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UNCOMFORTABLY REMINISCENT: *ODONNELL V. HARRIS COUNTY* IN HISTORY AND MEMORY

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ABSTRACT

In *ODonnell v. Harris County*, a federal trial court enjoined the misdemeanor bail system of Houston, Texas, freeing approximately 20,000 indigent defendants annually. To do this, the trial court drew upon Reconstruction-era precedents establishing intensive federal oversight of state criminal proceedings. The court explicitly invoked the Civil War and Reconstruction transformation of the federal judiciary, comparing the County's defenses to slavery-era arguments. Conversely, when the en banc Fifth Circuit reviewed a similar order in Dallas, Texas, six years later, it rejected this historical framework, condemning such litigation as an impermissible "ongoing federal audit of state criminal proceedings." Through extensive archival research into Freedmen's Bureau operations and congressional debates surrounding § 1983's passage, this Article suggests that Reconstruction Republicans specifically intended federal courts to provide extensive oversight of municipal bail practices and criminal justice administration. The Article thus challenges contemporary federalism doctrines that have obscured these

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Radical Republican origins while illustrating how competing historical memories have shaped constitutional remedies for systemic rights violations in the Texas bail system.

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I. INTRODUCTION

In 2017, a federal district court enjoined the misdemeanor bail system of Harris County, Texas, home to the nation's third-largest jail.[1] By the court's decree, misdemeanor defendants who did not otherwise have felony charges or immigration detainers could not be detained more than twenty-four hours for failure to pay money bail.[2] That year and in every subsequent year, experts have concluded that around 20,000 people have been

1. ODonnell v. Harris County, 251 F. Supp. 3d 1052, 1058, 1161 (S.D. Tex. 2017), *aff'd as modified*, 882 F.3d 528 (5th Cir. 2018).

2. ODonnell v. Harris County, No. 16-1414, 2017 WL 1735453, at *1 (S.D. Tex. Apr. 28, 2017) (order granting preliminary injunction), *vacated sub nom.* ODonnell v. Harris County, 892 F.3d 147 (5th Cir. 2018).

freed who otherwise would have remained incarcerated for the duration of their pretrial proceedings.[3]

While the relief ordered in Harris County appeared extraordinary, the facts of the case did not. Harris County's misdemeanor bail system operated similarly to most other municipal bail systems in the United States. Magistrates conducted "hearings" that lasted less than sixty seconds and ordered defendants detained unless they paid arbitrary amounts of money that bore no relation to the circumstances of their cases. Rather than navigate the cumbersome process to contest their bail (without a lawyer), indigent defendants typically pleaded guilty to their charges in exchange for sentences of time served pretrial—a "sentence first, conviction after" system in the words of one testifying expert.[4] Despite the assurance of constitutional authorities that "[i]n our society[,] liberty is the norm, and detention prior to trial or without trial is the carefully limited exception,"[5] Harris County maintained a system in which more than 40% of defendants facing the lowest level charges were detained prior to and without trial, unable to afford the $500 to $5,000 bail bonds routinely imposed in their cases.[6]

The constitutional violations endemic to the Harris County bail system were thus fairly obvious to anyone who looked at the facts. The signal question of the litigation, then, was whether a federal court *could* look at the facts and interpose its remedial authority to vindicate the constitutional rights of indigent defendants. After the U.S. District Court for the Southern District of Texas ruled that it could, other federal courts followed its lead and denied motions to dismiss claims inviting scrutiny into the bail systems of other municipalities near and far.[7] In 2023, however, the en banc Fifth Circuit definitively shut the door on

3. *See* BRANDON L. GARRETT ET AL., MONITORING PRETRIAL REFORM IN HARRIS COUNTY: SEVENTH REPORT OF THE COURT-APPOINTED MONITOR 20 (2024), https://sites.law.duke.edu/odonnellmonitor/wp-content/uploads/sites/26/2024/03/ODonnell-Monitor-Seventh-Report-v.17.pdf [https://perma.cc/J89L-77Q6].

4. *ODonnell*, 251 F. Supp. 3d at 1092, 1105, 1153.

5. United States v. Salerno, 481 U.S. 739, 755 (1987).

6. *ODonnell*, 251 F. Supp. 3d at 1114; *Misdemeanor Bail Schedule for the Harris County Criminal Courts at Law*, HARRIS CNTY. CRIM. CTS. AT L. (Sep. 6, 2012), https://www.ccl.hctx.net/criminal/Misdemeanor%20Bail%20Schedule.pdf [https://perma.cc/5AQV-BPZ9].

7. *See, e.g.*, Buffin v. City & County of San Francisco, No. 15-cv-04959-, 2018 WL 424362, at *3 n.9 (N.D. Cal., Jan. 16, 2018); Little v. Frederick, No. 6:17-CV-00724, 2018 WL 6036911, at *1 (W.D. La. 2018); Schultz v. State, 330 F. Supp. 3d 1344, 1369–70 (N.D. Ala. 2018) (granting a preliminary injunction of Cullman County's bail practices); Daves v. Dallas County, 341 F. Supp. 3d 688, 691 (N.D. Tex. 2018), *vacated*, 22 F.3d 522 (5th Cir. 2022).

such claims, ruling that challenges like the Harris County bail case "should never have been brought in federal court."[8]

This Article explores the contrasting visions of constitutional history that underlay the district and appellate courts' views of the bail litigation. On the one hand, the trial court drew on a long federal tradition anchoring its jurisprudence in the memory of the Civil War and Reconstruction, when the federal courts were remade for effective oversight of constitutional abuses, even down to the level of municipal law. When the County defended its detention rates on the ground that indigent people in Houston *wanted* to be in jail, the district court found the County's position "uncomfortably reminiscent of the historical argument that used to be made that people enjoyed slavery because they were afraid of the alternative."[9] The appellate court, on the other hand, found the litigation uncomfortably reminiscent of another era, when judges overzealously intervened in state criminal affairs to enact their personal visions of constitutional policy. In doing so, the Fifth Circuit adopted the municipal defendants' antebellum logic of local supremacy over the custody of citizens, to the total exclusion of federal oversight.

II. SEEKING HELP: HARRIS COUNTY AND THE AMERICAN BAIL SYSTEM

Maranda Lynn ODonnell was arrested at five o'clock on a Monday afternoon, driving to work.[10] A twenty-two-year-old single mother, ODonnell was pulled over for driving through a toll plaza without paying. When the officer checking her license discovered it had been suspended for unpaid tolls and fees, ODonnell was booked into the Harris County Jail, at that time the third-largest jail in America.[11]

After more than two and a half days in detention, ODonnell stood before a judge—or rather, before an image of a judge. For

8. Daves v. Dallas County, 64 F.4th 616, 620 (5th Cir. 2023) (en banc).

9. Cameron Langford, *Judge Won't Buy Harris County's Defense of Bail System*, COURTHOUSE NEWS SERV. (Feb. 9, 2017), https://www.courthousenews.com/judge-wont-buy-harris-countys-defense-of-bail-system/ [https://perma.cc/GAW6-JKTF].

10. *ODonnell*, 251 F. Supp. 3d at 1062; Transcript of Harris County Pretrial Services Hearing for Maranda Lynn ODonnell at 0:15–0:20 (May 19, 2016) (on file with the Houston Law Review) [hereinafter ODonnell Hearing Video].

11. *ODonnell*, 251 F. Supp. 3d at 1058, 1062; ODonnell Hearing Video, *supra* note 10, at 0:00–0:35; *see Largest Jails in the United States*, WORLD ATLAS, https://www.worldatlas.com/crime/the-largest-jails-in-the-united-states.html [https://perma.cc/3RY5-UUW8] (last visited Feb. 22, 2026).

years, Harris County had used a videolink system to facilitate prisoner appearances in court without the bother of moving detainees in and out of jail.[12] Rather than facing a judge on the bench, ODonnell faced a screen with four grids, a structure that has become common in our post-pandemic world but was less familiar in May of 2016. In one quadrant was the hearing officer; above him, the prosecutor in an office down the street. In the third quadrant, ODonnell could see herself, standing in front of a room where a couple dozen prisoners were seated behind her, awaiting their hearings.[13] The fourth quadrant was a black box—Harris County would not supply public defenders at bail hearings until years after ODonnell's suit spurred the innovation.[14]

Standing in clothing she had worn for over sixty-two hours since her arrest, ODonnell stood mute through the forty-two seconds that constituted her hearing, only speaking briefly at the very end.[15] When asked whether she would hire a lawyer herself or was seeking the appointment of a public defender, ODonnell answered, "Seeking help."[16] Those were the only words Harris County would hear from ODonnell through four days of detention.

From the first hour of her arrest, ODonnell had her bail set at $2,500.[17] That is, had she paid that amount or had she arranged to pay a local bail bondsmen a nonrefundable premium of $500 or more, she would have been released from detention within hours. That amount was based on Harris County's misdemeanor bail schedule, a predetermined list of bail amounts based on the type and number of charges facing a defendant.[18] The schedule called for a $500 bail for a class B misdemeanor—which is what ODonnell had been charged with—and $500 for each prior conviction, of which ODonnell had three.[19] These numbers were not picked for any particular reason; no actuarial science has ever been applied to the making of a bail schedule, in Harris County or

12. *ODonnell*, 251 F. Supp. 3d at 1062.

13. ODonnell Hearing Video, *supra* note 10.

14. *Id.*; *ODonnell*, 251 F. Supp. 3d at 1127. Public defenders pressed for years for appointment of counsel at bail hearings without success until the ODonnell litigation launched. *See* Alexander Bunin, *The Constitutional Right to Counsel at Bail Hearings*, CRIM. JUST., Spring 2016, at 23, 25.

15. ODonnell Hearing Video, *supra* note 10; *see ODonnell*, 251 F. Supp. 3d at 1062.

16. ODonnell Hearing Video, *supra* note 10, at 0:44–0:48.

17. HARRIS CNTY. PRETRIAL SERV., DEFENDANT REPORT – LONG FORM FOR MARANDA L ODONNELL 1 (May 18, 2016) (on file with the Houston Law Review).

18. *Misdemeanor Bail Schedule for the Harris County Criminal Courts at Law*, *supra* note 6.

