

## NOTE

### “AIRBRUSHED OUT OF THE CONSTITUTIONAL CANON”<sup>†</sup>: THE EVOLVING UNDERSTANDING OF *GILES V. HARRIS*, 1903–1925

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*Richard H. Pildes argued in an influential 2000 article that the U.S. Supreme Court’s opinion in *Giles v. Harris*, which was written by Justice Oliver Wendell Holmes, was the “one decisive turning point” in the history of “American (anti)-democracy.” In *Giles*, Holmes rejected on questionable grounds Jackson W. Giles’s challenge to the new Alabama Constitution of 1901—a document which was designed to disfranchise and had the effect of disfranchising African Americans. The decision thus contributed significantly to the development of the all-white electorate in the South, and the concomitant marginalization of southern African Americans. According to Pildes, however, the case was “airbrushed out of the constitutional canon” despite its importance—perhaps, Pildes theorized, because the American constitutional tradition takes issues of democratic governance “off the map.” Certainly, before Pildes brought the case back to prominence, few of the standard constitutional law casebooks even mentioned the decision. The case, however, disappeared from the canon in a far more gradual and nuanced manner than the epithet “airbrushed out of the constitutional canon” would suggest.*

*This Note traces the ways in which the decision in *Giles* was received and interpreted in both the general media and legal scholarship in the two decades after the decision was handed down in 1903. It argues that while during this period there was no conscious attempt to “airbrush” the decision out of the constitutional canon, as the case gradually came to be viewed by some scholars as one more concerned with procedural technicalities than with the core meaning of democracy, constitutional scholars interested in*

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<sup>†</sup> Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 *CONST. COMMENT.* 295, 297 (2000) [hereinafter Pildes, *The Canon*].

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*studying questions of race and disfranchisement increasingly looked toward cases (both democratic and antidemocratic) that were perhaps procedurally simpler and cleaner.*

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## INTRODUCTION

“In this bleak and unfamiliar saga” of the history of antidemocracy<sup>1</sup> in the United States, argued Richard H. Pildes in his 2000 article *Democracy, Anti-Democracy, and the Canon*, “there is one key moment, one decisive turning point: the 1903 opinion of Justice Oliver Wendell Holmes in *Giles v. Harris*.”<sup>2</sup> In 1902 Jackson W. Giles, an African American citizen of Alabama, brought a test case to the federal courts alleging that new provisions of the Alabama state constitution that were designed to disfranchise (and had the effect of disfranchising) nonwhites violated the Fourteenth and Fifteenth Amendments.<sup>3</sup> In a relatively short—though controversial and

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1. In explaining what he meant by “anti-democracy,” Pildes noted:

If sustained attention to democracy itself has been startlingly absent from the constitutional canon, so too has its antithesis: the history in American politics and constitutional law of anti-democracy. For constitutional law played a role in sustaining the blatant manipulations of political institutions that kept America from fully becoming a democracy before 1965. Recovering this history of the Supreme Court’s removal of democracy from the agenda of constitutional law, for most of the 20th century, is one way of bringing democracy to constitutional thought today.

Pildes, *The Canon*, *supra* note †, at 296 (footnote omitted).

2. *Id.*

3. See Transcript of Record at 2–13, *Giles v. Harris*, 189 U.S. 475 (1903) (No. 493). For more on *Giles v. Harris* in historical context, see MICHAEL PERMAN, STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH, 1888–1908, at 122–23 (2001); REBECCA J. SCOTT, DEGREES OF FREEDOM: LOUISIANA AND CUBA AFTER SLAVERY 195–98 (2005); RICHARD M. VALELLY, THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT 140–47 (2004); Charles A. Heckman, *Keeping Legal History “Legal” and Judicial Activism in Perspective: A Reply to Richard Pildes*, 19 CONST. COMMENT. 625 (2002); Pildes, *The Canon*, *supra* note †; and Richard H. Pildes, *Keeping Legal History Meaningful*, 19 CONST. COMMENT. 645 (2002) [hereinafter Pildes, *Meaningful*].

convoluted—opinion, the Supreme Court, led by Holmes, concluded that the federal courts had jurisdiction over the question but could not provide Giles his requested relief of being once again enrolled as a voter.<sup>4</sup> Holmes’s two justifications for refusing to provide any relief to Giles were quite startling: first, Holmes explained that if Giles was correct that the provisions of the Alabama constitution violated the U.S. Constitution, then the Court could have no part in ordering that Giles be enrolled in an *unconstitutional* voting scheme; second, Holmes concluded that if there truly were a conspiracy of white southerners to disfranchise African Americans, then any pronouncement of the Supreme Court would be effectively useless.<sup>5</sup> Holmes ultimately boiled down the ruling in *Giles* to a single proposition: federal courts, sitting as courts of equity rather than courts of law, would not consider “political questions” dealing with such issues as enfranchisement or electoral apportionment.<sup>6</sup> This general (at least as applied to race) rule,<sup>7</sup> which was not solely the creation of the *Giles* court,<sup>8</sup> officially held sway until the landmark 1962 case of *Baker v. Carr*,<sup>9</sup> which ultimately helped lead to the “one person, one vote” standard applicable today.<sup>10</sup> The effect of the *Giles* ruling during the first half of the twentieth century was normatively egregious: Holmes in effect gave carte blanche to southern politicians—some of whom expressed an intent, both before and after *Giles*, to craft voting provisions that had the avowed purpose of disfranchising all nonwhites<sup>11</sup>—to do so, as long as the laws they drafted were seemingly facially neutral.

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4. *Giles*, 189 U.S. 475.

5. *Id.* at 486–88.

6. See *infra* note 26 and accompanying text.

7. See, e.g., Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601, 626–27 (2007).

8. See *Luther v. Borden*, 48 U.S. 1 (1849) (establishing the political question test in controversies arising under the Guarantee Clause of the U.S. Constitution).

9. 369 U.S. 186 (1962). The *Baker* Court, in attempting to define the boundaries of the political question doctrine, held that there is a political question (or “nonjusticiable political question”) when there is:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Id.* at 217. Charles argues in *Democracy and Distortion* that the “law-equity distinction is not entirely persuasive” in the racial voting rights context, and that Holmes himself in *Nixon v. Herndon*, 273 U.S. 536 (1927), circumvented the issue by describing a situation similar to *Giles*’s as one involving a “private remedy,” and therefore comprising a legal, rather than equitable case. Charles, *supra* note 7, at 627.

10. See *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (“Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests.”).

11. See, e.g., Orville Vernon Burton et al., *South Carolina*, in QUIET REVOLUTION IN THE SOUTH 191, 194 (Chandler Davidson & Bernard Grofman eds., 1994), cited in Pildes, *The Canon*, *supra* note †, at 302 n.31 (quoting South Carolina Senator Benjamin R. “Pitchfork Ben” Tillman,

Perhaps even more startling than Holmes's strained justifications in the *Giles* opinion, however, especially given the normatively egregious practical results of the decision, is that, as Pildes points out, as of the late twentieth century *Giles* appeared to have been "airbrushed out of the constitutional canon."<sup>12</sup> In other words, as of the turn of the millennium contemporary constitutional scholars had little knowledge or understanding of *Giles*.<sup>13</sup> This omission can be explained, Pildes implies, by "the longer constitutional tradition" in the United States "in which issues of democratic governance were off the map altogether."<sup>14</sup> Pildes is probably not suggesting that there was some sort of active conspiracy to remove the decision from standard case-books, or that scholars of constitutional law could not have read the decision had they wished to. Rather, Pildes is suggesting that scholars teaching, writing about, and discussing American constitutional law neglected to focus on this opinion. If the case truly was, or should be, the "ready focal point" of "(anti-)democracy in American constitutional law,"<sup>15</sup> then it remains for legal historians to determine exactly how and when scholars began to ignore

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who in 1900 announced proudly on the floor of the U.S. Senate that "[w]e have done our level best [to disfranchise nonwhites]. We have scratched our heads to find out how we could eliminate every last one of them. We stuffed ballot boxes. We shot them. We are not ashamed of it."); *Congressman Hardwick Appeals to Georgians*, COLUMBUS ENQUIRER-SUN, Sept. 25, 1908, at 1 (quoting Congressman Hardwick explaining approvingly how proposed constitutional provisions in Georgia would have the effect of disfranchising all African Americans).

12. Pildes, *The Canon*, *supra* note †, at 297. The concept of canonization, and especially constitutional canonization, has attracted a fair amount of academic attention. See, e.g., LEGAL CANONS (J.M. Balkin & Sanford Levinson eds., 2000); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998); Pildes, *The Canon*, *supra* note †. Despite this attention, however, scholars have been hard-pressed to settle on a coherent and unitary definition of the "constitutional canon." "To define the canon," Suzanna Sherry argues, "is to specify the basic and essential reading materials for students in constitutional law." Suzanna Sherry, *The Canon in Constitutional Law*, in LEGAL CANONS, *supra*, at 374, 381. Texts are "canonical" to constitutional law, Philip Bobbit writes, when "they are authoritative in our legal and political culture—owing to their role in defining, exemplifying, or explaining the legitimate methods of constitutional argument." Philip Bobbit, *The Constitutional Canon*, in LEGAL CANONS, *supra*, at 331, 331. Perhaps the best understanding of the "constitutional canon" is that there are *multiple* constitutional canons existing simultaneously. As Balkin and Levinson note, "canons are made by all of us, just as our ways of thinking are shaped by them in turn." Balkin & Levinson, *supra*, at 1021. Balkin and Levinson give a fair summary in *Legal Canons* when they note that "legal materials can be canonical because they are important for educating law students (the pedagogical canon), because they ensure a necessary cultural literacy for citizens in a democracy (the cultural literacy canon), or because they serve as benchmarks for testing academic theories about the law (the academic theory canon)." J.M. Balkin & Sanford Levinson, *Constitutional Canons and Constitutional Thought*, in LEGAL CANONS, *supra*, at 400, 402. In *The Canon*, Pildes clearly believes the "constitutional canon" to comprise cases and materials included in standard law textbooks and understood and discussed by scholars of constitutional law. See Pildes, *The Canon*, *supra* note †, at 297.

13. See, e.g., Pildes, *The Canon*, *supra* note †, at 297 (noting that most constitutional law texts omitted the decision entirely before 2000 and that even well-established constitutional law scholars were not familiar with the case).

