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Lawyers Amid the Redemption of the South

Paul D. Carrington*

I. ON JUDGING THE PAST

Francis Lieber wisely enjoined us not to judge Moses by the standards of Sparta. In judging individuals distant or now dead, we are tempted to be more harsh than when judging persons close at hand whose humanity is more visible to us. In thinking about friends and family, we are more prone to accept the dictum: "Judge not, that you be not judged." Indeed, among the most common human failings is a failure of moral courage, i.e., the unwillingness to risk the loss of companionship, affection and love to do and to judge what is right and just. Few of us do not flee the moral sanctions of hatred and ostracism imposed by our neighbors and our kin. Yet, it is easy to withstand odium imposed by foreigners or members of another tribe, and for that reason, we seldom fully perceive the pressures to which distant others are subject. It is easy to see and to say that we would not be ethnic cleansers, but there is a dark side to all our natures, and we have not been tested in our ability to withstand the hatred and ostracism befalling those who call attention to the evil of others, especially of our near and dear.

Because we are often weak in moral courage, it is in our natures to rationalize the conduct in which we find ourselves and our

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friends engaged; social scientists denote this as the tendency to resolve cognitive dissonance. The tendency is manifested when we fantasize about events in order to avoid the pain of condemning one's self. Such fantasies and the sentiments that give rise to them are infectious and can produce what Hugh Henry Brackenridge denoted as "moral influenza," a disease depriving whole tribes and nations of sensible moral judgment. It is this form of influenza that explains the blindness of whole nations to the barbarism of ethnic cleansing and makes ethnic cleansers of otherwise sane and decent folk. Lieber does not, however, enjoin us to withhold all moral judgment about the past. We must learn from past failures of moral courage and we cannot do so without deploying moral judgment. Yet we should, in judging individuals, be cautious and take account of the moral environment in which they lived.

II. ON JUDGING LAWYERS

We are less constrained in imposing our moral judgment on lawyers who work in other cultures or past times, because we share with them certain moral precepts that are derived from our common professional roles. In one respect, however, lawyers who collaborate with evil ought to be judged less harshly because they are lawyers. When lawyers perform professional services as counselors and advocates to seemingly evil persons performing seemingly evil deeds, they may be performing a public service. They may be enabling the law to perform its mission with respect to such persons. This is especially so with respect to their representation of persons charged with crimes; but, in civil matters too, it is useful that malefactors receive competent advice and honest representation.

On the other hand, for at least three reasons, we are justified in imposing on lawyers, as a privileged class, a special duty to refrain from collaboration with evil. First, lawless behavior is gener-

3. The term belongs to Leon Festinger. See Leon Festinger, A Theory of Cognitive Dissonance (Stanford Univ. Press 1962) (1957). The idea is that most people will seldom long endure a dissonance between their conduct and their moral beliefs. If we are impelled to do a thing, we will generally modify our beliefs to justify our deeds. See id.

ally unbecoming to a lawyer, especially if the participation in lawlessness occurs in the performance of professional work as an officer of a court. Lawyers who deploy their professional talents to join their clients in cheating are, again in Brackenridge's phrase, not lawyers at all, but assassins of other people's rights. The line between honest advice and representation and participation in a client's evil deeds is often murky, and complicated by the existence of a relationship that antedates the evil, or at least the visibility of the evil. But that is why good lawyers not infrequently fire their clients. A lawyer wishing to retain moral stature must be willing from time to time to exercise that option, and one who fails to do so can fairly be judged a collaborator.

Second, there are evils that are not merely contrary to law reflecting general social norms, but special evils that violate moral precepts intrinsic to law itself, to which lawyers owe special allegiance. The luminous work of Lon Fuller serves for the present purpose to define that morality. He observed certain characteristics of legal texts and institutions that together form the essence of law, such as publicity, comprehensibility, possibility of compliance and congruence between the rules as announced and their administration. The total absence of any of eight such characteristics deprives a text of its status as law. Those who administer law must respect and nurture those characteristics.

Fuller is careful to say that this morality is one of aspiration, not of duty, but he observes that law's morality of aspiration "is after all a morality of human aspiration. It cannot refuse the human quality to human beings without repudiating itself." In other words, the idea of equal protection, at least in its more confined senses, is implicit in the idea of law. In this respect, Fuller tells us, the morality of law is not merely aspirational, but imposes a positive duty on those who share the privilege of administering it to respect the humanity of fellow citizens. Thus, lawyers who par-

6. See Lon L. Fuller, The Morality of Law (1964) [hereinafter Fuller, Morality of Law]; see also Lon L. Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630 (1958) (discussing the distinctions between law and morality).
7. See Fuller, Morality of Law, supra note 6, at 39.
8. See id. at 3-32.
9. Id. at 183.
ticipate in ethnic cleansing carry the additional moral burden that they are not only inhumane, but they are in direct violation of the most elementary moral precept of law. They are evil lawyers.

The duty of lawyers to be faithful to this idea of law as equal treatment is heightened by the demands of self-government. Tocqueville observed the special responsibility of the legal profession for the stability of a democratic society.10 Frederick Grimke,11 Francis Lieber12 and Timothy Walker13 were contemporaries of Tocqueville who elaborated on the public responsibility of the profession. Their works were well-known to nineteenth century American lawyers. Fuller's notion was implicit in the work of each.