19. *Id*; DEFENDANT REPORT – LONG FORM FOR MARANDA L ODONNELL, *supra* note 17, at 7.

anywhere else.[20] Adding to the arbitrariness of the process, Harris County officials got their math wrong. By the schedule, ODonnell's bail should have been $2,000, not $2,500.[21]

In subsequent litigation, Harris County's hearing officers defended their short, perfunctory hearings on the ground that the County's pretrial services division compiled an extensive paper record for them to review in lieu of a drawn-out oral hearing.[22] But ODonnell's report, compiled during a midnight interview more than a day after her arrest,[23] only makes her hearing that much more puzzling. The report shows plainly the four misdemeanor charges, making the mistaken bail amount clear.[24] Further, after pretrial services established the fact of ODonnell's employment and support of her child, it recommended she be released on what Texas law refers to as a "personal bond," a promise to appear *without* the upfront payment of cash either to the County or to a commercial bondsman.[25] Yet in the hearing, the judge failed to correct the bond amount and further told ODonnell, "You do not qualify for a personal bond," a statement with no support under Texas law or the facts as recorded by the pretrial services office.[26]

The constitutional violations in ODonnell's case and the thousands of cases like hers are unmistakable. Even if county officers had probable cause to make the arrest, multiple days of detention without a hearing exceeded the constitutional requirements of due process.[27] The hearing ODonnell eventually received was so rushed, perfunctory, and erroneous as to be meaningless.[28] No rational basis supported ODonnell's detention on a $2,500 bail—or really on any amount of bail at all.[29] And the

20. *See* Christine S. Scott-Hayward & Sarah Ottone, *Punishing Poverty: California's Unconstitutional Bail System*, 70 STAN. L. REV. ONLINE 167, 170–71 (2018).

21. *Misdemeanor Bail Schedule for the Harris County Criminal Courts at Law*, *supra* note 6.

22. ODonnell v. Harris County, 251 F. Supp. 3d 1052, 1092–94 (S.D. Tex. 2017), *aff'd as modified*, 882 F.3d 528 (5th Cir. 2018).

23. *Id*. at 1062.

24. DEFENDANT REPORT – LONG FORM FOR MARANDA L ODONNELL, *supra* note 17, at 1, 7.

25. *Id*. at 1–2; Off. of Att'y Gen. State of Tex., Opinion letter No. JC-0215 3 (May 4, 2000).

26. ODonnell Hearing Video, *supra* note 10, at 0:38–0:39; *ODonnell*, 251 F. Supp. 3d at 1154.

27. *See* Gerstein v. Pugh, 420 U.S. 103, 114 (1975); County of Riverside v. McLaughlin, 500 U.S. 44, 52, 58–59 (1991).

28. *See* notes 15–16 and accompanying text (describing ODonnell's forty-two-second bail hearing, during which she stood mute and the only question asked was whether she sought appointed counsel). *See also* Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (holding that due process requires an opportunity to be heard at a meaningful time and in a meaningful manner); Am. Surety Co. v. Baldwin, 287 U.S. 156, 168 (1932) (explaining that due process requires a meaningful opportunity to present available defenses and contest liability).

29. On the tiers of scrutiny applied to bail regimes, see Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J.F. 1098, 1117–18 (2019).

fact that a working-class single mother was detained for days while a wealthy defendant would have been released within hours of arrest was a fairly obvious violation of the requirement that the protection of the law extend equally to all.[30]

And yet, obviously unconstitutional practices proliferated in Harris County and in bail systems all across America for decades. Like the school segregation cases of an earlier era, constitutional abuses in municipal bail systems raise acute problems for remedial authority. County jails, like school boards, are among the most local of American institutions and tend to be insulated by federalism and comity doctrines.[31] At the same time, state and local authorities often have little incentive to reform their systems and may rather face counterincentives that deepen the problem, like tough-on-crime electoral politics that treat constitutional protections as roadblocks to be overcome in the drive to incarcerate accused criminals quicker, longer, and in more punitive conditions.[32]

When the *ODonnell* trial court found that it could proceed to examine the facts of Harris County's bail system and order effective relief, it located its work in a long history and tradition of federal vindication of individual rights that dated back to Congress's dramatic transformation of the federal courts during the Civil War and Reconstruction Eras. Citing the Reconstruction statute that undergirds most modern civil rights litigation, the trial court observed that "Congress enacted § 1983 to enforce the provisions of the Fourteenth Amendment against those who carry a badge of authority and represent it in some capacity, whether they act in accordance with their authority or misuse it."[33] That was a quotation of *Hafer v. Melo*, in which the Supreme Court affirmed that individual officials were proper defendants in civil rights cases, whether or not they were just following the orders of their governments.[34] *Hafer*, in turn, was quoting *Scheuer v. Rhodes*, the case that denied absolute immunity to the officials

30. *See* notes 10–11 and accompanying text; Bearden v. Georgia, 411 U.S. 660, 672–73 (1983). On the doctrinal path of wealth classifications under the Equal Protection Clause, see Cary Franklin, *The New Class Blindness*, 128 YALE L.J. 2, 40–41, 44–46 (2018).

31. *See* MICHAEL KLARMAN, *BROWN V. BOARD OF EDUCATION* AND THE CIVIL RIGHTS MOVEMENT 90–91 (2007); MARK V. TUSHNET, *BROWN V. BOARD OF EDUCATION*: THE BATTLE FOR INTEGRATION 113–15 (1995).

32. *See* LOÏC WACQUANT, PUNISHING THE POOR 9, 41, 310 (2009); Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform,"* 128 YALE L.J.F. 848, 856, 870, 872, 903–05, 929, 932 (2019).

33. ODonnell v. Harris County, 252 F. Supp. 3d 1052, 1165 (S.D. Tex. 2017) (quoting Hafer v. Melo, 502 U.S. 21, 28 (1991)), *aff'd as modified*, 882 F.3d 528 (5th Cir. 2018).

34. *Hafer*, 502 U.S. at 28, 31.

involved in the Kent State shooting by the National Guard in 1970.[35] And *Scheuer*, in turn, was quoting *Monroe v. Pape*, the 1961 case that revitalized civil rights actions by anchoring them squarely within the intentions of the Reconstruction Congress that authorized suits against state and local officials.[36]

Years later, when the en banc Fifth Circuit Court of Appeals ruled that cases like *ODonnell* "should never have been brought in federal court," [37] it drew on an alternative tradition that deemphasized, when it did not outright ignore, the Radical Republican roots of the modern federal courts. Instead, this tradition posed an "ongoing federal audit of state criminal proceedings" as a paradigm horror that federal courts must avoid at all costs.[38] "The injunctions issued in Houston . . . plainly show federal court involvement to the point of ongoing interference and 'audit' of state criminal procedures," the Fifth Circuit believed.[39] On this account, the history of the civil rights statutes the courts apply is irrelevant at best, or at worst, a counter-example to how modern federal courts should function. Instead, the Fifth Circuit has embraced judicially created doctrines that enable it to overrule the text and intentions of Congress while claiming adherence to judicial modesty. The rest of this Article traces the idea and practice of federal audits of state criminal proceedings in federal tribunals up through *ODonnell* and the current stance against this history and tradition.

35. Scheuer v. Rhodes, 416 U.S. 232, 234, 243 (1974).
36. Monroe v. Pape, 365 U.S. 167, 171–72 (1961).
37. Daves v. Dallas County, 64 F.4th 616, 620 (5th Cir. 2023) (en banc).
38. *Id.* at 626 (quoting O'Shea v. Littleton, 414 U.S. 488, 500 (1974)).
39. *Id*. at 631.

III. FURTHER ATTENTION AND THOROUGH INVESTIGATION: THE FEDERAL SUPERVISION OF BAIL IN THE FREEDMEN'S BUREAU

Intensive federal oversight of state criminal proceedings, especially including the administration of bail, meaningfully began with the establishment of the Freedmen's Bureau in the waning days of the Civil War. Bureau activities and adjudications provided a model that Congress then attempted to implement in the federal courts, though it would take nearly a century for Congress's aims to be realized there.

In March of 1865, Congress established the Bureau of Refugees, Freedmen, and Abandoned Lands, more commonly known as the Freedmen's Bureau.[40] After Congress expanded the Bureau's powers and enlarged its personnel in 1866, it became, as W.E.B. Du Bois put it, "a full-fledged government of men. It made laws, executed them and interpreted them; it laid and collected taxes, defined and punished crime, maintained and used military force, and dictated such measures as it thought necessary and proper for the accomplishment of its varied ends."[41] Nine hundred agents, most of them current or former military officers, spread out through the former Confederate states to establish schools, dispense medicines and rations, oversee labor contracts between freedmen and plantation owners, and assist freedmen in court.[42] Where the Bureau found southern courts unable or unwilling to dispense equal justice, it assisted freedmen with removing cases to federal court or else trying cases and resolving disputes in courts of the Bureau's own devising.[43] The Bureau's business thus

40. Act of Mar. 3, 1865, ch. 90, 13 Stat. 507, 507.

41. Act of July 16, 1866, ch. 200, 14 Stat. 173, 173–74; W.E.B. Du Bois, *The Freedmen's Bureau*, 87 ATLANTIC MONTHLY 354, 359 (1901).

42. *See* PAUL A. CIMBALA, THE FREEDMEN'S BUREAU: RECONSTRUCTING THE AMERICAN SOUTH AFTER THE CIVIL WAR 13, 19, 22 (Hans L. Trefousse ed., 2005); JAMES M. MCPHERSON, THE ABOLITIONIST LEGACY: FROM RECONSTRUCTION TO THE NAACP 143 (1975); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 55, 60, 69 (Henry S. Commager & Richard B. Morris eds.,1988); LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 382 (1979); GEORGE R. BENTLEY, A HISTORY OF THE FREEDMEN'S BUREAU 159, 209 (1955).

43. DONALD G. NIEMAN, TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865–1868, at 10–11 (Harold M. Hyman ed., 1979); Zachary Newkirk, *A Brief Moment in the Sun: The Reconstruction-Era Courts of the Freedman's Bureau*, 101 JUDICATURE, no. 4, 2017, at 49, 50; Amalia D. Kessler, *Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication*, 10 THEORETICAL INQUIRIES L. 423, 470, 472 (2009); James Oakes, *A Failure of Vision: The Collapse of the Freedmen's Bureau Courts*, 25 CIV. WAR HIST. 66, 72 (1979).

left millions of handwritten records documenting its work.[44] The following account draws on a machine-transcribed set of 30,000 pages of correspondence from the Assistant Commissioner's Offices curated for this Article.[45]

The Bureau correspondence from Mississippi alone mentions bail and bail abuses hundreds of times from 1865 to 1869.[46] At the outset, the Mississippi Bureau enjoyed broad discretion to supervise, intervene in, or broadly supersede all matters of criminal justice in the state.[47] On August 1, 1865, General Orders No. 6 declared jurisdiction "in all cases, either civil or military, that affect the interests of the Freedmen" and provided for Bureau prosecution of "[a]ll petty cases, such as theft, disobedience, or breach of the peace," as well as "[a]ll the higher crimes and offenses, such as murder, [and] extreme cases of abuse."[48] Military jurisdiction was extremely broad, but in most cases it was not exclusive. Writing to Captain J. N. Weber the next month, Colonel Samuel Thomas instructed that "all courts that will admit negro testimony are to be allowed to take up cases where Freedmen are interested."[49] Weber and the other agents were to "give the civil

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44. *See, e.g.*, *National Museum of African Am. History and Culture: Freedmen's Bureau Digital Collection,* SMITHSONIAN INST.: SMITHSONIAN ONLINE VIRTUAL ARCHIVES, https://sova.si.edu/record/nmaahc.fb [https://perma.cc/2A77-VY5V] (last visited Feb. 1, 2026).