14. *Id.* at 319. By this, Pildes seems to be suggesting that constitutional scholars and those helping to construct the constitutional canon, see *supra* note 12, had for much of the twentieth century been uninterested in issues of democratic government, and that this disinterest explains in part why cases such as *Giles* either failed to enter or were airbrushed from the constitutional canon during this period.

15. Pildes, *The Canon*, *supra* note †, at 296.

*Giles*'s deeper meaning and historical context, or to marginalize or ignore the decision altogether.

This Note examines reactions to the *Giles* decision among both legal scholars and the public in the immediate aftermath of the case and in the two decades following the decision.<sup>16</sup> It argues that after a burst of media and academic interest immediately following the opinion, in which the disfranchising results of the holding received considerable attention, in the decades following the decision legal scholars gradually came to cite *Giles* for three broad and varied propositions, two of which had little to do with the antidemocratic nature of Holmes's opinion. This Note also argues that by the mid-1920s some scholars writing about *Giles* seemed to acknowledge the antidemocracy aspects of the case only in passing, instead focusing on doctrinal rules about jurisdiction, equity, separation of powers, and political questions.<sup>17</sup> Put another way, it appears that during this period there was no *conscious* attempt to "airbrush" the decision out of the constitutional canon, but that gradually some scholars came to view and discuss the case as one more concerned with procedural technicalities than with the core meaning of democracy, while others, perhaps more interested in questions of race and democracy, looked to less procedurally messy cases for teaching tools. This evolution had the effect of limiting the importance of the *Giles* decision in the eyes of scholars—and also in the eyes of practitioners, who did not cite it for its holdings on voting—and so probably contributed to its exclusion from constitutional law teaching texts.<sup>18</sup> Part I of this Note analyzes the *Giles* case

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16. Pildes makes it clear that at least a few legal academics and casebook authors in the latter part of the twentieth century knew about and wrote about the *Giles* decision as part of the working of American antidemocracy. See *id.* 296–97 & nn.9–10 (citing OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910*, at 373 (1993) and DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 45–46, 112, 177, 189 n.14 (3d ed. 1992)). The basic premise of Pildes's argument in *The Canon*, however, is that by the twenty-first century *Giles* had largely been airbrushed from the constitutional canon, isolated examples such as Fiss's work or Bell's work notwithstanding. See *id.* at 297. The disappearance of the decision from the constitutional canon (whether it was "airbrushed" or, as this Note argues, it gradually faded away from the canon as it came to stand for technical procedural points) largely took place in the two decades following the decision. By the early 1920s, a number of the most influential legal thinkers of the time (including Charles Warren, Felix Frankfurter, and James Landis) had come to view the *Giles* decision as something other than a critical decision about democratic governance or a critical moment in the history of American democratic choice. See *infra* notes 123–125, 139 and accompanying text.

17. See, e.g., Note, *The Alabama Franchise Case*, 17 HARV. L. REV. 130, 131 (1903) (focusing on the procedural rules and concluding that "[o]n analysis, therefore, contrary to what might be thought, this case does not turn upon a question of constitutional law"); Note, *Constitutionality of the Grandfather Clause*, 14 COLUM. L. REV. 336, 337 n.7 (1914) (explaining that *Giles* was decided on nonconstitutional grounds).

18. This Note does not fully answer the question of why *Plessy v. Ferguson*, 163 U.S. 537 (1896), entered the constitutional canon, but *Giles* did not. One answer is that *Plessy* remains in the canon because of *Brown v. Board of Education*, 347 U.S. 483 (1954). In other words, normatively bad decisions may remain interesting because those decisions were overturned by later cases or events, as *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), for example, was nullified by the Civil War. *Giles*, however, was arguably nullified by *Baker v. Carr*, see *supra* note 9 and accompanying text, and so might actually form one of these normatively bad/normatively good pairs. Another possible answer is that *Plessy* touched on issues of everyday life, whereas *Giles* touched on the franchise, which is not implicated on a daily basis. What this Note does demonstrate is that *Giles*'s absence from the constitutional canon is not attributable to media or academic disinterest in

and Holmes's opinion. Part II examines some popular reactions (primarily in newspapers) to the case in the two years immediately following the decision. Part III traces the gradual evolution of *Giles* in legal and academic publications from a case about race and voting rights to a case (at least in the eyes of some scholars) about the technicalities of jurisdiction, equity, and separation of powers, and the concomitant move by those scholars who were interested in questions of race and democratic governance away from a focus on *Giles* to a focus on similar but procedurally cleaner cases such as *Williams v. Mississippi*<sup>19</sup> and *Guinn v. United States*.<sup>20</sup>

### I. THE CASE AND THE DECISION

Today, scholars and historians read *Giles* in a wide variety of ways: as an example of the Supreme Court's reluctance to issue orders it was afraid it could not enforce;<sup>21</sup> as a case "establish[ing] the principle that it is not the role of the courts to provide relief for political—structural—claims";<sup>22</sup> as a situation in which a "cynical and disingenuous" Justice Holmes sought to avoid confronting a difficult question;<sup>23</sup> as an indication of Holmes's deep sense of powerlessness in the face of Southern racism;<sup>24</sup> as an example of how the Court, at the beginning of the twentieth century, interpreted the Reconstruction Amendments in effectively formalistic terms—to the detriment of African Americans interested in voting, who needed the protections offered by the post-Civil War Congress;<sup>25</sup> or as an example of the Court very deliberately acting to avoid what it saw as either an insoluble question or a political question.<sup>26</sup> The various readings of *Giles* differ so much in tone in part because of the complicated procedural posture by which *Giles* reached the Supreme Court and the strained nature of Holmes's opinion. This Part

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the years immediately following the decision. Similarly, its absence is not even attributable to a larger academic disinterest in issues of democratic governance. See, e.g., *infra* notes 119–120 and accompanying text (describing how an academic focused attention in 1912 and 1914 on *Williams v. Mississippi*, 170 U.S. 213 (1898), as an example of antidemocratic jurisprudence).

19. 170 U.S. 213 (1898) (upholding state constitutional provisions requiring literacy tests and poll taxes).

20. 238 U.S. 347 (1915) (striking down as unconstitutional "grandfather clause" exceptions to literacy test requirements).

21. See Pildes, *The Canon*, *supra* note †, at 306; see also Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 315 (2005).

22. Charles, *supra* note 7, at 625–26; see also Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 606–07 (2002).

23. See, e.g., William M. Wiecek, *The Emergence of Equality as a Constitutional Value: The First Century*, 82 CHI.-KENT L. REV. 233, 263 (2007).

24. See, e.g., FISS, *supra* note 16, at 372–79.

25. James W. Fox, Jr., *Intimations of Citizenship: Repressions and Expressions of Equal Citizenship in the Era of Jim Crow*, 50 HOW. L.J. 113, 134 (2006).

26. See, e.g., J. CLAY SMITH, JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844–1944*, at 273, 346–47 (1993) (describing the political background of the case and Booker T. Washington's influence in bringing the litigation).

briefly traces the events that initially superimposed<sup>27</sup> the case on U.S. history and society. Section I.A describes the development of the case; Section I.B examines and critiques Holmes's opinion.

### A. *The Development of the Case*

*Giles* began when Jackson Giles, who led an organization in Alabama (the Colored Men's Suffrage Association) dedicated to retaining the franchise for African Americans, brought a test case before the local federal court challenging the enfranchisement provisions of the Alabama Constitution of 1901.<sup>28</sup> That constitution, which was proposed and ratified by a racist and biased group of elite Democrats intent on disfranchising African Americans,<sup>29</sup> created an enormously convoluted bifurcated system of registering voters. Under this system, voters—all of whom had to pay a poll tax<sup>30</sup>—fell into two groups: there were those (all, or almost all, white) who were qualified to register prior to December 20, 1902, and there were those (generally nonwhite) who were only qualified to register after December 20, 1902. The voters in the first group only had to register once, through a system that made it easy to register, to be qualified to vote for life.<sup>31</sup> The voters in the second group, however, had to face a system of harshly applied literacy, employment, and property tests, administered on an election-by-election basis.<sup>32</sup> In other words, the voters in the second group had to overcome far

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27. Thus, of course, allowing for what Pildes sees as the later “airbrushing” of *Giles* from the constitutional canon.

28. Pildes, *The Canon*, *supra* note †, at 299. Giles's claim was not a random and uncoordinated attack on the new Alabama Constitution: as Pildes points out, the case was secretly funded and orchestrated by the ostensibly accommodationist Booker T. Washington, and was handled and briefed by Wilford H. Smith, Washington's personal lawyer. *Id.* at 304–05.

29. *See, e.g., id.* at 299–303. Southern legislators seeking to craft constitutional and statutory hurdles to disfranchise nonwhites were not reticent about what they were attempting to accomplish. *See supra* note 11.

30. ALA. CONST. of 1901, § 178.

31. Under this permissive regime, those permitted to register included all those who had served honorably in the U.S. military in the War of 1812, the war with Mexico, any war with the Indians, the Civil War, or the Spanish-American War, or who had served in the confederacy, along with the “lawful descendants” of those who had served in these conflicts. *Id.* § 180. As most nonwhites in Alabama had *not* served—or been allowed to serve—in either the U.S. or the Confederate military, this rule excluded a large proportion of the African American community. Under the permissive regime, all those of “good character” who “understand the duties and obligations of citizenship under a republican form of government” were also permitted to register. Given the avowed intent of the Alabama Constitutional Convention of 1901 to prevent African Americans from voting, it is no surprise that the registrars found that few nonwhites had the requisite understanding of good government. *Id.*

32. After January 1, 1903, those permitted to register included both owners of extensive property and those who could pass a literacy test. The State Constitution identified these individuals as:

[t]hose who can read and write any article of the Constitution of the United States in the English language, and who are physically unable to work; and those who can read and write any article of the Constitution of the United States in the English language, and who have worked or been regularly engaged in some lawful employment, business or occupation, trade or calling for the

greater hurdles than did the voters in the first group—and had to do so again and again, any time they wished to vote. The voting system worked just as the framers had intended: in Alabama, of the 181,471 eligible African American voters in 1900, only 3000 were registered under the new constitutional provisions.<sup>33</sup>

In his complaint to the federal court, Giles, speaking for himself and putatively speaking on behalf of 5000 other African Americans in his county, claimed that the voter registration provisions of the Alabama constitution violated the Fourteenth and Fifteenth Amendments. Giles asked in his suit that the provisions be declared unconstitutional and that he be enrolled to vote in Alabama elections. Before holding a trial on the merits of Giles's claim, however, Federal Circuit Judge Thomas G. Jones concluded that the federal courts lacked jurisdiction, presumably because Giles had not met the \$2,000 "amount in controversy" requirement mandated by federal statute.<sup>34</sup> Under federal law, circuit judges concluding that they lacked jurisdiction could "certify" the question of jurisdiction to the Supreme Court.<sup>35</sup> At the urging of Wilford Smith, Giles's attorney, Judge Jones did so, and the case proceeded to the Supreme Court for consideration of this sole question.<sup>36</sup>

### B. Justice Holmes's Opinion

In his opinion for the Court, Holmes brushed past a number of procedural hurdles to reach the merits of the case, and in doing so effectively destroyed the hopes of African Americans who believed that the federal courts would step in to prevent Southern states from acting in ostensibly neutral ways to remove nonwhites from the voting rolls.