Third, lawyers ought be held to a higher moral standard than others, because they are by training and experience better than most at resisting the resolution of cognitive dissonance. Any law student who has argued a moot court case knows how an involvement in a cause, even one that is initially distasteful, can become a pious crusade. It was that familiar process that caused senior lawyers to tender the advice to young lawyers: "when in the course of bitter litigation it becomes apparent that someone must go to jail, be sure that it is your client that goes and not yourself." It is often a lawyer's duty to correct a client's factual misperception, occasioned by the client's instinct to avoid self-condemnation. Almost the first thing some of us learned as lawyers was not to believe our clients, for they have often misinformed themselves. Because it is generally in the interest of their clients, as well as themselves to do so, lawyers, with experience, learn to detect in themselves the tendencies to rationalize and fantasize, and to resist them. It is therefore reasonable to expect lawyers to be better able to resist these tendencies in public discourse, and to serve as physicians to heal the "moral influenza" of which Brackenridge wrote.14 They share a duty to recognize and dispel fantasies when they infect public discourse, as so often they do.

12. See Lieber, supra note 1.
14. See Brackenridge, supra note 4, at 641.
III. THE REDEMPTION

In this article, I will describe the roles of four lawyers whose careers bore on efforts after the Civil War to incorporate former slaves and their descendants into American society. The reader will know that from 1868 to 1876, the Grant Administration deployed military force in the former states of the Confederacy to support democratic government in which many former slaves participated. In 1876, that effort collapsed. John Mercer Langston, perhaps the most eminent of the first generation of African-American lawyers, observed in 1877:

Sixteen years ago there were three distinct classes composing the population of the South; the first, the slaveholding class, the lords of the land and the lash; the next, the class known as the "poor whites," the under grade of Southern society; and thirdly, the Negroes, slaves, chattels personal. The first class were not only the owners of the wealth, but they possessed the education and the intelligence, the social and political influence of their various communities. . . . Deprived by the war largely of [their] property, [their] numbers considerably reduced by the same cause, . . . [they] rallied, reorganized, assumed again political control, and once more promised to dominate the entire section. 16

15. Langston was educated at Oberlin, admitted to the Ohio bar, and elected to public office in Oberlin. He recruited soldiers during the Civil War, but refused to serve unless commissioned. With Frederick Douglass and George Vashon, he formed the National Equal Rights League to lobby for the rights of Negroes, including freedmen. Forsaking his law practice in Oberlin, he undertook to travel, lecturing to every available audience on the importance of black voting rights. While he lacked the charisma of Douglass, he won respect by his calm manner, quick repartee, and knowledge of pertinent facts. In 1867, he became Inspector of Schools for the Freedmen's Bureau, devoting two years to visiting black schools in the South, consulting local officials, and lecturing teachers and parents on their responsibilities. In 1869, he was rewarded for his efforts with appointment as founding dean of the Howard Law School. For his autobiography, see John Mercer Langston, From the Virginia Plantation to the National Capitol (Bergman Pub. 1969) (1894). One of his students would later designate him the "paterfamilias of the Negro lawyer in America." D. Augustus Straker, The Negro in the Profession of Law, 8 A.M.E. Church Rev. 180 (1891).

IV. DANIEL HENRY CHAMBERLAIN

Events occurring in South Carolina in 1876 illustrate the political process depicted by Langston. The governor of that state was Daniel Chamberlain, a native of Worcester, Massachusetts, an 1862 graduate of Yale, a former Harvard law student and active abolitionist and a former officer of the Fifth Massachusetts, a regiment composed of black soldiers. He had moved to South Carolina in 1866, apparently in the hope of prospering as a cotton planter utilizing his ability to work with black farmers. Like others who had this idea, he was not successful in organizing a new kind of plantation, and he was soon practicing law in Charleston.17

The election of 1868 was conducted pursuant to the Reconstruction Act in the presence of a federal military force. It was controlled by the state's Republican party, then led by African-Americans.18 Chamberlain was elected as the state's attorney general. The governor elected that year proved to be astonishingly corrupt. He was said to be "a blatant swindler,"19 "entirely devoid of moral sense,"20 to the point of selling fifty-seven pardons on his last day in office. The state fisc was a disaster. Despite this grim corruption, the number of children in public schools, and the number of teachers employed by the state tripled; where only a ninth of the state's children were in school in 1869, the proportion had risen to a third by 1873. In 1873, Chamberlain was among the trustees of the University of South Carolina responsible for the admission of black students, a decision resulting in the departure of many white students and faculty.21

17. See generally James Green, Personal Recollections of Daniel Henry Chamberlain 8 (1908) ("At the close of the war, a college classmate who had practiced law in Charleston, South Carolina, died there, and Chamberlain was called upon to go to Charleston and settle his affairs.").