45. One of the more comprehensive collections of correspondence addressed to the Bureau was maintained by the Records of the Superintendent of the Assistant Commissioner for the State of Mississippi, records subgroup M826 in the National Archives catalog. A digital copy of the scanned film is available at https://sova.si.edu/record /nmaahc.fb.m826 [https://perma.cc/2A77-VY5V]. For this Article, film copies were re-scanned at higher fidelity and processed for transcription through the Transkribus Text Titan I model. Special thanks to Katherine Franke for directing my attention to this collection and facilitating acquisition of the film.

46. Under the provisions of the initial legislation, the Bureau would have been closed one year after the end of the Civil War. It was twice extended by the Act of July 16, 1866, ch. 200, 14 Stat. 173 and the Act of July 6, 1868, ch. 135, 15 Stat. 83. However, its functions were limited by the Act of July 25, 1868, ch. 245, 15 Stat. 193, 193–94, effective January 1869, to supervising freedmen's education. Most Bureau courts and supervision of judicial matters ceased by that month.

47. The Freedmen's Bureau was originally organized under the War Department and could detail "any military officer" to perform duties for the Bureau. Freedmen's Bureau Act, ch. 90, 13 Stat. 507, 508 (1865). From the close of the Civil War to the adoption of the Military Reconstruction Acts, the Bureau thus enjoyed the expansive military jurisdiction established by Lieber's Code in 1863, which empowered the military to use commissions to try a host of civil and criminal offenses. *See* JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 294, 296, 304, 308, 314–15 (2012).

48. General Orders No. 6 (Aug. 1, 1865), Orders and Circulars Issued and Received, Records of the Assistant Commissioner, Mississippi (M826), Records of the Bureau of Refugees, Freedmen, and Abandoned Lands, Record Group 105, National Archives [hereinafter Bureau Archives].

49. Letter from Col. Samuel Thomas to Cap. J. N. Weber, Sep. 21, 1865, Letters Received, Records of the Assistant Commissioner, Mississippi (M826), Bureau Archives.

authorities of this State all the cooperation and assistance in your power" and "[a]void as far as possible any interference with State Officers in the discharge of their duties."[50]

Further correspondence between Colonel Thomas and Captain Weber shows that "as far as possible" did not actually extend very far. The same month, a petition arrived from William Moore, a freedman, claiming Moore had been falsely accused of larceny and held to an unaffordable bail—$200, a sum that far exceeded the means of any surety Moore could offer, and one that seemed grossly disproportionate to the alleged crime of stealing three to six pounds of cotton.[51] Arrested early in the morning on August 14, Moore would be detained until the October term of the local Mississippi court if he could not post bail.[52] Colonel Thomas received Moore's petition and instructed Captain Weber to investigate.[53] Weber received the instruction on August 30 and wasted no time. Rather than bother with lowering the bail amount, Weber proceeded directly to trial on the larceny charge the next day before a panel of three Bureau agents.[54] No prosecutor appeared for the State despite Weber's instruction to provide one, but the panel proceeded to examine both prosecution and defense witnesses and transcribed the testimony.[55] The balance of testimony strongly favored Moore's version of events, so the panel adjudged him not guilty of the charge and set him free the same day.[56]

Moore's case illustrates how Bureau agents could entirely displace southern criminal proceedings; in other cases, the Bureau permitted local courts to maintain jurisdiction but continued to direct their proceedings with a heavy hand. In August 1867, for instance, freedman Joe Newman disappeared after two White men assaulted him and dragged him off the plantation he was working, ostensibly to turn him in to local authorities on an (almost certainly false) charge of scandalizing a White woman.[57] The agent overseeing the case could not confirm Newman's death, but

50. *Id*.

51. *Id.*; Petition of William Moore, undated, Letters Received, Records of the Assistant Commissioner, Mississippi (M826), Bureau Archives.

52. Record of Proceedings in the Case of William Moore, Sep. 1, 1865, Letters Received, Records of the Assistant Commissioner, Mississippi (M826), Bureau Archives.

53. Order of Col. Samuel Thomas, Aug. 30, 1865, Record of Proceedings in the Case of William Moore, *supra* note 52.

54. *Id.*

55. *Id*.

56. *Id*.

57. Letter from Agent C. A. Shields to Bvt. Gen. A. C. Gillem, Oct. 29, 1867, Letters Received, Records of the Assistant Commissioner, Mississippi (M826), Bureau Archives.

believed he "[would] not [appear again] this side of judgement day."[58] The agent reported the outrage to a local magistrate, who arrested the White perpetrators. When the agent learned the justice planned to demand only $500 bail apiece, "[he] objected & asked that at least $1000 should be given," and the justice obliged.[59] The Bureau's indulgence of local jurisdiction ran only so far, however. Later, when the grand jury refused to indict the offenders, even on a lesser charge of false imprisonment, the Bureau ordered its staff to take charge of the prosecution as it had in Moore's case.[60]

Amalia Kessler has written about the ways Freedmen's Bureau courts exercising civil jurisdiction were renowned for their flexible, adaptive, and one might say "equitable" procedure.[61] One could say the same about the agents who exercised jurisdiction over pretrial criminal matters and regulatory offenses. In some cases, the Bureau directed local magistrates on what bail to demand; in others, it assisted the accused with securing sureties or paying cash bonds. Whenever the Bureau found its efforts at equal justice under law thwarted, it could remove proceedings entirely to its own jurisdiction and render speedy trials or summary judgments while the local courts remained closed until term time. This adaptive jurisdiction was not at all unique to Mississippi. Across the former Confederacy, Bureau agents intervened in thousands of cases in similar ways, exhibiting similar themes as the cases of Moore and Newman related above.

All in all, nine hundred agents comprised a tiny force to oversee the transition of four million emancipated slaves to a system of free labor and public education across the 750,000 square miles of the former Confederacy.[62] And to be sure, not all agents were equally zealous in their mission. Especially among the higher-ranking officers, too much sympathy for freedmen was liable to get an agent reassigned.[63] Given these circumstances, it is all the more remarkable what agents could accomplish in the reform of criminal justice where they were so inclined (and so staffed). Throughout the South, Bureau agents supervised local

58. *Id*.

59. *Id*.

60. Letter from Agent C. A. Shields to Lt. M. Barber, Nov. 23, 1867, Letters Received, Records of the Assistant Commissioner, Mississippi (M826), Bureau Archives.

61. Kessler, *supra* note 43, at 472–73.

62. Du Bois, *supra* note 41.

63. *See* Newkirk, *supra* note 43, at 53; Oakes, *supra* note 43, at 70, 73; Du Bois, *supra* note 41, at 360.

courts, audited jail facilities, and intervened directly in local law enforcement when they found magistrates abusing their authority over bail.

One of the more vivid—though not unusual—episodes was reported in Mount Holly, South Carolina. In April 1867, a White man, Ely Faulk, accused freedman Peter Marang of theft, though it was apparently a matter of record evidence that the theft had been committed by two White men. After a heated argument, Faulk fired a pistol at Marang while the latter fled. Suspecting the South Carolina justice of the peace would be insufficiently zealous in his prosecution, F.W. Liedtke, the Sub-Assistant Commander for the local field office, "required M. Browning, Magistrate, to proceed with this case according to law, forbidding any settlement short of a trial by the proper court."[64] About a week later, when Liedtke checked back in on the case, he was surprised to learn that Faulk had secured release on bail set at $500. "Not believing the whole of Mr. Browning's report," Liedtke "called for another and more detailed report, asking [the] name of the bailee [sic], etc." Liedtke discovered that the justice, believing Faulk's employer would stand surety, "had released Faulk, before the bail bond had been signed," and now neither Faulk nor his putative bailor were to be found.[65] Liedtke took custody of "all papers in the case" and by the end of May had filed them at the district headquarters in Charleston. Figuring that "[t]his case, needing in my opinion further attention and thorough investigation," Liedtke left the papers to the Bureau to either prosecute directly or refer to a more reliable judge.[66]

Such accounts, often with fewer details, appear many times in the records. "Forwarded to Hd. Qtrs."; "Returned from Hd. Qtrs."; "Returned to Asst. Comr."; "requesting arrest by the Military Authorities"; "inviting attention to . . . Attorney General"—these and other notations were frequently scrawled on all manner of cases like those described above.[67] As if military jurisdiction conferred a kind of de facto certiorari power, agents seized and transferred

64. Report of Outrages Committed by Whites on Blacks and by Blacks on Whites for the Month of May 1867, by Lieut. F.W. Liedtke, 43rd Infantry A. Sub-Asst. Comr., Records of the Assistant Commissioner, South Carolina (M869), Bureau Archives.

65. *Id*.

66. *Id*.

67. *See, e.g.*, Register of Outrages Committed on Freedmen Jan.–Dec. 1868, Records of the Assistant Commissioner, Virginia (M1048); Reports Relating to Murders and Outrages 1865–68, Records of the Assistant Commissioner, Georgia (M798); Miscellaneous Reports and Lists Relating to Murders and Outrages Mar. 1867–Nov. 1868, Records of the Assistant Commissioner, Louisiana (M1027), Bureau Archives.

records and brought them before other tribunals or the attention of other prosecutors. "[S]o long as the present class of Magistrates are allowed to adjudicate Freedmen's Cases," one agent observed in Virginia, "the latter class will not receive the impartial justice they are entitled to."[68] In many cases, the solution was to remove the cases from the "present class of magistrates."