Holmes began by dismissing the mootness argument that federal courts had generally used to avoid deciding cases alleging that citizens had been wrongfully disfranchised.<sup>37</sup> Insomuch as Giles had officially asked to be enrolled as a voter in the congressional election of 1902, and as that election

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greater part of the twelve months next preceding the time they offer to register; and those who are unable to read and write, if such inability is due solely to physical disability.

*Id.* § 181. Not surprisingly, the Alabama officials tasked with administering the literacy and employment tests tended to use their discretion to exclude nonwhites. One tactic—which appears to have been the one that excluded Giles himself from voting—was to require the testimony of *whites* as to the previous year of employment and residency.

33. Pildes, *The Canon*, *supra* note †, at 303–04.

34. *See Giles v. Harris*, 189 U.S. 475, 485 (1903).

35. Judiciary Act of 1891, ch. 517, sec. 5, 26 Stat. 826, 827 ("In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."); Heckman, *supra* note 3, at 627.

36. *See* Transcript of Record, *supra* note 3, at 407–08. Because the Court was only supposed to be concerned with the jurisdictional question, the case proceeded to judgment on the basis of briefs alone, without oral argument. *Giles*, 189 U.S. at 494 (Harlan, J., dissenting); *see also Alabama Suffrage Provisions Are to Come Up in the Supreme Court*, CHARLOTTE DAILY OBSERVER, (Charlotte, N.C.), Nov. 11, 1902, at 1 ("The question of jurisdiction is the principal point involved in the case and there will be no oral argument . . .").

37. *Giles*, 189 U.S. at 484.

had passed by the time the case got to the Supreme Court, the Court could have ruled that the question was moot and the case no longer relevant.<sup>38</sup> This is the path the Court had followed in the past in *Mills v. Green*,<sup>39</sup> and would follow again—at least until 1969, when the Court in *Moore v. Ogilvie* extended the “capable of repetition, yet evading review” doctrine to voting rights.<sup>40</sup> Instead, however, Holmes announced that the Court was not willing to take this step, as “to be enabled to cast a vote in that election . . . is not even the principal object of the relief sought by the plaintiff.”<sup>41</sup> As Charles Heckman notes, Holmes was being somewhat disingenuous here: while Holmes distinguished *Giles* from *Mills* on these grounds, in fact “voting in any one election was not the object of the litigation in *Mills* any more than it was in *Giles*,” and so Holmes was “distinguishing without a difference”—albeit while “getting to the real issue.”<sup>42</sup>

After dismissing the seemingly valid mootness claim, Holmes considered and dismissed in quick succession three jurisdictional challenges: (1) the amount-in-controversy question; (2) the fact that the statute purportedly granting jurisdiction to the federal courts to hear cases involving the abrogation of Fourteenth Amendment rights specified that such violations be included in a “statute, ordinance, regulation, custom, or usage”—and did *not* specify a state constitution; and (3) the fact that the lower court had certified to the Supreme Court only the question of jurisdiction, and no question on the merits.<sup>43</sup> As to the amount-in-controversy claim—that *Giles* had not specified that he had suffered damages in excess of \$2,000—Holmes concluded that because the state had not *objected* on the grounds that *Giles* had failed to meet the amount-in-controversy claim, the Supreme Court could consider the case.<sup>44</sup> As to the claim that the enabling statute did not specifically list state constitutions as documents giving rise to federal lower-court jurisdiction, Holmes concluded simply that the Court was “not prepared” to say that the subject matter was “wholly beyond the jurisdiction of the circuit court,” and so the Supreme Court would not deny jurisdiction on these grounds.<sup>45</sup> As to the certification claim, Holmes concluded that “as the ground of the bill is that the Constitution of Alabama is in contravention of

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38. See, e.g., Heckman, *supra* note 3, at 636–37.

39. 159 U.S. 651 (1895) (finding a voting rights suit moot because the election in which the plaintiff wished to vote had passed).

40. 394 U.S. 814 (1969); see also Heckman, *supra* note 3, at 637. The “capable of repetition, yet evading review” doctrine was first applied in *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911).

41. *Giles*, 189 U.S. at 484; see also Heckman, *supra* note 3, at 636.

42. Heckman, *supra* note 3, at 636. Heckman adds that “[a]lthough Holmes may deserve some lumps for writing the *Giles* opinion, he ought to receive a good deal of credit for this holding.” *Id.* at 636–37.

43. *Giles*, 189 U.S. at 484–86.

44. *Id.* at 485.

45. *Id.* at 485–86.

the Constitution of the United States, the appeal opens the whole case.”<sup>46</sup> Justice Holmes’s rationales for disposing of the jurisdictional claims, as Justices Harlan and Brewer noted in dissent, were surprising and perhaps inconsistent with Court doctrine.<sup>47</sup> Holmes, it seems clear, was quite interested in getting to the merits of the decision, and viewed the jurisdictional issues as obstacles rather than opportunities for the Court to duck a difficult question.

Having disposed of the jurisdictional questions, Holmes turned to the merits of the case, and with two swift strokes seemed to close off much of Jackson Giles’s hope for judicial protection. In his first move, which Pildes calls “the most legally disingenuous analysis in the pages of the U.S. Reports,”<sup>48</sup> and which Rebecca Scott calls “a breathtaking Catch-22,”<sup>49</sup> Holmes concluded that the Court could not grant relief even if the Justices assumed that all of Giles’s complaints were substantially correct.<sup>50</sup> If the Court made this assumption, and proceeded with the understanding that the provisions of the 1901 Alabama Constitution *did* violate the U.S. Constitution, then the Court could not provide relief because it could have no part in sustaining an unconstitutional voting scheme. “If, then, we accept the conclusion which it is the chief purpose of the bill to maintain,” Holmes asked rhetorically, “how can we make the court a party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists?”<sup>51</sup> In other words, *because* Giles was alleging that the provisions of the state constitution were unconstitutional, the Court could do nothing to provide Giles any relief from the allegedly unconstitutional provisions. Giles, as Holmes knew, could not have escaped from this logical trap by not asking to be placed on the voting rolls—for, as Holmes acknowledged, Giles “could not maintain a bill for a mere declaration in the air.”<sup>52</sup>

In his second move in deciding the merits, Holmes focused on the seemingly more pragmatic question of whether anything the Court did would have an impact on a truly racist voting system in Alabama. “If the conspiracy and the intent exist, a name on a piece of paper will not defeat them,” he concluded.<sup>53</sup> “Unless we are prepared to supervise the voting in that state by officers of the court, it seems to us that all that the plaintiff could get from

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46. *Id.* at 486.

47. *See, e.g., id.* at 498 (Harlan, J., dissenting) (“That is a new, and I take leave to say, a startling, doctrine.”); *see also* Heckman, *supra* note 3, at 631 (discussing Holmes’s conclusion that the fact that a court had not previously noticed a party’s failure to plead lack of amount-in-controversy meant that the court could fail to notice it again). “This kind of [legal analysis] is nonsense,” Heckman wrote, “and Holmes knew nonsense when he saw it.” *Id.*

48. Pildes, *The Canon*, *supra* note †, at 306.

49. SCOTT, *supra* note 3, at 321 n.17.

50. *Giles*, 189 U.S. at 486–87.

51. *Id.* at 486.

52. *Id.*

53. *Id.* at 488.

equity would be an empty form.”<sup>54</sup> In summarizing this point, Holmes explained that the difficulty the Court would have in enforcing the rule “strikingly reinforces the argument that equity cannot undertake now, any more than it has in the past, to enforce political rights.”<sup>55</sup> Put another way, Holmes concluded that the Court, sitting in equity, would not decide a question of political rights precisely *because* plaintiffs might well have no nonjudicial means of enforcing those rights in the aftermath of any decision.

Perhaps the most interesting element of the *Giles* decision was Holmes’s claim that the Court could not accomplish anything by finding for Jackson Giles because, as Pildes demonstrates, Holmes was basing his argument on an assumption that he could or should have known was entirely incorrect.<sup>56</sup> Holmes’s approach to *Giles* makes more sense if observers assume that whites in Alabama were *already united* in a conspiracy to disfranchise non-whites, and were willing to go to any lengths necessary to achieve this disfranchisement. In fact, the population of Alabama was *not* divided neatly along racial lines, and single-race, single-party domination of the South was far from certain.<sup>57</sup> The population of Alabama was, rather, deeply divided along class, political, and socioeconomic lines.<sup>58</sup> As Pildes explains in *The Canon*,

[T]he framers of disfranchisement were typically the most conservative, large landowning, wealthy faction of the Democratic Party, who were also seeking to entrench their partisan power and fend off challenges from Republicans, Populists, and other third parties, as well as from the more populist wings of the Democratic Party. While pledging not to disfranchise any whites, they advocated provisions that would remove the less educated, less organized, more impoverished whites from the electorate as well—and that would ensure one-party, Democratic rule, which is precisely what happened from this moment forward through most of the 20th century in the South.<sup>59</sup>

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54. *Id.*

55. *Id.* at 487.