In 1874, Chamberlain ran as a Republican candidate for governor. When elected, it was apparently Chamberlain's hope to win some white support, or at least respectability among white observers, for Republican government. He reorganized the state fisc, collected taxes, reduced the state payroll and expenditures, reduced the state militia and removed some of the least competent Republicans, including some black trial judges and school officials, sometimes replacing them with white Democrats. Within a year, he had become the toast of Charleston drawing rooms, but the despair of many of his former supporters. Friction with his African-American supporters may have stirred in Chamberlain private doubts about the competence of some of his constituents, but in accepting renomination in 1876, he reaffirmed his faith that "the colored masses of South Carolina, were as loyal as any people in this country to the demands and necessity of good government in South Carolina." He also appears to have attempted to groom an African-American congressman as his replacement in the Governor's office.

The presidential campaign of 1876 was a pivotal event. It was conducted during a serious economic depression triggered by the bank panic of 1873. William Tilden, the Democratic candidate from New York, attained a significant majority in the reported popular vote in all states. But Republicans plausibly claimed fraud and intimidation in Florida, Louisiana and South Carolina; if these claims were upheld by Congress, Tilden would fail to win the election by one electoral vote. A majority of those elected to Congress were Democrats.

The campaign in South Carolina had proved to be gruesome. One planter-lawyer had circulated a "Plan of the Campaign" obligating each white citizen in the state to intimidate one black, declaring that black citizens "can only be influenced by their fears."
On July 4, a white farmer took offense at a parade in the largely black town of Hamburg, and caused a melee. In the aftermath, a former Confederate General demanded that the black militia in Hamburg be disarmed. When the black marshal refused the demand, the general left, but returned with hundreds of members of white "rifle clubs" and a cannon. When the militia tried to flee, the black marshal was killed, twenty-five men were captured and five of these were killed in cold blood. Chamberlain denounced the event as a massacre, but some white South Carolinians declared it to be the beginning of Redemption.

In August, Wade Hampton, a once wealthy planter who had lost all in the war, was nominated to run against Chamberlain. Few African-Americans believed Hampton's benign campaign promises, and some attacked persons leaving a Democratic meeting in Charleston, wounding several and killing one. Wearing red shirts, armed, and riding mules, Hampton's supporters roused large crowds of white Democrats and disrupted Republican gatherings. In some counties, rifle clubs drove blacks from their homes and murdered several Republican leaders.

Chamberlain nevertheless won in almost every county, except two where virtually no Republican votes were counted. On the basis of the vote in those two counties, Hampton claimed a narrow victory. Chamberlain refused to accept the vote in the two counties, reporting that he and Hayes had received almost no votes, and, with military support from the Grant Administration, remained in office. Hampton had himself inaugurated, too. For four months, the dispute raged. Chamberlain's life was threatened repeatedly. Hampton also threatened to arrest Chamberlain for bribery, despite the lack of any evidence that he was guilty of that offense. "Here I stand," Chamberlain said, "I can do no otherwise." His devoted wife "lived in daily and nightly dread that the hand of an assassin would take her husband."

The Presidential Election Commission disallowed the Democratic vote in the two challenged counties in South Carolina and declared that Hayes had won the presidency. President Hayes promptly asked Chamberlain to resign, even though he had attained a more favorable vote in South Carolina than had Hayes.

27. See Foner, supra note 20, at 573-74.
29. Id. at 466 (quoting Dr. H.V. Redfield).
Chamberlain angrily refused. At the same time, Hampton supporters sent word that Chamberlain could have the open seat in the United States Senate if he would leave the Governor’s office. President Hayes then advised Chamberlain that the federal troops would be withdrawn. Chamberlain announced that he would nevertheless remain in his office, come what may. At this point, four black cabinet officers implored him to give up peacefully; he did so.

Almost half of the persons identified as Northern abolitionists supported Hayes’ action in withdrawing the military and making peace with persons such as Hampton, holding that it was “better, I must say, that the colored people generally vote with the Democratic party than to be slaughtered by hundreds.” As Chamberlain rightly perceived, the North, in the throes of depression and threatened by widespread violence by unemployed workers, was “tired of the Southern question” and wanted “a settlement, no matter what.” And thus, as Langston described, the slave-owning class was redeemed in South Carolina.

V. L.Q.C. Lamar

Lucius Quintus Cincinnatus Lamar, Jr. was born in 1825 to a wealthy Georgia Huguenot family. An uncle was to become a President of the Republic of Texas opposing annexation. His father, who built a successful practice in Georgia, was an alumnus of the celebrated Litchfield Law School in Connecticut. He was afforded an education in the classics, as befitted a member of his class. After his father committed suicide, apparently in a moment of clinical depression, Lamar acquired a close relation to his teacher at Emory College, Augustus Baldwin Longstreet,
other Litchfield graduate who had become a prominent Methodist clergyman.\textsuperscript{35}

Longstreet, in the pre-war years, held firmly to the disunionist opinion that there was no place for the slave-owning class controlling the South in the prevailing American culture. During Lamar's time at Emory, Longstreet led the proslavery or antiabolitionist movement among the Methodist clergy, causing a schism; the schism resulted in the establishment of Southern Methodism in 1845.\textsuperscript{36} Lamar graduated in 1845 and then served a legal apprenticeship with another uncle in Macon. He married Longstreet's daughter, and in 1849 when Longstreet became the President of the University of Mississippi, he and his wife settled nearby.

