justices and categorizes the Louisiana Supreme Court by its three periods in the Reconstruction Era.

Professor Wilson logically divides the work of the Court into three periods and describes the provisions of the particular constitution that created each Court and the political backgrounds of the governors who made the appointments. She gives detailed biographical information about the men who were appointed to each bench, along with highlighting and analyzing selected opinions that these justices wrote, thus reflecting the political events of the times.

Louisiana's secession ordinance was passed on January 26, 1861, and by the end of April of 1862, United States Commodore David Farragut captured New Orleans intact after Confederate troops stationed at two forts along the Mississippi River failed to

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stop him. On May 1, 1862, Union General Benjamin Butler arrived, placing New Orleans and its surrounding areas under his command.

Professor Wilson explains that, in the face of the imminent capture of New Orleans, four of the five justices of the Louisiana Supreme Court met on February 24, 1862, and the Court's minute book shows that the Supreme Court and the courts in the parish of Orleans adjourned until May 5, 1862. Some of the justices left New Orleans and followed Louisiana's Confederate government, although there is no evidence that the Court rendered any opinions during this time. No judges were present on May 5 in New Orleans, when the Clerk of Court called the Court to order. Professor Wilson reports that the clerk returned the next day and, finding no justices in attendance, adjourned the Court *sine die*.

During the first months of military occupation by United States forces, none of the established courts were open in New Orleans. Because the state court system had collapsed,¹ General Butler quickly established a Provost Court to handle civil and criminal trials. General Butler required all who held public office or wished to use the courts in civil or criminal cases to take a loyalty oath to the Union. By the summer of 1862, some of the district courts in New Orleans were reopened. In October of 1862, President Lincoln established the Provisional Court of Louisiana that was granted the most unusual power of federal and state jurisdiction. These special courts remained in operation until the organization of the judiciary under the Constitution of 1864.²

Others, such as Henry Plauché Dart, Ben Robertson Miller, Warren Billings, Judith Schafer, and Mark Fernandez, wrote about the history of Louisiana's judiciary, but no one focused in depth on the particular time period Professor Wilson has chosen. Henry Plauché Dart, the premier Louisiana legal historian of his time, gave little

1. JOE GRAY TAYLOR, *LOUISIANA RECONSTRUCTED 1863–1877* 4 (LSU Press 1974).

2. Thomas Helis, *Of Generals and Jurists, in A LAW UNTO ITSELF? ESSAYS IN THE NEW LOUISIANA LEGAL HISTORY* 117–137 (Warren Billings & Mark Fernandez eds., LSU Press 2001).

credit to most of the justices who served during the period that Professor Wilson covers. In Dart's "The History of the Supreme Court of Louisiana," published in 1913 as part of *The Celebration of the Centenary of the Supreme Court of Louisiana*, Dart does give some credit to the Ludeling Court:

The Annuals from 1868–72 cover a great course of jurisprudence—not even at the beginning of that century were the questions so intricate or the matters at stake so important. This court was engaged, as had been the case with the first court, in rebuilding a government. It was called on to interpret and to enforce legislation which was intended to reverse the ancient and create a new order of things.³

Ben Robertson Miller, in *The Louisiana Judiciary*, indicates that the limited scope of his book did not permit him to examine the opinions that the Supreme Court of Louisiana issued during Reconstruction, and that "a study of the personalities of the bench would no doubt give an insight into certain of the decisions."⁴

In order to expand on what had been written before, Professor Wilson saw a need to examine the work of the Louisiana Supreme Court by selecting cases she found to be unique. Her analysis of these cases demonstrates that the work of the justices was crucial in restoring order to the lives of people in Union-occupied Louisiana and in creating a necessary new way of life. She delves into the background of each justice and offers lively biographical sketches. Professor Wilson consulted genealogical sources, government reports, letters, books, and articles that yielded some previously unrevealed details. She also makes use of the Court's minute books that are a rich source of details on the Court's work. By highlighting selected cases, Professor Wilson shows that these justices focused on setting a steady course during a particularly turbulent political period for Louisiana. Her intention is not to describe all the intricacies

3. Henry Plauché Dart, *The History of the Supreme Court of Louisiana*, in *THE CELEBRATION OF THE CENTENARY OF THE SUPREME COURT OF LOUISIANA* 29 (Louisiana Supreme Court 1913), available at <https://perma.cc/6T2G-DMSG>.