56. See Pildes, *The Canon*, *supra* note †, at 301; Pildes, *Meaningful*, *supra* note 3, at 645–46.

57. See Pildes, *The Canon*, *supra* note †, at 301; Pildes, *Meaningful*, *supra* note 3, at 645–46; *Negroes Indignant*, N.Y. TRIB., Apr. 28, 1903, at 1 (describing the reaction to the *Giles* decision in Birmingham, Alabama). According to the *New York Tribune*, which was reporting on the basis of telegraphed information, “[t]he negroes,” “indignant” about the decision and, uncertain as to what action to take, were planning a meeting at which they claimed “as many white men will be present as there are negroes.” *Negroes Indignant*, *supra*. Reinforcing the concept of Alabama politics as *not yet* simply divided along racial lines, the newspaper’s correspondent concluded that “[t]he outlook is that the Republicans of the State are on the verge of another great split . . . . It is said that . . . ‘[l]ily White’ leaders will be read out of the party.” *Id.*

58. See Pildes, *Meaningful*, *supra* note 3, at 645–46; Pildes, *The Canon*, *supra* note †, at 301 (“For those who mistakenly believe in the inevitability of white supremacy in this period, the key word here is ‘slowly’; it took several years of the self-conscious construction and organized mobilization of a militarized white supremacy, often against a divided white business community willing to accommodate black political participation for the sake of stability, to enable white ‘redemption’ of the South.”).

59. Pildes, *The Canon*, *supra* note †, at 302; see also Pildes, *Meaningful*, *supra* note 3, at 645–46 (“A generation after the turbulence of this era, though, the comprehensive regime of white

In other words, had Holmes actually faced down the supporters of the Alabama Constitution of 1901, then the Court might actually have prevented the disfranchisement about which Jackson Giles was complaining. Holmes's words were at least in part self-fulfilling;<sup>60</sup> *Giles* permitted the creation of the single-party, single-race domination of the Alabama political system that Holmes assumed already existed, and so meant that *from that moment on* Holmes's logic would have made more sense.

Given Holmes's determination to avoid the jurisdictional question and reach the merits, *Giles* has to be read, at least in part, as a definitive message from the Supreme Court putting the members of the African American community of the South on notice that they could not count on the judiciary to protect their rights. In his decision, Holmes left only one possible opening—the suggestion that Giles could sue the state for damages, and so make a legal, rather than an equitable claim. The next year, however, the state and federal courts closed this possibility off as well, when the Supreme Court in *Giles v. Teasley* held that it had no jurisdiction to hear Giles's damages claim<sup>61</sup>—a claim which had been rejected by the Alabama Supreme Court on grounds that kept the case out of federal hands by avoiding federal questions or constitutional issues.<sup>62</sup>

## II. POPULAR (MEDIA) REACTION TO THE *GILES* DECISION

This Part examines some of the popular media coverage and editorials that immediately followed the *Giles* and *Teasley* decisions and argues that this coverage and these editorials, whether positive or negative and in both the northern and southern papers, focused heavily on the democracy/antidemocracy aspects of Holmes's decision. If media coverage determines in part what cases enter the canon of constitutional law,<sup>63</sup> then

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supremacy had emerged. So, too, had one party political monopolization of Southern politics, in the form of the Democratic Party. Blacks had been eliminated from politics and socially segregated. Because this regime endured until the modern civil rights era, it is easy to think its reign natural and inevitable. But this regime *emerged* through the struggles of this era; it had to be self-consciously constructed, brick by brick, year by year, in conflicts with opposing white factions close to equipoise, in battles whose outcome was often in doubt.”).

60. See, e.g., SCOTT, *supra* note 3, at 197 (“Disfranchisement by state constitution, begun as a clear challenge to federal authority, encompassing provisions that even some of its strongest proponents expected to see turned back by the courts, was in 1903–1904 accorded the respect of an inevitable expression of the will of the ‘people of the state.’”).

61. 193 U.S. 146 (1904). In *Teasley*, Jackson Giles brought suit for damages in the Alabama state courts. Given Holmes's suggestion that damages might lie in such a claim, it is not clear why Giles did not refile his suit in the federal courts. In considering the case, the Alabama Supreme Court (using Holmes's logic from *Giles*) reached its decision without depending primarily on a federal question and so cut off the U.S. Supreme Court's possibility of review.

62. Rebecca Scott suggests in *Degrees of Freedom* that at least one southern state official (the Louisiana attorney general) was waiting for the *Teasley* decision before acting on a filed lawsuit and moved to protect the new voting provisions of his own state within a week of the decision. SCOTT, *supra* note 3, at 195.

63. For more on how cases and materials enter the constitutional canon, see *supra* note 12. Heavy media scrutiny of a particular case, like heavy academic scrutiny of a particular case (as Pildes scrutinized *Giles*), could presumably help propel that case into the constitutional canon by

the reporting in 1903 and 1904 could easily have helped *Giles* do so. The case was big news for many in the United States, and the media coverage seemingly set the stage nicely for continuing academic and scholarly interest in the decision—though for some reason that interest failed to materialize. Section II.A examines how in the immediate aftermath of the decision newspapers from multiple places on the political and judicial spectrum clearly identified, in both ostensibly neutral reportage and more partisan editorializing, the link between the case and the constitutional implications of a decision preventing African Americans from voting. Section II.B describes how some newspapers went even further, actually reveling in the link between *Giles* and constitutional, legal racism. Section II.C argues that despite the falloff in coverage about *Giles* after 1904, the media's response to the case in 1903 and 1904 suggests that newspapers were not in any way interested in airbrushing the case from the constitutional scene.<sup>64</sup>

#### A. Identifying the Link Between *Giles* and Antidemocracy

In the immediate aftermath of the *Giles* decision, national news reports, newspapers critical of the decision, and newspapers strongly supporting the decision all quickly made the connection between *Giles* and the question of African American enfranchisement—essentially identifying the link between *Giles* and antidemocracy.

The first surviving public reactions to and interpretations of *Giles* came in national, fairly objective news reports (rather than editorials) published in numerous small papers around the country. While it remains unclear exactly how closely various communities were watching the Court as it made its

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bringing it to the attention of canon-defining law professors, legal scholars and observers, and current and future law students. This Note does not argue that media attention is necessary before a case can enter the canon, or even that for the case to remain in the canon it was necessary for the public to learn by reading media reports not only that *Giles* had bad normative results for African Americans but also that *Giles* was an important case with antidemocratic elements. Instead, this Note argues that even if Pildes is correct that *Giles* was *airbrushed* from the canon—and that presumably somebody or something actively engaged in airbrushing—then (1) it was not the newspaper reporters and editors writing in the aftermath of the case who did so, and (2) it would have been hard for anyone else to do so while the newspapers continued to focus in such a noisy manner on the democratic/antidemocratic importance of the decision. See also *infra* Section II.C.

64. It is of course unclear whether the news reporters or editors writing about *Giles* intended to make the case an important symbol in either the canon of democracy or the canon of antidemocracy. What is clear, however, is that these reporters and editors thought it important to talk about the democratic/antidemocratic elements of the decision. History is rife with examples of individuals disingenuously ignoring the democratic or antidemocratic implications of court decisions. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (“We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority.”). History is also rife with examples of reporters choosing not to write about particular topics because of concerns about national security, propriety, or the appearance of the United States in the eyes of the world. See, e.g., ARTHUR M. SCHLESINGER, JR., ROBERT KENNEDY AND HIS TIMES 362–65 (Mariner Books 2002) (1978) (noting that “[t]he refusal of newspapers to touch” audio tapes of sexual orgies engaged in by Martin Luther King, Jr., “attests to the standards of decency the press observed in those forgotten days”). Had they, or their readers, been interested in, for whatever reason, airbrushing *Giles* from the constitutional canon, these reporters and editors could have held off from writing extensively about the democracy/antidemocracy implications of the opinion, and instead either mourned or celebrated the decision off the front pages.

decision in *Giles*, contemporary newspaper accounts suggest that the case was an item of intense interest in a number of southern states, including Alabama, North Carolina, South Carolina, and Virginia,<sup>65</sup> and was of general interest in some northern and western states as well.<sup>66</sup> On April 28, 1903, the day after the decision was announced, for instance, a number of newspapers in communities as distant as Columbus, Georgia; Columbia, South Carolina; Boise, Idaho; Aberdeen, South Dakota; Washington, D.C.; Chicago, Illinois; and San Francisco, California published nearly identical stories about the Court's decision.<sup>67</sup> According to the stories, which essentially contained a summary of the Court's decision, the case "was brought to test the validity of the portion of the state constitution bearing upon [the] question," and "[t]he relief sought was denied on the ground that the case was political."<sup>68</sup> As this summary and other news accounts from the period demonstrate, contemporary observers were well aware of the link between the *Giles* decision and the normative question of African American voting rights and disfranchisement.<sup>69</sup>

Not surprisingly, the newspapers that editorialized strongly against Holmes's decision in *Giles* were even more explicit than were the authors of ostensibly objective news stories in describing the connection between the *Giles* litigation and the disfranchisement of African Americans in southern states. These newspapers were far less likely than were those in favor of the

65. See, e.g., *Alabama Suffrage Provisions Are to Come Up in the Supreme Court*, CHARLOTTE DAILY OBSERVER (Charlotte, N.C.), Nov. 11, 1902, at 1; *Alabama's Constitution*, STATE (Columbia, S.C.), Feb. 25, 1903, at 1; *And Still Another*, PLANET (Richmond, Va.), May 9, 1903, at 4; *Edward M. Shepard's Defense of the South's Suffrage Laws: From the New York Evening Post*, STATE (Columbia, S.C.), Aug. 31, 1903, at 10 (reprinted from the *New York Evening Post*). The case was obviously of particular interest to Alabama, as it concerned the constitutionality of the Alabama Constitution of 1901. See, e.g., *Negroes Indignant*, N.Y. TRIB., Apr. 28, 1903, at 1 (reporting, on the basis of telegraphed information from Birmingham, Alabama, that "the negroes are indignant at the Supreme Court for deciding the franchise case against them, and are at a loss as to what action to take").

66. See, e.g., *Against Negro Voters*, N.Y. TRIB., Apr. 28, 1903, at 1; *Colored Voter Loses Suffrage: Supreme Court Upholds Ruling of Southern Registrars*, S.F. CALL, Apr. 28, 1903, at 2.