Mississippi at the time counted 370,000 people, about half of them slaves. Its university had opened in 1848. Congressman Jacob Thompson,\textsuperscript{37} the chairman of a governing board, was a political ally of Jefferson Davis, then serving as senior United States Senator. The University was handsomely equipped with a campus before it had a student; the campus was centered on a Lyceum to celebrate its continuity with classical traditions. The first president was an Englishman who came to Mississippi from William and Mary,\textsuperscript{38} but he was soon succeeded by Longstreet. There being no rule against nepotism, Lamar joined Longstreet on the faculty as a professor of mathematics, a subject in which he had no interest, but the appointment provided him with some useful income while he sought to build a law practice.

By 1850, Lamar was active in Mississippi politics as an advocate for the expansion of slavery to western territories, ardently opposing the admission of California and supporting the first calls for a meeting to consider secession.\textsuperscript{39} He won public notice by a passionate impromptu speech challenging the words of a United

\textsuperscript{35} See id.; Edward Mayes, Genealogy and History of Lamar and Related Families 17-18 (1935).

\textsuperscript{36} See Henry Morton Bullock, A History of Emory University 85-88 (1936); Clement Eaton, The Freedom-of-Thought Struggle in the South 228 (Harper & Row 1964) (1940); Wade, supra note 34, at 270-77.

\textsuperscript{37} Thompson served six terms, from 1839 to 1851.


\textsuperscript{39} See James W. Garner, The First Struggle over Secession in Mississippi, 4 Publications of the Mississippi Historical Society 91 (1901).
States senator to an Oxford audience; his speech resulted in his being carried from the hall on the shoulders of university students. His views were, however, successfully opposed by a Union party that favored compromise; the Unionists held sway in Mississippi through the decade of the 1850s. Senator Jefferson Davis held the centrist position, favoring secession only as a last resort. Lamar rejected moderation; like his father-in-law and uncle, he saw no merit in the Union with Northern states, which he regarded as agents of a New England manufacturers' conspiracy bent on subduing the Southern planters. He disavowed loyalty to the United States, proclaiming his commitment to the South to be second only to his commitment to Southern honor.

For reasons that are not recorded, Lamar's law practice did not flourish. In 1851, he resigned his position as a mathematics professor at the University, and returned to Georgia to practice law for a time with an old friend. When his partner became sick, that practice failed. He tried again in Macon, but also failed to attract clients there. His forays in Georgia politics were no more successful than those in Mississippi. So, in 1854, he returned to the shelter of his father-in-law's home in Oxford, Mississippi, where his wife had remained during the time of his return to Georgia, awaiting a time when he could support his family.

That year, the legislature authorized Longstreet's University to establish a Department of Governmental Science and Law. Thompson's governing board explained its aim to be the training of young Mississippian for public leadership. The teaching of "law alone" was not the objective; they sought to teach history and political philosophy as well. The models for such a law department were those at the College of William and Mary and Transylvania University in Lexington, Kentucky. The latter was an institution attended by many Mississippi lawyers, including Jefferson Davis. The founders of the Mississippi Law School hoped that "[a] youth coming from the walls of the University with enlarged and fixed principles of political justice—with elevated notions of the

40. See Mayes, supra note 32, at 73-74 (footnote omitted).
41. See Cate, supra note 32, at 58.
42. See Edward Mayes, History of Education in Mississippi 143 (1899).
use, the scope and the design of government—would not be apt to sink into a factionist, or to merge the philosophic statesman in the turbulent demagogue."

There is no evidence that Lamar, despite his connection to Longstreet, was considered for appointment as the professor of law. Instead, William F. Stearns was appointed; a native of New England, Stearns was an experienced lawyer practicing in nearby Holly Springs; he was said to have been "a lawyer's lawyer in that much of his work grew out of consultations with lawyers on their cases." He was also a Unionist. Stearns established a two-year course that attracted more than 100 students in the seven years before the War, making it by the standards of the time a successful program. In 1859, he was joined by a second professor, James Trotter, who was, in addition, a member of the Supreme Court of the state.

By 1857, Lamar at last enjoyed some success, being nominated by a deadlocked Democratic convention, and then elected to Congress, where he undertook to defend the interests of slaveowners. Mississippi was by the mid-1850s, a center of the proslavery expansionist sentiment that Lamar professed. Many Mississippians were among those hoping to secure control of Cuba and what remained of Mexico for the purpose of creating additional slave states. Congressman Lamar did not openly approve their lawless banditry in conducting private military invasions of Mexico and Nicaragua, but he protested their arrests by the United States, and on occasion endorsed their vision of a slavery empire extending to Cape Horn. Lamar was also adamant in his opposition to the admission of Kansas as a non-slave state. He denounced the idea that the people of Kansas should be permitted to vote against a proslavery state constitution prepared by a group composed chiefly of interloping Missouri slave owners. Arriving in Washington, he became known among Southern politicians as "'Moody'" Lamar in recognition of his periods of depression, and as "'Lushe'" Lamar in recognition of his effeminate manners and his