4. BEN R. MILLER, *THE LOUISIANA JUDICIARY* 57 (LSU Press 1932).

of Reconstruction, but her clear writing style provides an understandable outline of the political landscape as it affected the justices and their work. The reader, however, should realize that during this time period, deadly violence often accompanied elections and the work of the government. Those in government were never completely assured of their right to carry out their duties.

During Reconstruction, Louisiana held a unique position in contrast with the rest of the South. James K. Hogue describes the difference, stating that Louisiana's distinct population and geography set it apart from the rest of the Old South. He also mentions that Louisiana was one of three former Confederate states that counted an enslaved population outnumbering white people, as shown in the federal census of 1860. Enfranchisement was of momentous political consequence in Louisiana.⁵

Professor Wilson points out that the elected governors in Louisiana who appointed the members of the Louisiana Supreme Court were a changing cast of executives. James K. Hogue describes what the five governors who held office between 1865 and 1877 might face: threat of replacement, impeachment, assassination attempts, and death threats. Rival governments (due to contested elections) were expected, and the intervention of federal troops was necessary for governors to remain in office.⁶

The first period presented by Professor Wilson is called "War and Occupation," and starts with justices appointed under the Constitution of 1864. President Lincoln remained hopeful that Union-occupied Louisiana would return to the Union as a state, and he urged General Banks to have a new constitution written. Banks called a constitutional convention that resulted in the adoption of Louisiana's Constitution of 1864. Many of the delegates to the convention originally supported secession in 1861. The Constitution of 1864 abolished slavery, but because it did not grant suffrage to

5. JAMES K. HOGUE, *UNCIVIL WAR: FIVE NEW ORLEANS STREET BATTLES AND THE RISE AND FALL OF RADICAL RECONSTRUCTION* 4 (LSU Press 2006).

6. *Id.* at 7–8.

blacks, it was never accepted by Congress; however, Professor Wilson states that it operated as the governing document in the Union-controlled portions of Louisiana.

The judiciary article of the Constitution of 1864 called for the Court to consist of one chief justice and four associate justices to be appointed by the governor to eight-year terms. The appointments were subject to the advice and consent of the senate. The Court first sat at on April 3, 1865. Chief Justice William B. Hyman and Associate Justices Zenon Labave, John H. Ilesley, and Robert B. Jones were present and took the following oath required by Title VII – General Provisions of the 1864 Louisiana Constitution:

I do solemnly swear that I will support the Constitution and laws of the United States and of this State, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as [Chief Justice or Associate Justice], according to the best of my abilities and understanding: so help me God!⁷

Rufus Howell, who had been elected and served as a district court judge in New Orleans in 1857, took his oath several days later. Interestingly, Howell, who opposed secession, took the oath required in order to keep his court open as government dynamics changed. He also served as a delegate to the 1864 Constitutional Convention. Howell, a Radical Republican and strong supporter of suffrage for black men, issued the call to reconvene the 1864 Constitutional Convention in order to address the suffrage issue. This action resulted in the bloody Mechanic's Institute Riot of 1866, during which he narrowly escaped injury and death. Professor Wilson points out that Howell was the only justice to serve on the Louisiana Supreme Court for the duration of Reconstruction, serving longer than any of the other men who served with him.

Overall, Professor Wilson describes the members of Louisiana's first Reconstruction Court as men who opposed secession and remained loyal to the Union. Some had owned slaves, had previously

7. LA. CONST. Art. 90 (1864).

held elective offices, or had practiced law before the war. Generally, the cases that came before them had to do with complications arising from the fact that slavery had been abolished and Confederate money was worthless. Professor Wilson, having studied a number of cases arising from these issues, finds that the members of the Court considered the use of Confederate currency a treasonable act and an illegal transaction. As the Louisiana Constitution required, the justices remained careful to refer specifically to the Louisiana law on which they based their decisions. From her analysis of the cases that the 1865 Court decided, Professor Wilson believes that they did not seek to change the law but rather to administer it justly, and for this reason their work on the bench was respected. She points out that the justices who served on this Court were not held in high regard by many of the pro-Confederate lawyers who appeared before them because the justices were loyal Unionists. The litigation they heard might be considered pedestrian, but the issues were necessary ones to settle so that citizens could get on with life and business after the upheaval caused by the Civil War.