67. See, e.g., *Relief is Denied Jackson W. Giles: Alabama Negro Who Wanted to Register and Vote Under New Constitution*, COLUMBUS ENQUIRER-SUN (Columbus, Ga.), Apr. 28, 1903, at 7; *Alabama's Franchise Clause: Supreme Court of the United States Dismisses the Petition of a Negro Refused Registration*, STATE (Columbia, S.C.), Apr. 28, 1903, at 5; *Supreme Court Decision: Refuses to Interfere in Alabama Case Because It Is Political*, IDAHO DAILY STATESMAN (Boise, Idaho), Apr. 28, 1903, at 1; *No Relief is Given: Supreme Court and the New Alabama Constitution*, ABERDEEN DAILY NEWS (Aberdeen, S.D.), Apr. 28, 1903, at 2; *Negro Denied Relief: Court Declines to Pass on an Alabama Case*, WASH. POST, Apr. 28, 1903, at 4; *Negro Voter Denied Relief: United States Supreme Court Refuses to Decide Case Affecting New Registration Law in Alabama*, CHI. DAILY TRIB., Apr. 28, 1903, at 3; *Colored Voter Loses Suffrage: Supreme Court Upholds Ruling of Southern Registrars*, S.F. CALL, Apr. 28, 1903, at 2.

68. E.g., *Negro Denied Relief: Court Declines to Pass on an Alabama Case*, WASH. POST, Apr. 28, 1903, at 4; *Negro Voter Denied Relief: United States Supreme Court Refuses to Decide Case Affecting New Registration Law in Alabama*, CHI. DAILY TRIB., Apr. 28, 1903, at 3; *No Relief is Given: Supreme Court and the New Alabama Constitution*, ABERDEEN DAILY NEWS (Aberdeen, S.D.), Apr. 28, 1903, at 2.

69. Not all news accounts, however, focused on the democratic governance aspects of the case. See, e.g., *Alabama Suffrage Provisions Are to Come Up in the Supreme Court*, CHARLOTTE DAILY OBSERVER (Charlotte, N.C.), Nov. 11, 1902, at 1 ("The question of jurisdiction is the principal point involved in the case and there will be no oral argument . . .").

outcome to view the Court's decision as a necessary and pragmatic move by a powerless Supreme Court.<sup>70</sup> Especially notable among publications condemning the decision were those publications affiliated with African American communities, such as *The Journal*, an African American paper published in Huntsville, Alabama, and *The Planet*, an African American newspaper published in Richmond, Virginia.<sup>71</sup> In the aftermath of the decision, *The Planet* was particularly critical, deriding the Supreme Court's conclusion that the Court should decline to do equity if it is believed that it could not enforce equity.<sup>72</sup> "Colored men, we shall come again," declared *The Planet*, "but it will be with religion, intelligence and money to back our demands and to enforce a favorable decision from the Supreme Court of the United States."<sup>73</sup>

Despite the critiques in papers such as *The Planet*, however, the publications that seemed to devote the most time and space to the *Giles* case—and that also, in editorials, strongly highlighted the link between *Giles* and anti-democracy—were those that saw the decision as representing good judicial philosophy or even laudable racial discrimination. Publications as widely varied as *The Sun* (now the *New York Sun*), the *New York Evening Post*, the *Philadelphia Public Ledger*, and *Harper's Weekly* devoted significant space to the story.<sup>74</sup> The case was apparently so well known in some circles that publications such as *Harper's Weekly* could refer to it simply as "the Alabama case," without confusion.<sup>75</sup> These publications, in addition to elaborating on the racial and racist normative outcomes of the decision, focused intently on the constitutional and federalism implications of Holmes's opinion. The Democratic-leaning<sup>76</sup> *Harper's Weekly*, for example, published an editorial

70. See, e.g., Louis G. Gregory, Editorial, *Giles Suffrage Case: E.M. Shepard's Defense of the Action of the Supreme Court*, WASH. POST, Sept. 7, 1903, at 9 (responding to a case made in the *New York Evening Post* in favor of Holmes's decision).

71. See, e.g., *And Still Another*, PLANET (Richmond, Va.), May 9, 1903, at 4; *The Negro Is Persistent*, JOURNAL (Huntsville, Ala.), Sept. 11, 1902; *To Test State Constitution*, JOURNAL (Huntsville, Ala.), Nov. 6, 1902.

72. *And Still Another*, PLANET (Richmond, Va.), May 9, 1903, at 4.

73. *Id.*

74. See, e.g., Edward M. Shepard's *Defense of the South's Suffrage Laws: From the New York Evening Post*, STATE (Columbia, S.C.), Aug. 31, 1903, at 10 (reprinted from the *New York Evening Post*); *Recent Views of the Fifteenth Amendment*, 47 HARPER'S WEEKLY 873, 873 (May 23, 1903) (collecting commentary from the *Philadelphia Public Ledger* and the *New York Sun*). At the same time, however, there was almost no coverage of the *Giles* decision in some major northern papers such as the *New York Times*, and there was very little in papers such as the *Chicago Tribune*. See *supra* note 68.

75. See *Recent Views of the Fifteenth Amendment*, 47 HARPER'S WEEKLY 873 (May 23, 1903).

76. Of course, the Democratic Party of the early twentieth century bore little resemblance to the Democratic Party of the latter part of the twentieth century. Between the end of Reconstruction and the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, the "Solid South" gave its full electoral support to the Democratic Party, which responded by placing many of the levers of power in the hands of racist, southern legislators. See, e.g., DEWEY W. GRANTHAM, *THE LIFE AND DEATH OF THE SOLID SOUTH: A POLITICAL HISTORY* (1992). In addition to being the party of Woodrow Wilson and Franklin Roosevelt, at least until the flight of the Dixiecrats in 1948, the Democratic Party during this period was therefore also the party of Jim Crow and racial

suggesting that the case helped indicate that northerners would come to understand that the Fifteenth Amendment should be repealed.<sup>77</sup> The Philadelphia *Public Ledger*, meanwhile, praised the *Giles* decision as one in which the Supreme Court demonstrated that it was “a fountain of equity,” and *Harper’s Weekly* summarized the *Ledger’s* analysis as follows:

The *Public Ledger* went on to recognize that there has been awakened in the public consciousness a suspicion that the Fourteenth and Fifteenth Amendments may have been measures of uncertain wisdom, added to the Constitution without due deliberation upon their consequences, and that it might have been better to leave the determination of the question treated in those amendments, the question, namely, of negro suffrage, to the several States. It sees that, within very recent years, the most thoughtful citizens at the North have been tending to the conclusion that the South may and should be trusted to deal wisely and honorably with a problem which to them is far more momentous than it is to the rest of the republic. It is well said by the *Public Ledger* that the general prevalence of this conviction may be said to constitute a sort of unwritten amendment to the Federal Constitution, and that it was in accordance with this unwritten amendment that the Supreme Court declined to allow Federal tribunals to decide whether or not Alabama’s suffrage laws are in conflict with the negro-suffrage amendment.<sup>78</sup>

### B. Reveling in the Link Between *Giles* and Racism

In the months and years immediately following the decision, some newspapers—those whose editors approved of the *Giles* decision—not only highlighted the link between *Giles* and the constitutional canon, but in fact seemed to go much further by reveling in the link between *Giles* and official racism. Far from being anxious to shuffle this case off to the side, or air-brush it from the constitutional scenery, these newspapers repeatedly focused on the constitutional implications of the decision.

Racist opinions on the case did not break evenly along North-South lines, or even Democratic-Republican lines. The New York-based Democratic-leaning *Harper’s Weekly*, for instance, strongly sided with Holmes’s opinion, and approvingly summarized seemingly racist coverage from both the Republican-affiliated New York *Sun* and the Republican-affiliated Philadelphia *Public Ledger*.<sup>79</sup> “That the decision of the United States Supreme Court in the Alabama case would be viewed with satisfaction in the Southern States was to be expected,” noted *Harper’s*

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segregation. Cf. JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974, at 560–61 (1996) (observing that Lyndon Johnson’s support for the Civil Rights movement led to the decline of support for the Democratic Party in the South).

77. *Recent Discussion of the Fifteenth Amendment*, 47 HARPER’S WEEKLY 1144 (July 11, 1903).

78. *Recent Views of the Fifteenth Amendment*, 47 HARPER’S WEEKLY 873, 873 (May 23, 1903) (summarizing analysis from the Philadelphia *Public Ledger*).

79. *Id.* at 873–74 (collecting commentary on *Giles* and against African American suffrage from the Philadelphia *Public Ledger* and the New York *Sun*).

*Weekly*. “It is a more significant and, to some extent, a surprising fact that the decision also meets with approval at the North on the part, not only of many non-partisan newspapers, but also of some Republican organs of undisputed authority and wide influence.”<sup>80</sup> This “approval” for the decision by newspapers such as the *New York Sun* clearly extended to racist conclusions:

To the question why [the *Sun*] characterized as “hasty” the policy which invested the emancipated males of African descent with the full right of suffrage, it has replied that the term “hasty” seemed to be the right word for the sudden and wholesale extension of the suffrage, less than four years after the end of the civil war, to millions of people whose capacity for the responsibilities of the ballot was then untried, was exceedingly problematical in view of race characteristics, and has since, by a generation’s experience, been absolutely proved not to have existed.<sup>81</sup>

*Harper’s Weekly* itself seemed devoted to the sort of racial ideology that had governed the white elites who crafted the Alabama constitutional voting provisions. Writing in July of 1903, the editors noted that they were “not among those who [held] that a repeal of the Fifteenth Amendment . . . would be practicable at the present time.”<sup>82</sup> Such a repeal, they explained, needed to be considered at greater length: “Only through discussion is it possible that Northern citizens should arrive at a sober second thought concerning the matter.”<sup>83</sup> Of particular concern, the editors added, were the opinions of citizens of the northern states—opinions that the editors were certain would change once northerners realized *how bad* African Americans truly were.