Other activities of the agents could better be described as regulatory supervision, especially the many jail audits conducted by Bureau agents. For instance, Major C.W. Pierce, Sub-assistant Commander for Eastern Alabama, visited multiple counties' jails to report on their bail and detention rates by race.[69] Occasionally, these audits showed that Reconstruction was succeeding, and local magistrates were dispensing equal justice under law. E.G. Budd, Assistant Superintendent for the Palmyra, Virginia, Field Office, recorded in a series of adjudications he witnessed:

> The parties throughout are treated according to law, and colored testimony taken and given due consideration. Some few colored men have been bound over to keep the peace for misconduct and threats. Generally bail is given and they receive the benefit of the law, as [W]hite persons, and where bail is allowable in petty larceny it has been extended to them. The State Authorities thus far, in this County, I must note, have endeavored to do justice in law to colored people.[70]

Another Virginia agent, W.S. Chase, surmised that things were going so well only because the Bureau was there breathing down the necks of the local magistrates. Though he admitted that "the civil authorities of the county are disposed to deal fairly with the freedmen as a general rule," he observed "a class of irresponsible persons that endeavor to abuse the freedmen every chance they get and it would be often looked over by the Magistrates if it were not for the Bureau."[71] Other "Magistrates that seem afraid to do their duty . . . are improving" under the

68. Report of D.J. Connolly to Garick Mallory, Mar. 31, 1867, Records Relating to Court Cases Involving Freedmen, Records of the Assistant Commissioner, Virginia (M1048), Bureau Archives.

69. Report of Maj. C.W. Pierce to Col. O.D. Kinsman, June 11, 1867, Reports of Operations from the Subdistricts, Records of the Assistant Commissioner, Alabama (M809), Bureau Archives.

70. Report of Lt. Col. E.G. Budd to Brig. Genl. O. Brown, Aug. 31, 1866, Records Relating to Court Cases Involving Freedmen, Records of the Assistant Commissioner, Virginia (M1048), Bureau Archives.

71. Report of Lt. W.S. Chase to Maj. W. R. Morse, Sept. 30, 1866, Records Relating to Court Cases Involving Freedmen, Records of the Assistant Commissioner, Virginia (M1048), Bureau Archives.

Bureau's watchful eye, Chase thought.[72] The comments indicate the Bureau supervision of the magistrates, at least in these Virginia field offices, was thorough, frequent, and, where need be, invasive.

Altogether, these records show that racially discriminatory abuses of the bail system were a widely known problem to the Bureau. When agents were inclined to intervene and rectify these situations, they relied on the removal provisions of the Civil Rights Act of 1866 to transfer both civil and criminal cases to federal court, or at other times they took over the prosecution themselves (both of White and Black defendants), asserting military jurisdiction under the Military Reconstruction Acts.[73]

IV. EQUAL IN STRINGENCY: THE MILITARY JURISDICTION ORIGINS OF SECTION 1983

Freedmen's Bureau reports and newspaper accounts of bail abuses in the South were central to the passage of the Third Force Act, also known as the Ku Klux Klan Act or the Civil Rights Act of 1871. Now codified at 42 U.S.C. § 1983, the vehicle for most modern civil rights litigation has spurred half a century of debate over the meaning of the statute's delphic text.[74] Careful historical scholarship has resolved some of these disputes, most notably by showing that § 1983 liability for those acting "under color of law" was meant to be co-extensive with the notion of "state action" under the Fourteenth Amendment.[75] But scholarly inquiries about § 1983's history have tended to get so far down in the weeds of the text that they have missed important lessons from the context of the debates. By paying attention to Congress's concern about southern bail abuses, the intended scope of § 1983 liability becomes more apparent.

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72. *Id.*

73. Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27 (codified *inter alia* at 28 U.S.C. § 1443); Military Reconstruction Acts, ch. 153, 14 Stat. 428, 428–30 (Mar. 2, 1867); ch. 6, 15 Stat. 2, 2–5 (Mar. 23, 1867); ch. 30, 15 Stat. 14, 14–16 (July 19, 1867); ch. 25, 15 Stat. 41, 41 (Mar. 11, 1868).

74. *See, e.g.*, Michael Kent Curtis, *The Klan, the Congress, and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments & the State Action Syllogism, a Brief Historical Overview*, 11 J. CONST. L. 1381, 1423 (2009); George Rutherglen, *Custom and Usage as Action Under Color of State Law: An Essay on the Forgotten Terms of Section 1983*, 89 VA. L. REV. 925, 940–41 (2003); Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 54–55 (1989); Eric H. Zagrans, *"Under Color of"* What *Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499, 510 (1985).

75. *See* David Achtenberg, *A "Milder Measure of Villainy": The Unknown History of 42 U.S.C. § 1983 and the Meaning of "Under Color of" Law*, 1999 UTAH L. REV. 1, 52–53 (1999); Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323, 369 (1992).

The legislation that became § 1983 had an elaborate factual record in Congress to bolster it. In the winter of 1870, the Radical Republican Senator Oliver P. Morton established a Senate select committee to gather direct evidence on southern outrages perpetrated in North Carolina.[76] The five-member committee worked rapidly, traveling to the South, deposing witnesses, and publishing a 600-page report by March, 1871.[77] Seeking to slow Morton down, House Democrats and moderate Republicans pressed for additional investigation in a joint select committee composed of members of both chambers.[78] Even that body worked quickly, however, and by the next year had begun publishing thirteen volumes of examination transcripts from over 580 men and women who testified before it across the former Confederacy.[79] The Radicals feared they could not await the end of the investigation, however. Spurred on by a message from President Grant demanding action, Congress set a special schedule limiting debate to two weeks of one-hour exchanges alternating between Republicans and Democrats, after which it enacted the Civil Rights Act of 1871. President Grant signed the bill on April 20, just forty days after the publication of the Senate Select Committee Report.[80]

Whether one goes by the investigative reports from the eve of the bill's passage or from the months following, bail issues appeared all throughout—two dozen times in the Senate Select Committee volume and thousands of times in the Joint Select Committee reports.[81] Like the Freedmen's Bureau reports, the congressional investigation described the mechanics of bailing the Klan. One twenty-five-year-old recruit who turned state's witness

76. CONG. GLOBE, 41st Cong., 3d Sess. 146 (1871); S. JOURNAL, 41st Cong, 3d Sess. 136 (1871).

77. SELECT COMM. OF THE SENATE, REPORT ON THE ALLEGED OUTRAGES IN THE SOUTHERN STATES, S. REP. NO. 42-1, at I (1871) [hereinafter SENATE SELECT COMMITTEE REPORT].

78. CONG. GLOBE, 42d Cong., 1st Sess. 116 (1871); *Washington: Ben Butler's Ku Klux Bill*, N. Y. HERALD, Mar. 18, 1871, at 10.

79. THE JOINT SELECT COMM., REPORT OF THE JOINT SELECT COMMITTEE TO INQUIRE INTO THE CONDITION OF AFFAIRS IN THE LATE INSURRECTIONARY STATES, H.R. REP. NO. 42-22 (1872) [hereinafter JOINT SELECT COMMITTEE REPORT]; *Portraits in Oversight: Congress Investigates KKK Violence During Reconstruction*, LEVIN CTR. HOME, https://levin-center.org/congress-investigates-kkk-violence-during-reconstruction/ [https://perma.cc/EGX5-E8J3] (last visited Feb. 28, 2026).

80. *See* ALLEN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION 387–88 (1979).

81. *See generally* SENATE SELECT COMMITTEE REPORT, *supra* note 77 (containing two dozen mentions of bail issues throughout); JOINT SELECT COMMITTEE REPORT, *supra* note 79 (containing thousands of mentions of bail issues throughout).

testified that "if there was a member in serious trouble, it was our duty to stand his bail so that he could make his escape."[82]

In the two weeks of debates, Radical Republicans supplemented this record with newspaper clippings, military reports, or their own experiences in the South. Not just freedmen, but sometimes military officers were reported to have been held in southern jails on unaffordable bail, including George Bergen, detained in North Carolina for ninety days on the uncorroborated charges of two Klan members.[83] Senator Adelbert Ames, recently elected in Mississippi, reported: "[A]t the recent massacre at Meridian, Mississippi, though some ten negroes were killed by a mob, but three men were found to have been engaged in it, and they were held to bail at one or five hundred dollars each," trifling sums in Ames's view.[84] "Thus was I taught in the equal rights of a free people," he sarcastically concluded.[85]

Like Ames, most Republicans treated these reports as an obvious violation of the Fourteenth Amendment's guarantee of equal protection of the law, but a few went further. Senator John Bingham explained in the debates over § 1983 that the Fourteenth Amendment unequivocally applied the first eight amendments to the Constitution against the states, and thus any right in the Bill of Rights could be protected by Congress's legislation.[86] Congressman Henry Dawes agreed. Reading from both the Fourth and Eighth Amendments specifically, Dawes exclaimed that both these rights were bestowed on freedmen against southern outrages "by one single amendment [the Fourteenth], . . . as it were, by the wave of a magic wand."[87] By styling the legislation "An Act to Enforce the Fourteenth Amendment," Republicans signaled their understanding that, both on the basis of the Equal Protection Clause and the Privileges and Immunities Clause, Congress had the power to rectify the paradigm cases of local bail abuses and failures of evenhanded prosecutions.[88]

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82. ULYSSES S. GRANT, MESSAGE OF THE PRESIDENT OF THE UNITED STATES, COMMUNICATING, IN COMPLIANCE WITH THE RESOLUTION OF THE SENATE OF THE 16TH OF DECEMBER, 1870, INFORMATION IN RELATION TO OUTRAGES COMMITTED BY DISLOYAL PERSONS IN NORTH CAROLINA AND OTHER SOUTHERN STATES, S. EXEC. DOC. NO. 41-16, at 51 (1871).

83. CONG. GLOBE, 42d Cong., 1st Sess. 605 (1871).

84. *Id.* at 571.

85. *Id.*

86. *Id.* app. at 84. For a synthetic overview of the modern jurisprudence of "incorporating" the Bill of Rights against the states, see Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1218 (1992).

87. CONG. GLOBE, 42d Cong., 1st Sess. 475–76 (1871).

88. *See id.*; Jed Rubenfeld, *The Paradigm-Case Method*, 115 YALE L.J. 1977, 1984 (2006).