45. Hemleben & Bennett, supra note 38, at 42.
48. See Murphy, supra note 32, at 39-43.
seemingly irresistible impulses to kiss his male colleagues.\textsuperscript{49} His manners did not prevent his participation in a fistfight on the floor of Congress with Owen Lovejoy, an antislavery Congressman from Illinois.\textsuperscript{50} By 1860, Lamar was closely allied with the more moderate Senator Davis, but he was nevertheless quick to slip the traces of moderation and joined Southerners walking out of the Democratic party in protest at the prospect that Stephen Douglas, deemed insufficiently reliable as a friend of slavery, would be nominated to oppose Lincoln.\textsuperscript{51}

Lamar then, for reasons that remain obscure, announced his retirement from Congress. He accepted an appointment tendered by Longstreet's successor to become Professor of Ethics and Metaphysics at the University, planning to instruct law students as well as undergraduates. Yet, he took time to participate in shaping Mississippi's role in the Confederacy. He authored the idea that the Confederacy should adopt the existing Constitution of the United States with only such modifications as the seceding states might agree to. And he also led opposition in the state convention to the proposal that the people of Mississippi be permitted to vote on the ordinance of secession; apparently fearing that a majority of Mississippians would have voted to remain in the Union.\textsuperscript{52}

Lamar continued his ethics teaching for only a few months. By September 1861, the University had only four students and closed. Lamar had by then helped to organize a regiment. His regiment marched to Richmond, where for a time, he became a major figure in the drawing rooms of the Confederacy's elite.\textsuperscript{53} Apparently as a result of stress associated with the anticipation of military combat, he suffered apoplexy resembling a stroke and retired from his command. He returned to military service to participate in the Peninsula campaign of 1862, but thereafter again suffered a stress-related attack. By the time of his recovery from that attack, his home in Mississippi had been overrun by Grant's army. He was then sent to Russia on a diplomatic mission, but it was aborted when the Confederate Senate, in anger at European indifference to
their plight, refused to confirm his appointment. He returned to the drawing rooms of Richmond. In 1864, he was sent by President Davis to Georgia to defend the suspension of habeas corpus and rally support for the Confederacy. Soon after his return, he lost favor with Davis by criticizing the performance of Confederate generals at the Battle of Shiloh. Recommissioned as a judge advocate, he was at Appomattox when Lee surrendered on April 3, 1865.54

Lamar returned to Oxford, then a ruin of war, where he was reunited with his wife and daughters and the aged Longstreets. He had lost both brothers and both law partners in the war, an experience he shared with many surviving Southerners. He lost his plantation when his father-in-law reclaimed it for non-payment of interest on the mortgage. He again tried to practice law amid the ruins. He was, however, relieved of that burden in 1866 by a renewal of his appointment at the University. He soon became a Professor of Law,55 a position he held for four years. His students were impressed: "he was so superior to other men," we are told, "Colonel Lamar was so grand."56 In teaching law, he not only assigned Kent, Greenleaf and other conventional works, but directed his students to read and discuss judicial opinions; he was thus among those teachers who prefigured the development of "the case method." He drilled his students daily, and lectured to them on history and politics.57

In 1869, Grant was inaugurated and Reconstruction came to Mississippi. A new Governor was elected with the votes of freemen, and a new board of trustees was appointed to conduct the University. There was talk of admitting black students. Perhaps to forestall his dismissal, Lamar resigned his professorship.58 "I have been very successful as a law professor," he proclaimed.59

At that time, he entered on a brief period of prosperity as counsel to a railroad, but it failed in 1877, leaving him a person of modest means. He also defended several members of the Ku Klux Klan charged with violating the civil rights of black Mississippi-

54. See Murphy, supra note 32, at 84.
55. See Hemleben & Bennett, supra note 38, at 48; Meador, supra note 44, at 230-32.
56. Meador, supra note 44, at 242 (footnote omitted).
57. See id. at 239-44.
58. See Murphy, supra note 32, at 97-98.
59. Mayes, supra note 32, at 128.
ans, but there is no evidence of his personal involvement in their activities. He was for a brief time suspended from practice in the federal court as punishment for punching a United States marshal, an act for which he may have been lionized by the substantial constituency in Mississippi who indiscriminately despised federal officers.

In 1872, Lamar cautiously returned to politics. He was the one Democrat among the seven Congressmen from Mississippi taking seats in December 1873. His aim was to rid Mississippi and the South of the military occupation and federal control that had enabled the Reconstruction governments to form. The task, he wrote a friend, was to "restore the constitutional faith of our fathers, . . . to get rid of these creatures, defiled by blood, gorged with spoil, cruel, cowardly, faithless, who are now ruling the South for no purposes except those of oppression and plunder." He did not identify Chamberlain as such a creature.