Nothing but the growing frequency in the Northern States of the new negro crime, by which is meant the crime against white women, and the conviction that this crime is due to the notion of political and social equality implanted by the gift of the suffrage, is likely to cause such a revolution of Northern sentiment as to lead to the wholesale disfranchisement of the blacks on the ground of their race or color.<sup>84</sup>

While the coverage in *Harper’s Weekly* and the *New York Sun* demonstrated that some “northern” papers responded to *Giles* in racialized or racist ways, southern papers (not associated with the African American community) provided such racialized coverage as a matter of course. Quite typical was the story published in the *Columbus Enquirer-Sun* of Columbus, Georgia, in October of 1903 describing *Giles’s* attempt to sue for damages in the Alabama state courts: “Again Alabama negroes are trying to pick flaws in Alabama’s

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80. *Id.* at 873.

81. *Id.* at 874. “Our readers will not be surprised to learn,” added *Harper’s Weekly*, “that these expressions of opinion on the part of a Republican newspaper have been reproduced and annotated all over the Southern States.” *Id.*

82. *Recent Discussion of the Fifteenth Amendment*, 47 HARPER’S WEEKLY 1144, 1144 (July 11, 1903).

83. *Id.*

84. *Id.*

new State Constitution,” the paper noted. “It is not very likely that [Giles] will be successful . . . . The Alabama constitution will, in all probability, stand until the white people of the State decide to change it.”<sup>85</sup>

### C. Remaining in the Constitutional Picture

The reaction of media outlets in the months and years following *Giles* suggests that reporters and editors were interested in focusing on the link between the *Giles* decision and ideas of democratic governance or anti-democracy, and therefore were *not* interested in wiping that link from the constitutional scenery.

Not surprisingly, coverage of *Giles* trickled off in the weeks (or, in the case of publications such as *Harper’s Weekly*, months) after the decision.<sup>86</sup> The spurt of new coverage the next year following the Court’s decision in *Teasley* similarly diminished quickly.<sup>87</sup> In part, this was probably due to the nature of news—*Giles* had been decided, and the papers presumably found enough going on in 1903 and 1904 (including the election of President Theodore Roosevelt to his first full term in office) to cover. In part, however,

85. COLUMBUS ENQUIRER-SUN (Columbus, Ga.), Oct. 21, 1903, at 4.

86. *But see Congressman Hardwick Appeals to Georgians*, COLUMBUS ENQUIRER-SUN (Columbus, Ga.), Sept. 25, 1908, at 1 (quoting Hardwick discussing *Giles* in an attempt to convince Georgians to approve constitutional provisions designed to lead to African American disfranchisement). Hardwick’s citation of *Giles* in this address demonstrates how white racist southern politicians could rely upon Holmes’s “political question” reasoning to prevent federal courts from becoming involved despite the open desire of such politicians to remove African Americans from the electorate:

It is, I believe, generally and clearly understood that the purpose and object of the amendment is to disenfranchise the largest number possible . . . of the ignorant and venal negro voters of Georgia and at the same time preserve the ballot to every honest white man in this state. I should be insincere and far from candid if I did not readily concede as much. . . . [T]his measure means no more and no less than “negro disfranchisement.”

*Id.*

87. *See, e.g., Negro Suffrage in Court*, WASH. POST, Oct. 20, 1903, at 13; *Negro Case in Supreme Court*, CHARLOTTE DAILY OBSERVER (Charlotte, N.C.), Jan. 6, 1904, at 1; *Negro Suffrage Case: Argument on Alabama Suits Before Supreme Court*, WASH. POST, Jan. 6, 1904, at 9; *An Important Decision*, MACON TELEGRAPH (Macon, Ga.), Feb. 28, 1904, at 4 (“As the supreme court of the United States has again declined to interfere, it will probably be some time before further attempts are made to test the legality of the franchise restrictions adopted in certain of the Southern states.”); “*A Republican Form of Government*”, WASH. POST, Feb. 28, 1904, at ES6. News organizations also covered the run-up to the Supreme Court’s decision. *See, e.g., Double Tracking Southern*, CHARLOTTE DAILY OBSERVER (Charlotte, N.C.), May 30, 1903, at 1 (noting that the Supreme Court’s decision in *Giles* “has not ended the fight to test the validity of those disfranchising laws directed at the ignorant blacks in the South.”); *Giles Has Another Chance*, WORLD-HERALD (Omaha, Neb.), May 30, 1903, at 3; *Negro Suffrage Case*, COLORED AM. (Washington, D.C.), Jan. 9, 1904, at 1 (describing the oral argument in *Teasley* and concluding that “[w]ithout indulgence in fulsome praise or flattery it may be conceded that no better presentation of the case of the disfranchised Negro could have been made than the earnest eloquent and forceful argument offered”); *Supreme Court Decisions*, SUN (New York, N.Y.), Oct. 20, 1903, at 4 (describing a request by Giles’s counsel asking for three cases involving Alabama’s “Grandfather” clause to be consolidated).

the lack of ongoing coverage of *Giles* or *Teasley* might have been due to the finality of the decisions and the lack of any ongoing topic for argument.<sup>88</sup>

Despite the falloff in coverage, however, there was no concomitant attempt by newspapers in 1903 and 1904 to airbrush *Giles* from the constitutional canon; if anything, the newspapers reveled in the front-row place *Giles* immediately assumed in the American constitutional picture. While in *Giles* and *Teasley* the Court arguably slammed the door on any attempt by African Americans to protect their right to vote in the courts, the publications that covered the case, whatever their political stances, had generally made clear the connection between the decisions and African American disfranchisement. In 1903 and 1904, there appears to have been little question but that *Giles* stood for the proposition that states could rig suffrage requirements to exclude nonwhites. If Richard Pildes is correct that by the late twentieth century *Giles* had been “airbrushed out of the constitutional canon,”<sup>89</sup> then that airbrushing did not occur in the media in the immediate aftermath of the decision, and must have occurred after at least some observers had identified the decision as a focal point of Pildes’s anti-democracy.

### III. SCHOLARLY ANALYSIS AND CATEGORIZATION

With the disappearance of *Giles* and *Teasley* from newsprint after 1903 and 1904, the continuing meaning and importance of *Giles* over the following two decades were largely defined in and by the legal treatises, practitioner handbooks, and academic articles published after the decision was first handed down.<sup>90</sup> This Part argues that between 1903 and the mid-1920s scholars discussing *Giles* generally categorized the case under one of three broad headings: (1) as a case (possibly a *minor* case) involving central questions of disfranchisement, racism, and anti-democracy; (2) as a case establishing or reinforcing the rule that courts sitting in equity cannot decide political questions (and so making a separation-of-powers argument);<sup>91</sup> or

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88. Cf. SCOTT, *supra* note 3, at 196 (“The strategy of judicial challenge had, in effect, reached a dead end. With the U.S. Supreme Court categorically on record in the *Giles* cases, there was no point in appealing [other decisions] further.”).

89. Pildes, *The Canon*, *supra* note †, at 297.

90. Cases enter the constitutional canon not only because of public reception or historical context, but also in large part because of ongoing judicial interest in citing back to earlier decisions, and because of the treatment of cases by scholars and authors of legal textbooks and treatises. Judges, it appears, were not particularly eager to cite *Giles* for any proposition; according to Westlaw’s “citing references” function, as of November 14, 2008, *Giles* was cited by judges in only ninety-nine reported cases, of which only around one quarter were cases before the Supreme Court. In contrast, according to Westlaw’s “citing references” function, by the same date *Lochner v. New York*, 198 U.S. 45 (1905), a critical Supreme Court opinion decided two years after *Giles*, has been cited in almost seven hundred decisions. Most of the references to *Giles*, moreover, are glancing, and make no mention of its importance as a case linked to legalized racial disfranchisement. If *Giles* was going to enter Pildes’s “canon of (anti-)democracy,” it was the legal and constitutional scholars who would have had to put it there.

91. See, e.g., 8 AM. TECHNICAL SOC’Y, LIBRARY OF AMERICAN LAW AND PRACTICE 102 n.11 (1919); GEORGE L. CLARK, EQUITY: ILLINOIS EDITION 320 n.9 (1920); 1 JOHN NORTON POMEROY,

(3) as a case establishing technical procedural points<sup>92</sup> (and nonconstitutional points) about jurisdiction or equity.<sup>93</sup> While in the years after the decision a number of scholars who viewed *Giles* as falling into the first of these categories produced articles and treatises that could easily have won the case an enduring place in the constitutional canon, at the same time commentators and legal scholars who viewed the case as falling into one of the latter two categories increasingly used *Giles* to reinforce or illustrate points about jurisdiction or political questions. By the 1920s, therefore, some constitutional scholars apparently viewed *Giles* as a case about the technicalities of equity, jurisdiction, or separation of powers,<sup>94</sup> while others regarded the case simply as a minor example of the linkage between jurisprudence and democratic governance, and only a few held the case out as a critical example of how court decisions affected the core meaning of democracy.<sup>95</sup> In examining the canon of democracy or even the canon of antidemocracy, some of those scholars who viewed the case as being less than critically important<sup>96</sup> instead focused attention on cleaner, more straightforward cases touching on southern suffrage rules, such as the 1898 case of *Williams v. Mississippi*, in which the Court upheld the provisions of Mississippi's state constitution providing for a poll tax and literacy test,<sup>97</sup> or the 1915 case of *Guinn v. United States*, in which the Court struck down Oklahoma's grandfather clause.<sup>98</sup>

If *Giles* was airbrushed from the constitutional canon during the two decades following the decision, then perhaps it was more because *Giles* was both a procedurally messy case and a possibly minor one among several

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JR., A TREATISE ON EQUITABLE REMEDIES § 324 n.43 (1905); Roscoe Pound, *Equitable Relief against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640, 681 (1916); Comment, *Power of Equity over Public Elections*, 29 YALE L.J. 655 (1920).

92. Among the procedural jurisdictional questions scholars used *Giles* to answer was the role of jurisdictional certification. As soon after the case as 1904, in his *Handbook of Jurisdiction and Procedure in the United States Courts*, Robert M. Hughes cited *Giles* for the proposition that the Supreme Court has the right to review entire cases when a state constitution is claimed to be in contravention of the U.S. Constitution, "even though the lower court has certified a question up as a jurisdictional question, for it is not in the power of the lower court to narrow the jurisdiction of the Supreme Court by such a certificate." ROBERT M. HUGHES, HANDBOOK OF JURISDICTION AND PROCEDURE IN THE UNITED STATES COURTS 406 (1904). Nine years later, in the second edition of the work, Hughes used almost exactly the same words to describe the importance of *Giles*. ROBERT M. HUGHES, HANDBOOK OF JURISDICTION AND PROCEDURE IN UNITED STATES COURTS 512 (2d ed. 1913). Clearly, for Hughes even the passage of a decade of increasingly obvious racial discrimination in the South had not changed the essential importance of *Giles*—at least inasmuch as the case stood for a procedural point.