The predecessor bill to § 1983 at first attempted to deal with these problems the way the Freedmen's Bureau had. In a bill introduced in February in the Forty-First Congress and reintroduced in March 1871, Benjamin F. Butler proposed that the federal courts should hire commissioners for every county and municipality in the South to investigate any reported outrage committed "with intent to hinder, impair, or deprive [any] citizen of the full enjoyment of any right guarant[e]ed to him under the Constitution" or federal law.[89] To effectuate this task, commissioners were to be granted full power to arrest and bail anyone accused of committing outrages. Indeed, the proposed bill required that, upon finding probable cause, commissioners could not permit the accused to go at large unless they could provide "recognizances with good and sufficient sureties, each having sufficient estate within the judicial district, in a penal sum not less than [one thousand], nor more than [ten thousand dollars]."[90] Of course, if the accused could not find sureties for such a sum, commissioners would have been empowered to commit them to the custody of the marshals for the duration of proceedings.[91]

As David Achtenberg has shown, objections to Butler's bill were both principled but also personal. Some Republicans doubted the constitutionality of the bill's especially vague jurisdictional provisions, but many other congressmen had developed personal grievances with Butler and were uninterested in seeing him lead Congress's response to southern outrages.[92] Ultimately Butler's bill was replaced with a proposal that closely tracked the language of the Civil Rights Act of 1866, declaring liability against any person who "subject[s] . . . any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States, and entitling aggrieved parties to "an action at law, suit in equity, or other proper proceeding for redress."[93] Although Butler professed at the conclusion of the debates that he still preferred his original bill, he noted of the revised draft that he, "for one, [was] quite content to take the

89. CONG. GLOBE, 42d Cong., 1st Sess. 173 (1871); Achtenberg, *supra* note 75, at 8–9.

90. CONG. GLOBE, 42d Cong., 1st Sess. 173 (1871).

91. *Id*.

92. *See* Achtenberg, *supra* note 75, at 12–14.

93. An Act to Enforce the Fourteenth Amendment, ch. 22, 17 Stat. 13, 13 (1871) (codified at 42 U.S.C. § 1983); Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27. A separate provision, now codified at 42 U.S.C. § 1985(3), created civil liability for two or more people who conspire to deprive certain classes of victims of their constitutional rights.

[revised] bill before the House," finding it equal in "stringency" to the one he had proposed.[94]

It may be obvious how Butler's original idea of an army of federal court commissioners could substitute for the literal army operating under military jurisdiction and the organization of the Freedman's Bureau, but in what sense was the final text of § 1983 expected to be as stringent? In answer, the clearest exposition of the bill may have been provided by one of its opponents, Democratic Senator Allen G. Thurman of Ohio. By its terms, Thurman perceived, the bill conferred a massive new jurisdiction on the federal courts "without any limit whatsoever as to the amount in controversy."[95] That meant that "[t]he deprivation may be of the slightest conceivable character" and involve "all mere private suits," yet plaintiffs would be able to pursue small claims for torts or even declaratory-like actions for nominal damages in the federal courts.[96] Recognizing that the act conferred concurrent jurisdiction on the state courts, Thurman nevertheless found the bill to be "a disparagement of the State courts."[97] By authorizing what had been ordinary civil suits to be brought in federal court "is to say, in effect, that the judiciary of the States is not worthy of being trusted."[98] What's more, the bill seemed to leave no room for any kind of judicial immunity, meaning that not just perpetrators of outrages but the local judges who failed to prosecute them would be proper defendants under § 1983.[99] Thurman pointed to two reports of state judges being prosecuted under federal jurisdiction as a sign of things to come.[100]

No Senator contradicted Thurman's reading. Indeed, Congressman Dawes encouraged it. Section 1983 allowed for federal court jurisdiction "if any one of these rights, privileges, or immunities [in the Bill of Rights] . . . are insecure in this or any other time, has been or is likely to be invaded, impaired, or otherwise injured."[101] Whether the state courts were trustworthy was beside the point. Federal courts were "a proper place in which

94. CONG. GLOBE, 42d Cong., 1st Sess. 449 (1871).

95. *Id*. app. at 216.

96. *Id*.

97. *Id.*

98. *Id.*

99. *Id*. app. at 217. On the modern provision for judicial immunity in § 1983, see Alexandra Nickerson & Kellen Funk, *When Judges Were Enjoined: Text and Tradition in the Federal Review of State Judicial Action*, 111 CALIF. L. REV. 1763, 1771–72 (2023).

100. CONG. GLOBE, 42d Cong., 1st Sess. app. 217 (1871).

101. CONG. GLOBE, 42d Cong., 1st Sess. 476 (1871).

to find redress for any such wrongs," for if there were "an offense at all, it is because it is an infraction of the Constitution of the United States or some law thereof," and what better use of "[t]he judicial power" than to rectify it in a federal court?[102] Paired with his commentary directing specific attention to the Fourth and Eighth Amendments as frequently violated by southern outrages and disparate prosecutions in southern courts, Dawes's remarks show how § 1983 was meant, at least by some of its supporters, to substitute for Butler's system of commissioners, a proposal that was itself a substitute for military jurisdiction and the on-the-ground interventions of the Freedmen's Bureau.[103] Instead of an army of agents or commissioners, § 1983 authorized an army of private plaintiffs to sue in federal court, including for seemingly "minor" infractions perpetrated by magisterial or judicial defendants.

The Radicals' intentions for § 1983 were swiftly obscured in practice. The same year as the bill's enactment, the Supreme Court announced a broad policy of judicial immunity with no reference to how state and local judges were actually being supervised, charged, and prosecuted by Freedmen's Bureau agents.[104] Moreover, without the budgetary increases envisioned by Butler's bill, a system of private plaintiffs visiting distant federal courts staffed by a single judge amounted to something like an unfunded mandate.[105] To date, no historian has examined the archives of early § 1983 litigation, but government prosecutions of the Klan under the same bill waned fairly quickly, to mixed results,[106] and a twentieth-century survey found very few reported decisions from the lower courts applying § 1983.[107]

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102. *Id*.

103. *See supra* notes 87–88, 94–99 and accompanying text.

104. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871); Jay M. Feinman & Roy S. Cohen, *Suing Judges: History and Theory*, 31 S.C. L. REV. 201, 243–49 (1980).

105. Across the period from 1865 to 1880, the federal courts had no more than sixty-three to eighty authorized judgeship positions total, including the nine or ten U.S. Supreme Court justices. Many states had but one or two district judges overseeing all federal litigation in the district. *See Demography of Article III Judges, 1789–2024*, FED. JUD. CTR., https://www.fjc.gov/history/exhibits/graphs-and-maps/composition-courts [https://perma.cc/5H5U-8YTT]; *Maps of Judicial Circuits, Judgeships, and Meeting Places*, FED. JUD. CTR., https://www.fjc.gov/history/exhibits/graphs-and-maps/geographical-distribution-authorized-judgeships [https://perma.cc/3DMC-AEHM].

106. *See* ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866–1876, at 45–50 (2005); *cf.* PETER CHARLES HOFFER, WILLIAMJAMES HULL HOFFER & N. E. H. HULL, THE FEDERAL COURTS: AN ESSENTIAL HISTORY 175–78 (2016) (surveying docket loads of the district courts across the era, but without reference to specific classes of filings).

107. *See* Comment, *Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951) (counting twenty-one cases between 1871 and 1920).

V. PERVASIVE SCHEMES AND ONGOING AUDITS: THE MEMORY OF RECONSTRUCTION IN SECTION 1983 JURISPRUDENCE

In January 1969, Reconstruction was a century-old memory and yet a living reality in Cairo, the southernmost town in Illinois and "the site of the last of the civil rights movements of the 'modern' civil rights era."[108] Integration had come to Cairo's schools just a year and a half before—at least, when the schools were not closed due to bomb threats.[109] In 1968, a White Baptist preacher named Larry Potts bludgeoned to death a seventy-three-year-old Black resident of Cairo, claiming the latter had tried to assault Potts's wife.[110] Potts was not held to bail—he was not even arrested. Potts was a member of the Committee of Ten Million, a nationwide law-and-order organization whose stated mission was to repress Black "uprisings" and civil rights protests.[111] Around Cairo, the Committee was more popularly known as the White Hats, after the distinctive white hard hats members paraded in. The prosecutor for Cairo, state's attorney Peyton Berbling, was also a prominent member of the White Hats.[112]

In March, Black leaders in Cairo organized the United Front of Cairo, and with assistance from the NAACP began planning an elaborate and effective boycott of local businesses. Supply chains running to Missouri and Kentucky kept local residents fed while Cairo's stores shuttered, choosing to close down rather than change their policies to hire Black workers.[113] Gunshots were fired nightly over Pyramid Court, Cairo's public housing, where many of the town's Black residents were concentrated.[114] When the Lawyers' Committee arrived to assist the protestors in December, it was greeted with an undetonated bomb on its doorstep and a bullet fired into its Xerox machine.[115]

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108. MARTHA A. MILLS, LAWYER, ACTIVIST, JUDGE: FIGHTING FOR CIVIL AND VOTING RIGHTS IN MISSISSIPPI AND ILLINOIS 303, 305–06 (2015).

109. *Id*. at 306.

110. Kathryn Anne Schumaker, *Investing in Segregation: The Long Struggle for Racial Equity in the Cairo, Illinois, Public Schools*, OHIO VALLEY HIST., Fall 2014, at 49, 60–61.

111. *Id*. at 61; ELIZABETH HINTON, AMERICA ON FIRE: THE UNTOLD HISTORY OF POLICE VIOLENCE AND BLACK REBELLION SINCE THE 1960S 73 (2021).

112. MILLS, *supra* note 108, at 306.

113. *Id*. at 307.

114. *Id*. at 306–07.

115. *Id*. at 308, 315. On the history of the Lawyers' Committee for Civil Rights Under Law, *see* William B. Spann Jr., *Lawyers and Human Rights*, 63 ABA J. 1121, 1122 (1977).

On July 23, 1970, the Lawyers' Committee filed a class action lawsuit against Berbling—the state's attorney—as well as the police chief, the local magistrate, and the circuit court judges of Cairo.[116] Quoting the text of § 1983, the complaint alleged Cairo's systemic "deprivation, under color of law, custom and usage" of its Black citizens' federal rights. Prosecutors allegedly declined to prosecute White residents, not just in Potts' case, but in a variety of others, including the case of a man who murderously drove his truck into a group of Black protestors.[117] On the other hand, Black defendants accused of trivial offenses were subjected to "more serious charges for conduct which would result in no charge or a minor charge against a [W]hite person," and then they were held to "substantially greater bonds" and detained when they could not post bail.[118]

When the case eventually reached the Supreme Court, Justice William O. Douglas thought the complaint alleged "a more pervasive scheme for the suppression of [B]lacks and their civil rights than I have ever seen."[119] Referring his brethren to the history of § 1983, Justice Douglas reminded them that "the Federal Constitution is supreme and if the power of the [W]hite power-structure in Cairo, Illinois, is so great as to disregard it, extraordinary relief is demanded."[120] Justice Douglas did not make a sustained resort to history, and his method could not be considered "originalist" under any method currently going by that name.[121] Instead of discerning a fixed legal meaning that carried forward in time, Justice Douglas saw the present collapsing back into the past. The Cairo of January 1969 was the Cairo of January 1869, a place "boiling with racial conflicts" and "vast invasions of civil rights."[122] If one looked, one could see the troops

116. Docket Sheet, Littleton v. Berbling, Civil No. 70-103 (E.D. Ill. July 23, 1970) (on file with the National Archives Chicago Records Division).