The Constitution of 1868 cut short the eight-year terms of the justices who received an appointment in 1865. The second part of Professor Wilson's book, entitled "Congressional Reconstruction," concerns two justices from the 1865 Court whom Governor Warmoth reappointed: Justice Howell and Justice Taliaferro. Justice Taliaferro, who replaced Justice Robert Jones upon his death, served as president of Louisiana's 1868 Constitutional Convention and also ran against Governor Warmoth in the 1868 gubernatorial election. Governor Warmoth completed the Court with the appointments of John T. Ludeling of Ouachita Parish as chief justice, and William Wirt Howe of New Orleans, and W. G. Wyly of Carroll Parish as associate justices.

Professor Wilson describes the relevant features of the 1868 Louisiana Constitution, including universal male suffrage, but highlights the oath the justices took in 1868 that clearly demonstrates a marked difference from the previous oath required under the 1864

Louisiana Constitution. The Court minute book on November 2, 1868, records the oath of Justice Taliaferro:

I, James G. Taliaferro, do solemnly swear (or affirm) that I accept the civil and political equality of all men and agree not to attempt to deprive any person or persons, on account of race, color, or previous condition of any political or civil right, privilege, or immunity enjoyed by any other class of men: that I will support the constitution and laws of the United States, and the constitution and laws of this state, and I will faithfully and impartially discharge and perform all the duties incumbent on me as Associate Justices of the Supreme Court of La. According to the best of my ability and understanding. So Help Me God.⁸

Professor Wilson states that these jurists strongly advocated for equal political rights for all blacks. Wilson says, while they did not agree on every issue, she found an amazing lack of discord from these men who came from diverse backgrounds. The most notable case from this court was the *Slaughter-House Case*.⁹ This case centered around an act enacted by the Louisiana Legislature in 1869 protect the public health of New Orleans from slaughterhouse waste polluting the Mississippi River, which supplied the city with its drinking water. The act created a corporation to control all slaughterhouse activities at a particular location. Butchers in the New Orleans area were required to rent space from this newly-formed corporation. A group of two hundred butchers formed a rival organization to compete with the one established under the 1869 law. Consequently, the state's Attorney General filed suit to enjoin them from operating a slaughterhouse in violation of the state law.

The Court determined that the state's police power authorized the legislature to close the upriver slaughterhouses in order to protect the public water system. Professor Wilson points out that one

8. 17 MINUTE BOOK 125–26 (1868).

9. State ex rel. Belden v. Fagan, 22 La. Ann. 545 (1870); aff'd. Slaughter House Cases, 83 U.S. 36 (1872). See Jared Bianchi, *Anything But Common: The Role of Louisiana's Civilian Tradition in the Development of Federal Civil Rights Jurisprudence under the Fourteenth Amendment*, 6 J. CIV. L. STUD. (2013).

justice dissented and one was absent. The case made its way to the United States Supreme Court, which affirmed the decision of the Louisiana Supreme Court.

Professor Wilson explains that, for the first time, the United States Supreme Court construed the Thirteenth and Fourteenth Amendments and found that they did not apply to butchers; rather, they applied only to privileges and immunities of United States citizenship. These amendments to the United States Constitution were written to protect newly emancipated blacks from state oppression and afforded the butchers no protection against laws the state was entitled to enact.

Although Professor Wilson analyzes interesting cases from this Court, which existed twice as long as the previous court, one opinion in particular should be mentioned because the Louisiana Supreme Court declared the *Dred Scott* decision of the United States Supreme Court inapplicable in a case that came before it. In 1857, the United States Supreme Court held that a black man had no rights under the U.S. Constitution and, consequently, could not sue for his freedom. The case before the Louisiana Supreme Court involved Charles Lallande, a man born of free parents, who purchased land in 1844 and was in quiet possession of it until 1866. The Louisiana Land Office cancelled Lallande's land title on the grounds that the *Dred Scott* decision stripped him of his United States citizenship. The Land Office sold the land to another man who then brought suit to evict Lallande. Chief Justice Ludeling's opinion for the Louisiana Supreme Court held that the treaty by which Louisiana was made a territory ensured that free, colored inhabitants were admitted to citizenship of the United States.¹⁰

Professor Wilson writes that the 1868 Court performed under challenging and hostile conditions. She states, however, that there were very few issues, which divided the Court. What brought dissents were cases that concerned deciding who should bear the loss

10. Walsh v. Lallande, 25 La. Ann. 188, 189 (1873).

for emancipated slaves and cases determining if madams of prostitution houses should have to pay rent for their furniture. The eight-year terms of the justices ended in 1876. Embattled Governor William Pitt Kellogg reappointed Chief Justice Ludeling and Associate Justice Leonard to the Court, and appointed John Edward King to fill a third seat. The two remaining seats were left vacant to allow the newly elected governor to make appointments. Determining whom would be the next governor brought the end of the Reconstruction Era to Louisiana.