93. See, e.g., 1 THOMAS ATKINS STREET, FEDERAL EQUITY PRACTICE 24–25 (1909). The second and third "broad headings" are discussed together in Section III.B.

94. See, e.g., Note, *The Alabama Franchise Case*, *supra* note 17, at 131 (1903) (focusing on the procedural rules and concluding that "[o]n analysis, therefore, contrary to what might be thought, this case does not turn upon a question of constitutional law").

95. See, e.g., *infra* notes 120–125 and accompanying text.

96. See, e.g., 3 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 339 n.2 (1922); WESTEL W. WILLOUGHBY, PRINCIPLES OF THE CONSTITUTIONAL LAW OF THE UNITED STATES 195 n.18 (students ed. 1914).

97. 170 U.S. 213 (1898).

98. 238 U.S. 347 (1915).

touching on the themes of democracy and antidemocracy than because of a “longer constitutional tradition” in the United States “in which issues of democratic governance were off the map altogether.”<sup>99</sup> Section III.A examines how scholars in the two decades after the decision in *Giles* spoke and wrote about *Giles*’s relevance to questions of democracy and antidemocracy. Section III.B discusses how a number of scholars in these years focused more on *Giles*’s political question, jurisdictional, and equity holdings than on its link to democratic governance.

#### A. Focus on Constitutional Importance

While by the late twentieth century *Giles* may have been “airbrushed out of the constitutional canon,” in the years immediately following the decision a number of legal and constitutional scholars and observers *did* focus on the links between the case and constitutional law and democratic governance. Even some of these scholars, however, clearly regarded the case as a minor or unimportant example of these links, and failed to ascribe to the case the critical importance for which Pildes argues in *The Canon*.<sup>100</sup>

Among the first legal observers or scholars to link the case, in an important legal journal, to the concepts of democratic governance and antidemocracy was the noted Michigan attorney Alfred Russell,<sup>101</sup> who on June 19, 1903 read a paper before the Michigan State Bar Association in which he identified *Giles* as one of the three key cases decided by the U.S. Supreme Court in the previous months that had touched upon constitutional concerns.<sup>102</sup> In its decision, Russell noted, the Court “has made a clear path for the Southern doctrine of a white man’s government.”<sup>103</sup> Russell seems to have been bothered by the Court’s decision on political or normative grounds, as he declined to discuss the case further so as to avoid being “led

99. Pildes, *The Canon*, *supra* note †, at 319.

100. *Id.* at 296 (“In this bleak and unfamiliar saga, there is one key moment, one decisive turning point: the 1903 opinion of Justice Oliver Wendell Holmes in *Giles v. Harris*.”).

101. Alfred Russell, described by the American Bar Association (“ABA”) as “one of the foremost lawyers in the West,” was a former U.S. Attorney in Michigan during the Civil War and was a frequent advocate before the U.S. Supreme Court. REPORT OF THE TWENTY-NINTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION, pt. 1, 675–76 (1906); *see also American Bar Association*, N.Y. TIMES, Aug. 20, 1891, at 8 (announcing that Alfred Russell of Detroit would give the ABA’s annual address). Russell was also described as being on intimate terms with all of the Supreme Court Justices; his criticism of the recently appointed Justice Holmes as being “best known . . . as the son of a noted man of letters, Dr. Holmes,” was either an attempt to praise Holmes’s father or a clear snub from a man who had apparently been himself considered twice for the Supreme Court, but had not been appointed. Alfred Russell, *Three Constitutional Questions Decided by the Federal Supreme Court During the Last Four Months*, 37 AM. L. REV. 503, 507 (1903). At least one publication clearly thought it was a snub, noting that “most lawyers . . . would take exception to [Russell’s words], as Judge Holmes has long occupied a most distinguished position on the Bench, and has an international reputation as an original thinker and jurist!” *Notes on Recent Leading Articles in Legal Publications*, 51 AM. L. REG. 646, 647 (1903).

102. Russell, *supra* note 101.

103. *Id.* at 503.

astray into a partisan discussion,”<sup>104</sup> but he did want to make clear his support for Holmes’s “pragmatic” stance, which he saw as necessary to skirt the problems that had helped lead to the Civil War. He noted:

The so-called Negro Question, so far from being closed, seems to me to have just begun to be opened; but I think we will most of us agree that the court was wise in not undertaking to determine the validity of the new policy of the white people of the Southern States, by a court of equity. The question is too large for courts. When the Dred Scott case was decided, the judges of that day reached a different conclusion, and thought that the momentous question then before the nation could be, and was settled by the court. No greater mistake was ever made in judicial annals, and I think the existing bench has displayed wisdom and true statesmanship in holding the powers of a court of equity unequal to the emergency.<sup>105</sup>

After Russell’s paper, and a 1904 treatise on the Constitution containing a short mention,<sup>106</sup> the next significant academic work to make the argument for reading *Giles* as a key case in constitutional and antidemocracy terms came not in a legal publication, but instead in the newly inaugurated *American Political Science Review*.<sup>107</sup> In his 1906 article, John Rose identified in Holmes’s statements about political questions and separation of powers “the real explanation of the difficulty in the way of those who seek through the courts to compel the dominant race . . . to do that which that race is almost unanimously determined it will not do.”<sup>108</sup>

Rose, however, did not represent the full spectrum of opinion within the discipline of political science on the importance of *Giles*. Writing a year earlier in the *Political Science Quarterly*, Francis Caffey (later the U.S. Attorney for the Southern District of New York and a federal district judge in the Southern District of New York) relegated *Giles* to an unimportant supporting role (literally as a footnote) in his attack on the 1903 report of the committee on political reform of the Union League Club of New York (which had been enormously critical of the disfranchising conventions).<sup>109</sup> Caffey took a radically different tone than did Rose, concluding that “[t]he predominant purpose” of the movement in Alabama to change the suffrage

104. *Id.* at 509.

105. *Id.*

106. C. STUART PATTERSON, *THE UNITED STATES AND THE STATES UNDER THE CONSTITUTION* 293–94 (2d ed. 1904). Oddly enough, in that work Patterson cited *Giles* and *Teasley* for the propositions that “[a] state, therefore, cannot limit the right of suffrage to the white race” and that an individual may maintain an action in damages if he has improperly been prevented from voting. *Id.* Both points were technically and legally correct, but in practice *Giles* seemed to stand for the opposite propositions.

107. John C. Rose, *Negro Suffrage: The Constitutional Point of View*, 1 AM. POL. SCI. REV. 17, 38–39 (1906).

108. *Id.* at 39, quoted in Pildes, *Meaningful*, *supra* note 3, at 652.

109. Francis G. Caffey, *Suffrage Limitations at the South*, 20 POL. SCI. Q. 53, 59 n.3 (1905). Unlike Russell, Patterson, and Rose, Caffey did not view *Giles* as a key constitutional case, but rather simply as an example of how challenges to the southern constitutions had consistently failed in the courts. *Id.*

requirements “was not to tie the negroes’ hands, but to untie the hands of the best of the white men.”<sup>110</sup> “Such a plan as that in the Alabama constitution is not selfish,” declared Caffey; “it is merely practical. It puts a premium on good qualities of citizenship and is well calculated to attain the best and fairest results, not for white men alone, but for negroes also.”<sup>111</sup>

After the publication of Rose’s article, there was apparently little or no analysis of *Giles* as an important constitutional case (though scholars and lawyers continued to cite it for its rule on equity and its jurisdictional holdings) until 1910, when both James Parker Hall,<sup>112</sup> the famed constitutional scholar and dean of the University of Chicago Law School, and William C. Coleman, writing in the *Columbia Law Review*, bemoaned the fact that those wishing to challenge the southern constitutions were finding it hard to bring the questions of disfranchisement “squarely before the Supreme Court.”<sup>113</sup> Hall in particular seemed angered, and attacked the grandfather clause and like tools in his treatise on constitutional law as “produc[ing] a practical discrimination against all negroes who are the descendants of negroes who in 1867 were excluded from suffrage on account of race and color.”<sup>114</sup> Hall went on to cite *Giles* as demonstrating Pildes and Scott’s point about the importance of the case: “It is extremely questionable whether such provisions do not violate the Fifteenth Amendment,” Hall wrote, “but it is also very doubtful whether the United States statutes as they stand afford any adequate procedure for testing the question in the Federal courts.”<sup>115</sup> Thirteen years later, in what appears to be the seventh edition of the same work, Hall discussed *Giles* as an example of a case in which “it may be impossible to secure a judicial declaration of the invalidity of a statute,” even though the statute is clearly unconstitutional, because the existing statutes regulating jurisdiction and judicial procedure do not permit a proper remedy.<sup>116</sup> “Congress has apparently not provided any effective procedure for the enforcement in the Federal courts of the right of suffrage in a state,” he concluded, “even when improperly denied by the state through the requirement of an unconstitutional system of registration as preliminary to voting.”<sup>117</sup>

Despite Hall’s clear impatience with the Court and the arguments made by Patterson and Rose about the critical nature of the *Giles* opinion, many

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110. *Id.* at 57.

111. *Id.*

112. JAMES PARKER HALL, CONSTITUTIONAL LAW 79–81 (1910).

113. William C. Coleman, *The Fifteenth Amendment*, 10 COLUM. L. REV. 416, 448 n.73 (1910).

114. HALL, *supra* note 112, at 80.

115. *Id.* Hall also went on to note that a restriction on the franchise that was facially race neutral and applied in a race-neutral manner, thereby eliminating both whites and blacks from the voting rolls, would probably be constitutional. *Id.* at 81 (citing *Williams v. Mississippi*, 170 U.S. 213, 222 (1898)).