117. Amended Complaint at 2, 7–8, Littleton v. Berbling, Civil No. 70-103, (E.D. Ill. Oct. 23, 1970) (on file with the National Archives Chicago Records Division).

118. *Id*. at 11.

119. O'Shea v. Littleton, 414 U.S. 488, 509 (1974) (Douglas, J., dissenting).

120. *Id*. at 510.

121. Justice Douglas's appeal to history significantly relied on Mitchum v. Foster, 407 U.S. 225 (1972). *See O'Shea*, 414 U.S. at 512 (Douglas, J., dissenting). The majority opinion in *Mitchum*, authored by Justice Stewart, drew its structure and evidence from Justice Douglas's deeply historical dissent in Younger v. Harris, 401 U.S. 37, 58 (1971). For a survey of originalist approaches and arguments after the most recent Supreme Court terms, see Reva B. Siegel, *The Levels-of-Generality Game: "History and Tradition" in the Roberts Court*, 47 HARV. J.L. & PUB. POL'Y 563, 576–78, 580–82 (2024); Richard H. Fallon Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221, 238 (2023).

122. *O'Shea*, 414 U.S. at 507 (Douglas, J., dissenting).

on the ground,[123] the unequal economic power, the evocative white uniforms, the bald racism. In a flash, one could see Reconstruction itself, vividly, in the now of its recognizability.[124]

Justice Douglas, though, was writing in dissent.[125] A six-member majority dismissed the complaint for failure to state a "case or controversy" under Article III. The first half of the opinion criticized the plaintiffs for failing to particularize the alleged injuries to the named plaintiffs, but then a five-member majority made clear that further amendment would be futile, not because of the pleading, but because of the relief.[126] Since the complaint sought "nothing less than an ongoing federal audit of state criminal proceedings," federal equity was insufficient to order relief of such invasive scope against a municipal government or its officers.[127] Without saying a word about Reconstruction, the Court cited a different source of history, its recent *Younger v. Harris* opinion, with its affirmation of faith that "[s]ince the beginning of this country's history, Congress has . . . manifested a desire to permit state courts to try state cases free from interference by federal courts."[128]

O'Shea v. Littleton, as the Cairo case became known, was only one point in a long series of dueling opinions using or ignoring Reconstruction history in § 1983 litigation.[129] Strikingly, many of these cases alleged municipal abuses of bail or pretrial arrest

123. The National Guard was sent to Cairo in the summer of 1967 in the wake of protests over the jail cell death of Robert L. Hunt, a Black nineteen-year-old soldier. *See* MILLS, *supra* note 108, at 305–06; Schumaker, *supra* note 110, at 56–57.

124. *See* WALTER BENJAMIN, THE ARCADES PROJECT 462–63 (Howard Eilan & Kevin McLaughlin, trans., 2002); Rolf Tiedemann, *Dialectics at a Standstill: Approaches to the Passagen-Werk*, *in* THE ARCADES PROJECT 929, 942 (Howard Eilan & Kevin McLaughlin, trans., 2002). For a recent example of a self-described "Benjaminian book" of legal history, see CHRISTOPHER TOMLINS: IN THE MATTER OF NAT TURNER: A SPECULATIVE HISTORY 227 n.3 (2020).

125. *O'Shea*, 414 U.S. at 505 (Douglas, J., dissenting).

126. *Id.* at 493–99, 504 (majority opinion).

127. *Id*. at 500.

128. *Id.* at 496–501; Younger v. Harris, 401 U.S. 37, 43 (1971).

129. In addition to *O'Shea*, *Younger*, and *Mitchum*, see, for example, Monroe v. Pape, 365 U.S. 167, 170 (1961); *id.* at 237 (Frankfurter, J., dissenting); Preiser v. Rodriguez, 411 U.S. 475, 476, 489–90 (1973); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 664–65, 669 (1978); Hutto v. Finney, 437 U.S. 678, 680, 693–94 (1978); Pulliam v. Allen, 466 U.S. 522, 524, 540–41 (1984); Hafer v. Melo, 502 U.S. 21, 27–28 (1991). Scholarly literature debating the relevance of Reconstruction history to the Court's jurisprudence is vast. For representative positions, see AZIZ Z. HUQ, THE COLLAPSE OF CONSTITUTIONAL REMEDIES 149–150 (2021); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 208–09, 213 (1998); Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1161–62, 1164 (1988); Douglas Laycock, *Federal Interference with State Prosecutions: The Cases* Dombrowski *Forgot*, 46 U. CHI. L. REV. 636, 680–81 (1979); Aviam Soifer & H. C. Macgill, *The* Younger *Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141, 1170–71 (1977).

practices, although this context often faded into the background by the time the cases were canonized in Hart & Wechsler's influential casebook.[130] In one line of cases, the Court has followed "the assumption," first articulated by Justice Felix Frankfurter, "that the state courts, not the federal courts, would remain the primary guardians" of "fundamental" rights, and that "[t]he Fourteenth Amendment did not alter this basic aspect of our federalism."[131] In the other line, the Court has often emphasized the history of Reconstruction to conclude, as Justice Douglas once wrote for the Court, that

> [O]ne reason [§ 1983] . . . was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.[132]

Both of these dueling lines originated in *Monroe v. Pape*, a 1961 case alleging abusive arrest and detention practices by the Chicago police.[133] For supporters of Justice Frankfurter's view, *Monroe v. Pape* is the original sin of § 1983 jurisprudence. As Judge Silberman of the D.C. Circuit once put it, the *Monroe* Court "overrode what seems to me to be the characteristically impeccable reasoning of Justice Frankfurter" and "turned § 1983 into a provision that the post-civil war Congress could not possibly have visualized."[134] Docket statistics seemed to bear this assertion out. Section 1983 appeared "moribund" before *Monroe*, with few cases filed and even fewer resulting in any decisions of note.[135] But since 1961, almost 40,000 § 1983 claims are filed each year, with about half from prisoners making claims about abusive arrest, bail, and detention practices.[136] For Justice Frankfurter's defenders,

130. On the canonical status of Hart & Wechsler and its subsequent editions, see Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 691, 710–11 (1989).

131. *Monroe*, 365 U.S. at 237 (Frankfurter, J., dissenting).

132. *Id.* at 180 (majority opinion).

133. *Id.* at 169–170; Philip O'Sullivan, *Putting a Check on Police Violence: The Legal Services Market, Section 1983, Torture, Abusive Detention Practices, and the Chicago Police Department from 1954 to 1967*, 56 HARV. C.R.-C.L. L. REV. 2, 24 (2021).

134. Crawford-El v. Britton, 93 F.3d 813, 830 (D.C. Cir. 1996) (en banc) (Silberman, J., concurring).

135. Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape*, and the Frontiers Beyond*, 60 NW. U. L. REV. 277, 282–87 (1965); Note, *Limiting the Section 1983 Action in the Wake of* Monroe v. Pape, 82 HARV. L. REV. 1486, 1486–87 (1969).

136. *See Crawford-El*, 93 F.3d at 830 (Silberman, J., concurring).

pre-*Monroe* practice is *res ipsa* proof of what the Reconstruction Congress wanted; the subsequent history is evidence of Warren Court overreach.[137]

Indeed, as William Baude has noted, Justice Scalia believed *Monroe* had gotten § 1983 so far off track that unoriginalist, judicially invented doctrines like qualified immunity and habeas exhaustion were necessary compensations to bring the federal courts back into balance.[138] While Professor Baude acknowledges that Justice Scalia's reading of the history "appears to be wrong," his article excuses the reliance on Justice Frankfurter's version of federal history as "often a good practice,"[139] and students of Professor Baude appear to be hard at work reestablishing the foundations of Justice Frankfurter's "perspicacious skeptic[ism]" of federal jurisdiction.[140]

The irony at the root of this vision is that Justice Frankfurter, the academic historian of the federal courts, got the history wrong. In his *Monroe* opinion, Justice Frankfurter cited J. G. Randall's *Civil War and Reconstruction*, praising it especially for its "more dispassionate appraisal of the [Black] Codes than was possible during the turbulence of Reconstruction."[141] Still a standard work in the field, Randall's text has been revised over the years to say nearly the opposite of the 1937 volume Justice Frankfurter was using.[142] As one review in 1964 noted, "the book had a noticeable pro-Southern slant" and required significant rewrites to "present the Radicals and the Negroes in a more [favorable] light."[143] Following Randall's guidance, Justice Frankfurter placed more

137. *See* Louise Weinberg, *The* Monroe *Mystery Solved: Beyond the "Unhappy History" Theory of Civil Rights Litigation*, 1991 B.Y.U. L. REV. 737, 739, 752, 757 (1991); Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1337 (1952).

138. William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 62–63 (2018) (quoting Crawford-El v. Britton, 523 U.S. 574, 611–12 (1998) (Scalia, J., dissenting)); *see also* Heck v. Humphrey, 512 U.S. 477, 490 n.10 (1994) (Scalia, J.) ("But if . . . the goal of our interpretive enterprise under § 1983 were to provide a remedy for all conceivable invasions of federal rights that freedmen may have suffered at the hands of officials of the former States of the Confederacy, the entire landscape of our § 1983 jurisprudence would look very different. We would not, for example, have adopted the rule that judicial officers have absolute immunity from liability for damages under § 1983. . . .").

139. Baude, *supra* note 138, at 63–64.

140. *Id*. at 64. *See, e.g.*, Tyler B. Lindley, *Anachronistic Readings of Section 1983*, 75 ALA. L. REV. 897, 927 (2024); E. Garrett West, *Refining Constitutional Torts*, 134 YALE L.J. 858, 885–87 (2025).

141. Monroe v. Pape, 365 U.S. 167, 225 n.35 (1961) (Frankfurter, J., dissenting).

142. *See* David Herbert Donald, *Preface* to JAMES G. RANDALL, THE CIVIL WAR AND RECONSTRUCTION xiii–xiv (David Herbert Donald, Jean H. Baker & Michael F. Holt, eds., 2001).