Seeking advice from Northern political leaders as to the conditions on which the federal presence in Mississippi might be terminated, Lamar formed the opinion that the only means for achieving that result was to proclaim policies of moderation and goodwill toward the North and toward freedmen. This strategy was unveiled when he was afforded an opportunity to eulogize Charles Sumner. In life, Sumner had been the embodiment of abolitionism and Reconstruction and had despised the class of Southerners whom Lamar exemplified and who reciprocated Sumner's feelings, perhaps several fold. At the time of his death, Sumner had been the proponent of a Civil Rights Act requiring even the churches in the South to desegregate. Yet, Sumner had voted to restore the civil liberties of Confederate leaders such as Lamar. Seizing on that straw, Lamar falsely depicted Sumner, a hater, as a loving and forgiving nationalist who sympathized with the suffering of the South. Without acknowledging any fault in antebellum slavery, he emphasized the great respect and affection Southerners had come to feel for the great Sumner, and he closed by putting

60. See Murphy, supra note 32, at 100-01.
61. Mayes, supra note 32, at 170 (quoting Letter from Lucius Lamar to Charles Reemelin (July 15, 1872)).
into the mouth of the deceased the sentiment: "My countrymen, know one another, and you will love one another." This speech, transparent though it now seems, and hypocritical as Lamar privately acknowledged it to have been, was received with wild enthusiasm by the Northern press, and by much of the South, save those Southerners who were ardently unreconstructed and too slow to see what Lamar was doing.

Lamar followed the triumph of his Sumner eulogy with another when he spoke for withdrawal of federal intervention in Southern elections. He assured Congress that there was not a single Southerner who did not agree with his eulogy of Sumner, nor a single black male who did not possess the vote. "There is not a trace of privilege throughout the land... negro liberty is universal, thorough, and complete, and their equality before the law is without an exception." So great was their desire to believe that, many in the North accepted these preposterous statements at face value.

Lamar was embarrassed a few weeks later by a violent incident at Vicksburg. In August 1874, the "White Man's Party" patrolled the streets of the town and intimidated black voters in a town council election; in December, they returned to the streets and by force of arms demanded the resignation of the black county sheriff. The sheriff was supported by a black posse armed with pistols and shotguns. The White Man's Party, armed with rifles, won the ensuing battle, although two of its members were killed. Twenty-nine of the sheriff's supporters were killed, and in the next few days, about 300 blacks were murdered. President Grant sent in federal troops, and the sheriff was restored to office. Lamar declined to make a public speech regarding the event, but he played a very active role in orchestrating the efforts of the ruling class of Mississipeans to blame the event on the Reconstruction

64. See Murphy, supra note 32, at 116 (citing Letter from Lucius Q.C. Lamar to Mrs. Lamar (Apr. 28, 1874)).
66. See Foner, supra note 20, at 558.
67. See id.
68. See id.
69. See id.
state government, and to "[s]how that there was no wanton or very little needless slaughter of negroes." 70 And he wrote the New York Herald to assure its readers that the end of Reconstruction would result in the complete protection of Negroes’ security and civil rights. 71 He became, indeed, an outspoken advocate of the voting rights of African-American citizens unabashed by the frequent violent suppression of those rights by his constituents.

Lamar’s efforts to reassure the North were successful. They set the stage for President Grant’s decision not to send federal troops to supervise the Mississippi election of 1875. During the campaign that followed, Lamar carried his message to the South, again proclaiming the patriotism and goodwill of white Mississippians and the right of black citizens to participate in Mississippi politics. He attacked the Reconstruction government for having cruelly divided black Mississippians from white. And he passionately demanded the withdrawal of the federal presence that, he alleged, was such an obstacle to the healing of Southern wounds, all the while observing the growing repression of those of his fellow citizens whose pigmentation he disapproved. As a result of the Democratic victory of that year, the Reconstruction Governor resigned under pressure and the black Lieutenant Governor was impeached and removed.

Lamar was also in the forefront of the effort to resolve the controversy over the election of 1876. As leader of the Mississippi Congressional delegation, he temporized and supported the creation of a special commission to investigate the competing claims for the electoral votes of Florida, Louisiana and South Carolina. As a Democrat, he continued to support every contention favoring the Democratic vote count, but in the end accepted the recommendations of the commission whose report favored the Republican candidate, Rutherford Hayes. Lamar early advised Hayes that the South would accept that result peaceably, provided that Hayes would withdraw the federal presence from the South. There is no evidence that any bargain was struck, but the hated federal presence did recede in the early months of the Hayes presidency. 72 At

70. Murphy, supra note 32, at 128 (quoting Letters from Lucius Q.C. Lamar to E.D. Clark (Dec. 21, 1874)).
72. See Murphy, supra note 32, at 177-78.
least one Northern Democratic Congressman accused Lamar of sacrificing Tilden's presidency for personal political advantage, an accusation nearly resulting in another violent encounter on the floor of the House.