116. JAMES PARKER HALL, CONSTITUTIONAL LAW 39–40 (1923).

117. *Id.*

constitutional scholars in the two decades after the *Giles* decision apparently agreed with Francis Caffey that *Giles* was a relatively unimportant case in the Court's jurisprudence. The political scientist Westel Willoughby,<sup>118</sup> for instance, instead focused his attention on *Williams v. Mississippi*, the 1898 case in which the Court unanimously upheld (as not facially discriminatory, and so not violative of the Fourteenth Amendment) the provisions in Mississippi's state constitution providing for a poll tax and literacy test.<sup>119</sup> In his texts on constitutional law, Willoughby simply referred his readers to *Giles* and *Teasley* "[f]or other attempts to obtain judicial pronouncements upon the constitutionality of these disfranchising clauses in the State Constitutions."<sup>120</sup> Even in some articles in which scholars did discuss *Giles* as a disfranchisement case, the authors made no effort to single *Giles* out as a pivotal moment in the Court's jurisprudence or in the development of antidemocracy in the United States. In a 1921 article on African American citizenship, for instance, the renowned African American historian Carter G. Woodson<sup>121</sup> simply listed and described *Giles* (albeit at some length) as merely one more case, sandwiched between a little-known case about the poll tax and *Teasley*.<sup>122</sup>

Perhaps most indicative of how little importance some influential scholars and legal figures ascribed to *Giles* was the treatment of the case in Charles Warren's 1922 Pulitzer Prize-winning *The Supreme Court in United States History*.<sup>123</sup> Warren made scant and passing reference to *Giles* in his work.<sup>124</sup> He had been an Assistant Attorney General of the United States between 1912 and 1916; that he placed *Giles* alongside *Williams v. Mississippi* as simply one of the cases upholding the provisions in some southern constitutions preventing blacks from voting suggests that he did not identify *Giles* as a critical moment in the Court's jurisprudence. In fact, Warren—perhaps attempting to present a positive reading of the Court's trajectory, or perhaps focusing on a case that did not bring with it *Giles*'s procedural oddities—instead focused on *Guinn*.<sup>125</sup> *Giles* was not yet "airbrushed" from

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118. Westel Willoughby, perhaps the "father of political science," founded the Political Science Department at Johns Hopkins University and became known as an expert on Supreme Court jurisprudence.

119. WILLOUGHBY, *supra* note 96, at 195 n.18; WESTEL W. WILLOUGHBY, PRINCIPLES OF THE CONSTITUTIONAL LAW OF THE UNITED STATES 195 n.18 (1912).

120. WILLOUGHBY, *supra* note 96, at 195 n.18; WILLOUGHBY, *supra* note 119, at 195 n.18.

121. Woodson was the second African American (after W.E.B. Dubois) to be awarded a Harvard doctorate. He went on to found *The Journal of Negro History* (now the *Journal of African American History*) in 1916. Woodson was also primarily responsible for inaugurating the celebration of Negro History Week, which has become Black History Month. For more information on Woodson, see The Carter G. Woodson Institute for African-American and African Studies at the University of Virginia, About the Institute, <http://artsandsciences.virginia.edu/woodson/about/index.html> (last visited Dec. 1, 2008).

122. Carter G. Woodson, *Fifty Years of Negro Citizenship as Qualified by the United States Supreme Court*, 6 J. NEGRO HIST. 1, 38–41 (1921).

123. 3 WARREN, *supra* note 96, at 339–40 n.2.

124. *Id.*

125. *Id.* (citing *Guinn v. United States*, 238 U.S. 347 (1915)).

constitutional discourse, but it is clear that it was already being marginalized in favor of cleaner cases, in which those challenging antidemocratic measures achieved greater success than did *Jackson Giles*.

### B. *Political Questions, Jurisdiction, and Equity*

Even as some constitutional scholars in the two decades after the *Giles* decision focused on the links between the decision and questions of democratic governance, other scholars instead—in perhaps the key step for airbrushing *Giles* from the constitutional canon or pushing *Giles* off center stage—focused on the importance of *Giles*'s political question, jurisdictional, or equity holdings. In doing so, these scholars perhaps helped transform the case from one about voting rights into one about how courts sitting in equity or deciding jurisdictional questions should act.

In the late 1910s, several legal scholars and the authors of practitioner handbooks began to focus on the political question holding of *Giles*—the holding that courts sitting in equity rather than in law would not decide political questions. Before that time, the only scholarly mention of the political question holding of the case came in a footnote in John Norton Pomeroy's 1904 treatise on equitable remedies.<sup>126</sup> In 1916, however, Roscoe Pound, the incoming dean of Harvard Law School, cited *Giles* in a *Harvard Law Review* article for the case's denial of equitable relief on political question grounds.<sup>127</sup> Pound was not the only scholar or attorney to turn his attention to this holding: three years later, for instance, a publication of the Library of American Law and Practice quoted the case to illustrate Holmes's point that "[t]he traditional limits of proceedings in equity have not embraced a remedy for political wrongs."<sup>128</sup> In 1920, University of Missouri Law Professor George L. Clark similarly used *Giles* to illustrate the rule on political questions in his treatise on equity.<sup>129</sup> That same year, the *Yale Law Journal* published a Comment in part examining the importance to separation-of-powers doctrine of the *Giles* limit on courts sitting in equity over political questions.<sup>130</sup>

While some scholars were citing *Giles* to illustrate the holding about political questions, others in the decade immediately after the decision viewed *Giles* as standing for a general equitable rule about court efficacy. In 1909, for example, in his treatise on federal equity practice, Thomas Atkins Street, a professor at both Vanderbilt and the University of Missouri, and a future Associate Justice of the Supreme Court of the Philippines, cited *Giles* for the proposition that when a court of equity determines whether it can take

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126. 1 POMEROY, *supra* note 91, § 324 n.43 (using *Giles* to illustrate the use of injunctions in political question cases).

127. Pound, *supra* note 91, at 681 n.114.

128. AM. TECHNICAL SOC'Y, *supra* note 91, at 92.

129. CLARK, *supra* note 91, at 320 n.9.

130. Comment, *supra* note 91, at 655–59.

jurisdiction, “one of the first questions is what it can do to enforce any order that it may make.”<sup>131</sup>

More common than the view that *Giles* stood for the proposition that a court should not mandate a remedy where it cannot enforce that remedy was the view that *Giles* was less of a critical case about democratic governance than it was a procedural mess. As early as 1903, the *Harvard Law Review* focused on the procedural rules employed in the *Giles* decision, concluding that “[o]n analysis, therefore, contrary to what might be thought, this case does not turn upon a question of constitutional law.”<sup>132</sup> Just over a decade later, a Note in the *Columbia Law Review* echoed the *Harvard Law Review*’s conclusion.<sup>133</sup> Even Gilbert Thomas Stephenson, who wrote the influential *Race Distinctions in American Law*, believed that *Giles* was of no particular importance, instead viewing the case (along with *Teasley*, *Mills v. Green*,<sup>134</sup> *Jones v. Montague*,<sup>135</sup> and *Selden v. Montague*<sup>136</sup>) as one in which the Court had ducked the central question by focusing on procedural oddities.<sup>137</sup>

By 1924, two years after Charles Warren glossed over *Giles* in his analysis of voting rights cases in *The Supreme Court in United States History*,<sup>138</sup> the case had come for some key scholars to stand chiefly for the proposition that there were limits on what the Supreme Court would, or should, do. In their exhaustive 1924 *Harvard Law Review* article on aspects of separation of powers in the context of criminal contempt trials, for instance, Felix Frankfurter, later an Associate Justice of the Supreme Court, and James Landis, later the dean of Harvard Law School, cited *Giles* for the proposition that “[t]he aptitude of judges and the quality of judicial machinery puts bounds, as a practical matter, to the kind of business which should come before the courts and which, therefore, courts will assume.”<sup>139</sup> For Frankfurter and Landis—two men who helped define the evolution of legal thought and “the canon” in the first half of the twentieth century—*Giles* was useful as a tool in identifying the boundaries of the separate powers of courts. While this reference was only a passing one, it reinforces the conclusion that within two decades of the decision some of the key legal and constitutional scholars had effectively removed *Giles* from the context of antidemocracy, and instead placed it in the context of separation of powers, jurisdiction, or equity.

131. 1 STREET, *supra* note 93, at 25.

132. Note, *The Alabama Franchise Case*, *supra* note 17, at 131.

133. Note, *Constitutionality of the Grandfather Clause*, *supra* note 17, at 337 n.7 (explaining that *Giles* was decided on nonconstitutional grounds).

134. 159 U.S. 651 (1895).

135. 194 U.S. 147 (1904).

136. 194 U.S. 153 (1904).

137. GILBERT THOMAS STEPHENSON, *RACE DISTINCTIONS IN AMERICAN LAW* 314–15, 345 n.65 (1910).

138. *See supra* notes 123–125 and accompanying text.

139. Felix Frankfurter & James M. Landis, *Power of Congress over Procedure in Criminal Contempts in “Inferior” Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1021 (1924).

## CONCLUSION

If by the beginning of the twenty-first century *Giles* had been airbrushed from the constitutional canon, as Richard Pildes suggests, the roots of that process probably lay in the two decades immediately following the Court's decision. Historians and legal scholars of democracy, antidemocracy, race, and voting rights should not conclude, however, that because the case had largely disappeared from the constitutional corpus by 2000 that no legal scholar ever ascribed to it the importance Pildes does in *The Canon*, or that no legal scholars of the early twentieth century were interested in issues of democratic governance.<sup>140</sup> In the immediate aftermath of the decision, and in the two decades following the publication of the Court's opinion, a number of journalists, scholars, and practicing attorneys focused on *Giles* as a critical moment in the evolving legal disfranchisement of African Americans in southern states. At the same time, however, some of the most influential scholars marginalized the decision as simply another minor example of a general trend, while others ignored altogether *Giles*'s linkage to core questions of democracy, and instead used the opinion to explain or illustrate abstruse doctrinal rules about political questions, separation of powers, and jurisdiction. By the mid-1920s, even those voices arguing for the critical importance of *Giles* were fading as legal scholars interested in the growth of democracy and democratic governance apparently turned their attention—both in terms of advocacy and in terms of legal-historical scholarship—to cleaner, more recent, and more publicly “noisy” decisions that perhaps highlighted more *successful* judicial challenges. *Giles* was not *airbrushed* from the constitutional canon; instead, it simply faded away as seemingly more important cases were superimposed on the constitutional scene.

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140. *But see* Pildes, *The Canon*, *supra* note †, at 319.