143. G.M. Craig, *The Civil War and Reconstruction by J.G. Randall, David Donald*, 45 CAN. HIST. REV. 63 (1964) (book review).

emphasis on moderate Republicans like James Garfield to conclude that even the Radical Congress of 1871 aimed to limit federal intrusions on state court jurisdiction.[144]

By forgoing reliance on academic historians of the day, Justice Douglas's account of the primary sources picked up more of the intensive focus of the Radical Republicans on the actual regulation of municipal abuses of their power to arrest.[145] Justice Douglas's account of the "supplementary" nature of § 1983 remedies[146] thus came closer to the vision Radical Republicans had in mind when constructing the Civil Rights Act of 1871—not state courts confining themselves to traditional forms of action,[147] but military jurisdiction swiftly and equitably interposing itself between state officials or quasi-officials and individual citizens, without regard to any immunity. Later jurists would model American federalism along lines of "dual sovereignty," with state and federal courts operating different spheres that interacted infrequently if at all.[148] But Justice Douglas's history of on-the-ground practices of bailing and jailing attributed to § 1983 a more cohesive vision of a municipal Constitution.

Today, we use "municipal" to mean the most local, implicitly non-federal, level of government.[149] In the 1870s, however, "municipal" law was an exact synonym for domestic law, all of the law internal to a nation as opposed to international law.[150] In defining municipal law this way, John Norton Pomeroy's elementary treatise in 1883 recognized that if "Municipal law is that of a [separate] State," the only state that could be in America was the United States as a whole.[151] Pomeroy thus understood federal jurisdiction and causes of action as the *Monroe* Court

144. *Monroe*, 365 U.S. at 231 n.47, 237 (Frankfurter, J., dissenting).

145. *Id.* at 174–76, 174 n.10 (majority opinion).

146. *Id.* at 183.

147. *Cf.* Tyler B. Lindley, *Reconstructing Section 1983*, 101 NOTRE DAME L. REV. (forthcoming 2026) (manuscript at i, 28–29) (proposing that "federal courts were limited to adjudicating state-law causes of action" at the time of § 1983's drafting).

148. For an overview of the vast literature on dual sovereignty within the context of § 1983 litigation, see Fred O. Smith Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2336–37 (2018).

149. *See* HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870, at 190 (G. Edward White ed., 1983).

150. *See, e.g.*, *id.*; John Bleecker Miller, Letter to Hon. Homer A. Nelson, Chairman, Judiciary Comm. of the Senate of N.Y. (Apr. 25, 1883); EDWARD G. RYAN & MATTHEW H. CARPENTER, ADDRESSES BY HON. EDWARD G. RYAN, LATE CHIEF JUSTICE OF WISCONSIN, DELIVERED BEFORE THE WISCONSIN LAW SCHOOL, 1873, AND HON. MATT H. CARPENTER, LATE UNITED STATES SENATOR, DELIVERED BEFORE THE COLUMBIAN LAW SCHOOL, 1870, at 11 (1882).

151. JOHN NORTON POMEROY, AN INTRODUCTION TO MUNICIPAL LAW 10 (S.F., 2d ed. A.L. Bancroft & Co., 1883).

would ninety years later—as concurrent, supplementary, and "modern."[152] No act or regulation was too local for federal question or diversity jurisdiction. The municipal and the federal were but two points along the spectrum of constitutional activity.

VI. UNCOMFORTABLY REMINISCENT: *ODONNELL* AND HISTORICAL MEMORY IN THE TEXAS BAIL LITIGATIONS

The litigation that would become *ODonnell v. Harris County* began years before suit was filed in Houston. The primary architect of the litigation was a team of lawyers at the nonprofit Civil Rights Corps, a Washington, D.C.-based firm founded to mount innovative structural challenges against mass incarceration in the United States.[153] Like the *Brown v. Board of Education* integration suits of the 1930s and 40s, Civil Rights Corps started small, building upon settlements and consent decrees in small towns unwilling to dig in to defend against structural litigation when the plaintiffs seemed to be demanding relatively minor concessions.[154] Over time, however, the admissions of guilt started to pile up, and, while they were not technically precedential in the federal district courts, the array of municipal authorities admitting that their bail systems violated basic constitutional rights became impressive.[155]

Having secured multiple victories in Mississippi and having launched a significant suit in New Orleans, Civil Rights Corps attorneys looked to scale up their litigation against municipal bail abuses in Houston, albeit concentrating on misdemeanor bail and leaving the complications of felony bail for another day.[156] While the legal strategy had been developing in the small town cases for years, almost an equally long effort was required to develop the facts in

152. *See id*. at 90–91, 93; Monroe v. Pape, 365 U.S. 167, 183 (1961).

153. *About Us*, C.R. CORPS, https://civilrightscorps.org/about-us/ [https://perma.cc/MY8Y-G7C3] (last visited Jan. 8, 2026); *Civil Rights Groups Urge Court to Uphold Decision that Struck Down Unconstitutional Money Bail System in Harris County, Texas*, ACLU TEX. (Aug. 10, 2017, at 16:45 CT), https://www.aclutx.org/press-releases/civil-rights-groups-urge-court-uphold-decision-struckdown-unconstitutional-money/ [https://perma.cc/28TN-RMA9].

154. *See* JOHN FABIAN WITT, THE RADICAL FUND 451–54 (2025).

155. *See* Jones v. City of Clanton, Alabama, Alabama, Civil No. 15-34, 2015 WL 5387219, at *3–4 (M.D. Ala. Sep. 14, 2015); Jenkins v. City of Jennings, Civil No. 15–252, at 3 (E.D. Mo. Dec. 14, 2016); Bell v. City of Jackson, Civil No. 15-732, 2016 WL 6405833 (S.D. Miss. June 20, 2016); Thompson v. Moss Point, Civil No. 15–182, 2015 WL 10322003, at *1 (S.D. Miss. Nov. 6, 2015); Snow v. Lambert, Civil No. 15–567, 2015 WL 5071981, at *2 (M.D. La. Aug. 27, 2015); Cooper v. City of Dothan, Civil No. 15–425, 2015 WL 10013003, at *1 (M.D. Ala. June 18, 2015); Pierce v. City of Velda, Civil No. 15–570, 2015 WL 10013006, at *3 (E.D. Mo. June 3, 2015).

156. *See Moss Point*, 2015 WL 10322003, at *1; Cain v. City of New Orleans, 186 F. Supp. 3d 536, 540, 548 (E.D. La. 2016).

what would become the *ODonnell* litigation. One of the major difficulties of suing over misdemeanor bail system is the short time horizons. Even the most egregious illegal detention tends to last only until a defendant takes a plea deal to time served, which meant only a few days on average in Harris County.[157] After an illegal detention ends, an action for prospective equitable relief becomes moot. Class certification can avoid mootness, but only if certification is sought *during* the illegal deprivation, so that the class maintains the characteristics of the named plaintiff(s) at the time of filing.[158] Putting these procedural rules together, Civil Rights Corps had to identify a potential plaintiff, meet with them while incarcerated and explain the significance and mechanics of an impact litigation, agree to attorney representation consistent with professional ethical rules, then draft and file pleadings that met the *Iqbal* plausibility pleading standard and the *Walmart* class-certification standard[159]—all within about thirty hours. For months in 2016, Civil Rights Corps interns accordingly studied the Harris County Jail closely to devise a strategy for pulling off such a filing.[160] Springing into action in the summer of 2016, Civil Rights Corps filed multiple suits at once in case any particular plaintiff's case failed to adequately represent a class by the time it was filed.[161]

Three cases ultimately made it onto the dockets of the U.S. Court for the Southern District of Texas, and under the court's usual practice, these were consolidated with the first-filed case that happened to come in minutes ahead of the others.[162] That case was Maranda ODonnell's.[163] ODonnell's case itself was almost moot before it could begin. Apparently catching wind of what Civil Rights Corps was up to, a surety company had one of its local bondsmen post ODonnell's bail, hoping to free her from illegal

157. ODonnell v. Harris County, 251 F. Supp. 3d 1052, 1105 (S.D. Tex. 2017), *aff'd as modified*, 882 F.3d 528 (5th Cir. 2018).

158. *See* Genesis HealthCare Corp. v. Symczyk, 569 U.S. 66, 74, 76 (2013); U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 404 (1980).

159. *See* Ashcroft v. Iqbal, 556 U.S. 662, 663 (2009); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349–50 (2011).

160. ODonnell v. Harris County, 892 F.3d 147, 153 (5th Cir. 2018), *overruled by* Daves v. Dallas County, 22 F.4th 522 (5th Cir. 2022), *and* Daves v. Dallas County, 64 F.4th 616 (5th Cir. 2023); Declaration of Salil Dudani at 1, ODonnell v. Harris County, Civil No. 16-1414 (S.D. Tex. May 19, 2016).

161. *See* Declaration of Salil Dudani *supra* note 160, at 1; *ODonnell*, 251 F. Supp. 3d at 1062–64.

162. *See ODonnell*, 251 F. Supp. 3d at 1060; LR7.6, U.S. Dist. Ct. S. Dist. Tex.

163. *ODonnell*, 251 F. Supp. 3d at 1062–63.

detention before the federal case got going.[164] In the end, the professional bail industry was too late to thwart the case.[165]

Through multiple days of hearings on motions to dismiss and counter-motions for summary judgment, the County presented a three-pronged defense, one of law and two of fact. As a matter of law, the County cited *Younger* and *O'Shea* and insisted that federalism doctrine insulated the municipality from federal court review.[166] Under Supreme Court and Fifth Circuit precedent at the time, these were not serious arguments. In *Gerstein v. Pugh*, decided the year after *O'Shea*, the Supreme Court had unanimously agreed that challenges to pretrial process were not challenges to criminal cases themselves and did not fall under either *Younger* or *O'Shea*'s strictures.[167] More recently, in 2013's *Sprint Communications v. Jacobs*, the Supreme Court had again unanimously affirmed that abstention from exercising federal jurisdiction was highly disfavored.[168]

The County's main factual defense proved equally groundless. No person, the County contended, was detained by discriminatory bail practices or a lack of due process. Instead, every detainee was in jail because their risk of nonappearance put them there.[169] As the district court observed, the defense tended to be an empty game of semantics. By expressly defining indigence as "high risk," the County was admitting to its wealth discrimination even as it claimed defendants were detained on account of their risk. Nor did the defense change the fact that in every single misdemeanor case, whatever the level of "risk," there was a money amount set that if paid or secured would have resulted in immediate release. Indigence was thus always a but-for cause of detention, even if other factors contributed proximate causes to the County's demand for one arbitrary amount of money over another.[170]

164. *Id*. at 1062.

165. *Id*.

166. *See* Transcript of Injunction Hearing at 15, ODonnell v. Harris County, Civil No. 16-1414 (S.D. Tex. Mar. 6, 2017); *ODonnell*, 251 F. Supp. 3d at 1157 n.119.