Louisiana found itself with a contested election in 1876 that resulted in two competing administrations with inaugurations held for each on January 8, 1877. The Democratic governor was Francis T. Nicholls and the Republican governor was Stephen B. Packard. Rival governors and legislatures were nothing new. During the tenure of Governor Kellogg, the Battle of Liberty Place was fought in New Orleans to remove him from his position due to his contested election. Although the rival administration of Governor John McEnery won the battle, the victory was brief. President Grant reinstated Governor Kellogg with the support of Federal troops. Instead of attacking his rival directly, Francis T. Nicholls employed an effective and carefully considered strategy.

Professor Wilson explains that Nicholls first appointed five attorneys to sit on the Court then used the civil and military officers of his government to take control of the state's government without attacking the State House where Governor Packard was being guarded. On the morning of January 9, 1877, more than 3,000 armed men surrounded the Cabildo, filling the area around it. The justices previously appointed under Governor Kellogg, Ludeling, Leonard and newly appointed King, were inside the building ready to begin their session. It was reported that the justices held a short session and adjourned. When faced by the troops, the Metropolitan Police protecting the courthouse realized that it would be useless to try to defend the courthouse, resulting in them leaving the courthouse with the three justices.

The five justices that Governor Nicholls appointed were then escorted to the Cabildo and the court crier opened court for Chief Justice Thomas Manning and associate justices Robert Marr, Alcibiades DeBlanc, William Egan, and William Spencer. No cases were heard that day, and Professor Wilson notes that the Court's minute book makes no mention of the brief session of the Ludeling Court earlier that day.

The disputed presidential election of 1876 resulted in Rutherford B. Hayes, a Republican, becoming president after he agreed to recognize the Democratic governments in Louisiana, Florida, and South Carolina in exchange for receiving their electoral votes. On April 27, 1877, President Hayes ordered United States troops to withdraw from the statehouse and formally recognized Nicholls's government, which marked the end of Reconstruction in Louisiana. Professor Wilson says the five appointments made by Governor Nicholls were respected lawyers who were loyal to the Confederacy. They bravely risked their reputations to accept appointment before they were certain that his government would prevail. These justices served only until 1880 when a new court was organized under the Louisiana Constitution of 1879.

Professor Wilson concludes her book with a chapter called "Judicial Legacy," wherein she gives a balanced and nuanced overview of the eighteen men who served on three different courts during three different social and political periods. She writes that the 1865 Court, a timid court, served as a forum for dispute resolution and not as a catalyst for change. Then the 1868 Court gave voice to the state's new constitution, but the justices did not always agree with one another. The practicing bar that argued before the 1868 Court mostly lacked respect for the justices for political reasons. Professor Wilson asserts that the 1877 Court was the most confident of the three courts and the justices actively embraced their role in restoring Democratic control to Louisiana. Professor Wilson concludes that the greatest combined contribution of the three courts centers on their operating with some level of success during a tumultuous time

for Louisiana after the Civil War so that the rule of law was carried forward.¹¹

Henry Plauché Dart, whom legal historian Warren Billings describes as having resolutely worked to undermine the Reconstruction government in New Orleans,¹² offered a harsh and critical voice when describing the Louisiana Supreme Court justices in his 1913 history of the Court. In contrast, Professor Wilson offers a more calm and reflective voice in presenting these justices who attempted to navigate a different way of life under the newly-enacted laws of Louisiana following the Civil War. A minor quibble, however, is that the book could have benefited from an index, which would have provided better access to the fascinating people and events she describes in such interesting detail. Nonetheless, the book fills a gap in the history of the Louisiana Supreme Court after the Civil War, and should be essential reading for anyone wanting to know more about Reconstruction in Louisiana.

11. E. Phelps Gay, *Justices of Louisiana Supreme Court, 1865-1880*, 13 DE NOVO 1 (2016), <https://perma.cc/98ZQ-8HUN>.

12. Warren Billings, *The Supreme Court of Louisiana 1813–2013: A Bicentennial Sketch*, in THE CELEBRATION OF THE BICENTENNIAL OF THE LOUISIANA SUPREME COURT 30–34 (West Publ'g 2013); see Dart, *supra* note 3, at 25–32.