Shortly after the inauguration of Hayes, Lamar was elected by the Mississippi legislature to the Senate. Some Republicans opposed his swearing-in on the ground that the 1875 Mississippi legislature was unlawfully elected. Lamar was saved from this embarrassment by the intervention of the black senior Senator from Mississippi, Blanche Bruce. Bruce had been a fugitive slave who found his way to Oberlin College during the war and returned to play a role in the Reconstruction government of the state. Bruce and Lamar formed a seemingly real personal friendship and a political alliance that endured for the four years that both were in the Senate.73 Lamar reported to his friends that Bruce was "a noble negro."74

When Hayes was slow to withdraw the federal presence, Lamar remonstrated. It was on the day following receipt of Senator Lamar's protest that the President summoned Governor Chamberlain from South Carolina to Washington and informed him that the federal support for the Reconstruction government led by Chamberlain would be withdrawn. Lamar gloated to a friend: "We have no enemy in our front.... But the negroes are almost as well disciplined in their silence and inactivity as they were before in their aggressiveness."75

After the Congressional election of 1878, Senator Lamar renewed his claim that Mississippi elections were peaceable, that "[n]ot a human being was molested or made afraid."76 This time, his false report was challenged in the press, and on the floor of the Senate, where Senator Blaine of Maine called for an investigation and a punitive reduction of Southern representation in Congress as provided in the Fourteenth Amendment, if, as he suspected, blacks had been prevented from voting. Lamar reiterated his bald misstatement, and further explained that Southern Negroes had

74. Murphy, supra note 32, at 186 (quoting Letter from Lucius Q.C. Lamar to E.D. Clark (Mar. 15, 1877)).
75. Foner, supra note 20, at 601 (quoting Lucius Q.C. Lamar after Hayes' inauguration).
76. Murphy, supra note 32, at 202 (footnote omitted).
realized that they were not yet ready to vote and had chosen not to do so, but would do so when they were able.\textsuperscript{77} As he spoke, there was renewed interest among black Southerners in emigration to Africa or the west; thousands migrated to Kansas in search of political equality, freedom from violence and access to education.\textsuperscript{78} Among the reasons for their eagerness to leave the South was the devastation of public education; school children were increasingly segregated by race, black children being assigned to schools provided with half the funds expended on whites.\textsuperscript{79} If there were those who complained about the emerging caste system, the Ku Klux Klan or others of like bent would supply the violent response.

Lamar remained in the Senate for eight years, now a symbol of the sectional reconciliation that brought an end not only to the War, but to Reconstruction. In 1885, he represented the South in the cabinet of President Grover Cleveland (who had defeated Senator Blaine for the presidency), serving as Secretary of the Interior. In 1886, he was awarded an honorary doctorate by Harvard.\textsuperscript{80} In 1888, he was appointed to the Supreme Court of the United States, the first Southerner to be appointed to the Court since the Civil War. For the latter appointment, he was confirmed by a narrow margin, the opposition resting not only on his role in the Confederacy, but also on his advanced age and his questionable competence as a lawyer.

Although Chief Justice Fuller would eulogize him as one possessed of "the most suggestive mind I ever knew,"\textsuperscript{81} Lamar himself lacked confidence in his own work as a Justice,\textsuperscript{82} and was never assigned the writing of an important opinion of the Court. Oddly, in light of the positions he had taken as a political leader, he fa-
vored strict constitutional restraints on the powers of the states to regulate interstate commerce. But, having himself once assaulted a United States marshal, he passionately dissented from the Court's holding that Congress could authorize removal to federal court of the California prosecution of a marshal. He protested that the decision divested the states "of what was once regarded as their exclusive jurisdiction over crimes committed within their own territory, against their own laws." He died in 1893, in his fifth year on the Court, perhaps before the full measure of his talents for its work could be exhibited.

Lamar's name has enjoyed good repute during much of the 20th century. So good in fact that Lamar was elevated to the status of hero by young John F. Kennedy, when in 1955 he wrote his Profiles in Courage. Kennedy would have had us believe that Lamar's eulogy of Sumner was an act of admirable moral courage.

Whether Lamar's career was consequential is uncertain. It seems likely that moral exhaustion would have overtaken Reconstruction with or without Lamar's help. If viewed from the perspective of the small class of persons whom he represented, he was both loyal and courageous, and a man of admirable pragmatism if, alas, a brazen practitioner of the big lie. If viewed from the larger perspective of the American commonwealth, he was an insidious provider of narcotic rhetoric serving to numb the moral sensibilities of the people and their leaders, and a cynical servant of privilege and arrogance. The sectional reconciliation identified with his name was achieved at the expense of the rights of freedmen and their descendants, and of Southerners hoping to pursue the goals expressed in the Declaration of Independence and by Lincoln at Gettysburg. While Lamar proclaimed otherwise, the rights of many citizens were systematically and violently suppressed.

See, e.g., Leisy v. Hardin, 135 U.S. 100 (1890); Kidd v. Pearson, 128 U.S. 1 (1888).

In re Neagle, 135 U.S. 1, 99 (1890) (Lamar, J., dissenting).


This is the message of Cate, supra note 32.

Curiously, Lamar, though blind to the rights of black citizens was a convinced feminist, advocating the rights of women to equality, at least in education. See Meador, supra note 44, at 247-48.
VI. JOHN RANDOLPH TUCKER

A second lawyer member of the Southern aristocracy to play a significant role in intersectional reconciliation was John Randolph Tucker. Born in Winchester, Virginia in 1823, his father was Henry St. George Tucker, and he was the third of five generations of Tuckers who taught at four law schools in Virginia. His grandfather had succeeded George Wythe, the first American law professor at William and Mary; his uncle held that same position from 1834 to 1851. His father, Henry St. George, was a state senator, a congressman and a professor of law at the University of Virginia. John Randolph studied law under his father, receiving his degree in 1844. He built a practice in Richmond and followed his ancestors into Virginia politics.