167. Gerstein v. Pugh, 420 U.S. 103, 123 (1975).

168. Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 81–82 (2013). Further, en banc precedents from the *Pugh* litigation demonstrated unequivocally that bail systems could be challenged in federal court without running afoul of the era's federalism cases. Pugh v. Rainwater, 572 F.2d 1053, 1064 (1978) (en banc).

169. *ODonnell*, 251 F. Supp. 3d at 1067.

170. *Id*. at 1107–10, 1158, 1189–90.

The final defense was so shocking to ordinary observers, it made the newspapers the day after it was presented in court.[171] Perhaps, County lawyers suggested, detainees were imprisoned not because of their poverty nor the County's violations of due process, but because they wanted to be. Without evidence, the County asserted that its jail provided better housing, food, and healthcare than a detainee might otherwise receive. The presiding judge, Lee H. Rosenthal, shut the argument down in an oral hearing before the County pursued it further on paper. "It's uncomfortably reminiscent of the historical argument that used to be made that people enjoyed slavery [because they were afraid of the alternative]," Rosenthal observed.[172] The daughter of Harold Hyman, a preeminent historian of Reconstruction at Rice University, Judge Rosenthal was quick to hear the echoes of the Lost Cause narrative that emerged at the end of the nineteenth century.[173] "There may have been individual cases in which that fear was tremendously powerful and real. But you didn't see a lot of people running towards enslavement. You don't see a lot of people volunteering for jail in order to get warm," she concluded.[174]

The preliminary injunction hearing continued for days after this exchange, but the County's defenders could likely sense their defeat at this moment. Within the complex constellation of artifacts that made up the practices of jailing and bailing 50,000 misdemeanor defendants a year, the County had shockingly identified its position with Confederate logic. Within its half-hearted defense lay a world of understandings: That some people just aren't fitted for freedom, that they need a master, a disciplining institution, a place to lay their head that owns the custody of their very bodies.[175]

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171. Eli Rosenberg, *Judge in Houston Strikes Down Harris Count's Bail System*, N.Y. TIMES (Apr. 29, 2017), https://www.nytimes.com/2017/04/29/us/judge-strikes-down-harris-county-bail-system.html [https://perma.cc/LP6H-J5NX]; Langford, *supra* note 9; New York Times Editorial Board, *Locked Up for Being Poor*, N.Y. TIMES (May 5, 2017), https://www.nytimes.com/2017/05/05/opinion/locked-up-for-being-poor.html [https://perma.cc/7LQ3-MX49].

172. New York Times Editorial Board, *supra* note 171.

173. *See* Avery Ruxer Franklin, *Rice Mourns History Professor, Author Harold Hyman*, RICE UNIV. NEWS & MEDIA RELS. (Aug. 17, 2023), https://news.rice.edu/news/2023/rice-mourns-history-professor-author-harold-hyman [https://perma.cc/73P2-EMPM]; HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835–1875, at 474–475 (1982).

174. Langford, *supra* note 9.

175. This view has been a consistent theme of the commercial bail bonds industry. For a popular deployment, see DOG THE BOUNTY HUNTER: *Do Unto Others* (A&E Apr. 4, 2006).

When the district court's decree went up on review to the Fifth Circuit, a not-particularly-favorable panel quibbled with some of the timing issues in the order but otherwise affirmed.[176] The panel sidestepped the echoes of Reconstruction found in both the factual record and the case law cited throughout the district court's 193-page opinion justifying its injunction, but the panel could not escape the simple discriminatory logic of Harris County's misdemeanor bail system:

> [T]ake two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. Applying the County's current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree.[177]

On the panel sat Judge Catharina Haynes, a former Texas state judge from Dallas.[178] In appeals from both the Harris County and Dallas County bail litigations, Judge Haynes consistently sided with the plaintiffs, appalled at the abuses her state counterparts had condoned for so long. But in the Dallas County case, Judge Haynes was relegated to the dissent.[179] In the name of federalism, her colleagues ignored what the former state judge had to say about state judicial practices.

Other Articles in this Symposium examine the doctrine of *Daves v. Dallas County* in more detail. This Article closes with the history related in *Daves*. And to be sure, Judge Edith Jones's majority opinion had a history to tell—not one beginning in Reconstruction and the framing of the Fourteenth Amendment, but one that begins in the 1970s, when "federal courts were

176. ODonnell v. Harris County, 892 F.3d 147, 160, 163 (5th Cir. 2018).

177. *Id*. at 163.

178. *Haynes*, *Catharina*, FED. JUD. CTR., https://www.fjc.gov/history/judges/haynes-catharina [https://perma.cc/93M5-YE6P] (last visited Feb. 22, 2026).

179. *ODonnell*, 892 F.3d at 151–52; Daves v. Dallas County, 22 F.4th 522, 655 (5th Cir. 2023) (en banc) (Haynes, J., dissenting).

awash . . . in adjudicating a heady mix of newly created constitutional rights."[180] Where the district court in *ODonnell* had found the echoes of Confederate Lost Cause history uncomfortably reminiscent, Judge Jones felt triggered by the memory of a time when "deference to state governmental systems or state courts seemed to have been overshadowed by the Supreme Court's enthusiasm for effectuating novel notions of social justice and personal rights."[181] In order "[t]o counteract judicial amnesia," Judge Jones insisted that courts in her circuit needed to re-learn that the "legacy of federal court noninterference in equity with state proceedings is over a century old."[182]

Of course one might point out—as this Article to some extent has—that there is an even older legacy of federal court interference in state criminal proceedings that patently violate the Constitution, one that is expressly commanded by Congress and firmly anchored in historical practice. But that is really beside the point. Indeed, as Reva Siegel has recently written, all history is beside the point of what she calls "constitutional memory."[183] In the hands of judges, Siegel writes, the past is not "a domain of facts free of values, a neutral ground on which to resolve conflict."[184] It is rather a value-laden construction (as all judicial interpretations are), one that roots itself in a temporal identity of "who we are" and what we are to do.[185] A historian might critique the factual basis of memory, but as memory does not derive primarily from factual accounts, factual accounts seem unlikely to displace it.[186]

Following this account, one could relate the *ODonnell* and *Daves* litigations in these identitarian terms: "We" are the heirs of those who fought and won a Civil War to secure equal justice for all; or "we" are the victims of lordly federal judges who too readily inflict their philosophies upon us. We feel these stories in our bones, in such a way that learning more about the Freedmen's

180. *Daves*, 22 F.4th at 623–24.

181. *Id.* at 624.

182. *Id.* at 623, 625.

183. Reva B. Siegel, *History or Memory?: Claims on the Past in Constitutional Argument Over Originalism, Civil War/Reconstruction, and MAGA*, 36 YALE J.L. & HUMANS. 479, 483–84 (2026).

184. *Id.* at 480.

185. *Id.* at 483.

186. I draw this corollary from Professor Siegel's engagement with Jonathan Gienapp's charge of "anachronism" against originalist methodology. *See id.* at 482 (citing JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE 239–42 (2024)). To be sure, Siegel's own account may leave more room for change and adaptation than I have credited for. *See, e.g.*, *id.* at 484.

Bureau or the Warren Court is unlikely, indeed powerless, to alter them. That may well be how judges operate with history, though it is a discouraging lesson. It suggests that from the moment of their professionalization, judges are locked into an orientation that is impervious to development in response to changing factual records (either historical or as docketed in court). As one Civil War Republican lamented, it leaves judges "having eyes to see, [to] see not; judges, having ears to hear, hear not."[187]

Other views are available. Earlier, I alluded to the historical theories of Walter Benjamin when I described Justice William O. Douglas's approach to history in the *O'Shea* litigation.[188] Benjamin, I think, was less interested than Professor Siegel and her interlocutors in posing a disjuncture between the historian's craft and the jurist's, between history and memory. Since the past can never be directly observed other than through the present, the task of any observer in Benjamin's account is to assemble fragments—a constellation of artifacts—that might jolt the observer into a moment of recognition: this crisis then is my crisis now; the complete injustice back then can be made incomplete now; the incomplete redemption back then can be finished now.[189] Critical to this experience of history and memory is that jolt, usually translated "shock."[190] Though, as with everything in Benjamin's philosophy, the concept of shock is enigmatic, it suggests a capacity for growth, disruption, and change in response to the past.

That, I would suggest, is another way of seeing the story from *ODonnell* to *Daves*. A litigation that might have run aground on any number of procedural difficulties achieved substantive clarity when the municipal defendants shocked the court with an argument that collapsed Confederate insurgency and ordinary municipal operations into the same crystalized moment. The powerful momentum of structural litigation to persuade even conservative judges to embrace far-reaching reforms shocked another court with the ghosts of past judicial crusades, and the court responded with retrenchment. In neither case was the

187. One of the many quotations about the need for § 1983 that was picked up in later Supreme Court debates over the memory of Reconstruction. *See* Mitchum v. Foster, 407 U.S. 225, 241 (1972) (quoting CONG. GLOBE, 42d Cong., 1st Sess. app. 78 (1871) (remarks of Rep. Perry)).

188. *See supra* note 124 and accompanying text.

189. Walter Benjamin, *Theses on the Philosophy of History*, *in* ILLUMINATIONS 253, 261 (1968); BENJAMIN, *supra* note 124 at 471 N7a,7, N8,1.

190. *See* A. K. Thompson, *When Shock Is No Longer Shocking: The Role of Seduction in Revitalizing Benjamin's Dialectical Image Under Late-Capitalist Conditions*, J. CULTURAL STUD. ASS'N, Spring 2019, at 1, 1.

outcome ordained the moment the court was selected. Rather, the stories were written in the moment, as they happened, uncomfortably reminiscent of past struggles.

VII. CONCLUSION

The *ODonnell* and *Daves* litigations illustrate the ways federal courts both create and respond to constitutional memory. The *ODonnell* district court's vindication of the rights of indigent detainees drew on a lineage stretching from the Freedmen's Bureau agents who audited southern jail practices after the Civil War, to the Radical Republicans who designed § 1983 to substitute for military jurisdiction over local abuses of criminal justice systems, to the federal judges who drew on those same traditions in the midst of the Civil Rights Movement. When the Fifth Circuit's *Daves* opinion foreclosed such litigation, it did not engage this history but rather displaced it with a competing constitutional memory that treats federal oversight of state courts as the greater danger to be avoided. While Houston's bail practices have been remarkably transformed by the consent decree in *ODonnell*, other municipal bail systems continue to impose pretrial detention as a function of poverty. Thanks to the circuit split created by *Daves*, the federal courts will continue to divide over whether to see that as a constitutional problem for the national courts or a local one of purely municipal policy.