Randy Tucker (as he then was known) first won public acclaim in 1851 with a speech asserting the right of Virginia to withdraw from the Federal Union. His argument was based partly on the understanding of those who ratified the Constitution in 1788 believing they could secede if union should prove unsatisfactory. He was surely correct that there would have been no union had it been initially presented as an indissoluble one. In making his claim of states’ rights, Randy drew on the scholarship of his grandfather, St. George Tucker. His grandfather’s 1803 edition of Blackstone’s Commentaries on English Law contained a 439-page appendix on American Constitutional Law that explicitly affirmed the right of


92. John Randolph Tucker, Address Delivered Before the Society of Alumni of the University of Virginia (Richmond, H.K. Ellyson 1851).
states to secede from the Union. Randy Tucker could also cite in support of his position the scholarly work of his father, whose lectures on constitutional law were published in 1843.

In 1857, Randy Tucker entered public service, winning election as Attorney General of Virginia. As a public figure in Virginia at that time, it is unsurprising that he defended the institution of slavery, although his grandfather had been a leading proponent of legislated emancipation in 1796. He remained in public office through the War. Because he had performed no service for the Confederacy, he was not exposed to punishment as Lamar and Jefferson Davis were; indeed, he was among the lawyers preparing a defense for Davis in the event he was prosecuted for treason or war crimes. But like so many others, Tucker lost property, relatives and friends. After the War, he practiced briefly in Middleburg and then took a position with the Baltimore & Ohio Railroad requiring him to move to Baltimore.

General Lee had retired to the presidency of Washington College. In 1865, it established a relation with the law school conducted by a local judge. In 1870, the college decided to appoint a professor of public law and equity; Randy Tucker was invited to fill that position. He made haste to do so, and resided in Lexington for the remainder of his long life.

As a teacher, “Old Ran” Tucker was a partisan of natural law, and spoke of public duty as derived from religious (although not necessarily his own Presbyterian), as well as secular authority. He equated law with justice and it was said that he held it “to be divinely implanted in the human breast” and expressed in the Con-


94. See Henry St. George Tucker, Lectures on Constitutional Law (Richmond, Shepherd & Colin 1843).

95. It does seem likely that he favored racial segregation. He defended slavery publicly on at least two occasions. See John Randolph Tucker, A Lecture Delivered Before the Young Men's Association of Richmond on the 21st of May 1863 (Richmond, W.H. Clemmitt 1863); John Randolph Tucker, Address of John Randolph Tucker, Esq. Delivered Before Phoenix and Philomathean Societies, of William and Mary College, on the 3d of July, 1854 (Richmond, Chas. H. Wynne 1854).

stitution and the Bill of Rights.97 When speaking of such matters, we are told, he "caught fire." He knew right from wrong, or thought that he did, and never hesitated to inform his students of his opinions. One of his warmly held beliefs was that the separation of West Virginia from Virginia in 1862 was a lawless act,98 inconsistent with the position of nationalists regarding secession by the slave states, contrary to nature and void. More generally, he adjured his students "to defend the oppressed and assail the oppressor; to protect freedom and oppose tyranny; to uphold the institutional liberties of [the] people and to guard them against all usurpation; and . . . [thereby] serve God."99

In 1875, Randy Tucker was elected to Congress, but still continued to teach. As a national politician, he joined Lamar on many issues. Yet the two divided on the first issue to which Tucker spoke: the appropriation of money to fund the centennial of the Declaration of Independence. Tucker argued that the appropriation was unconstitutional because it was not within an enumerated power of Congress under Article I,100 thus, challenging the opinion of the Court in McCulloch v. Maryland,101 written by his fellow Virginian, John Marshall. The power to celebrate was a power, however, that even Lamar was willing to concede to the federal government.102 Tucker joined Lamar in supporting the appointment of the election commission in 1876. He also argued for the electors pledged to support the Democrat Tilden, but accepted the commission report favoring Hayes, albeit only with great reluctance, declaring that the report "puts fraud at a premium, fair dealing at a discount."103

In Congress and out, Randy Tucker became the premier spokesman for states' rights as a principle of constitutional law.

97. Davis, supra note 88, at 147.
98. See Laughlin, supra note 88, at 634.
99. Id. at 635-36 (quoting an address given by John Randolph Tucker to the class of the University of Maryland in 1877).
100. See Vance, supra note 88, at 337; see also John Randolph Tucker, The Relations of the United States to Each Other, as Modified by the War and the Constitutional Amendments (Albany, Weed, Parsons & Co. 1877) (discussing the history of the Colonial era, the Continental Congressional era, the Confederation era and the Constitutional era).
103. Davis, supra note 88, at 144 (quoting John Randolph Tucker).
Francis Lieber\(^{104}\) and Tucker’s contemporary, Thomas Cooley,\(^{105}\) both ardently antislavery in their sentiments, had also found good reasons for favoring local government within the framework of the Republic. Lieber and the earliest political theorists had recognized as a risk of localized government that a stable faction will control government to the disadvantage of a helpless minority. This demerit of states’ rights was never acknowledged by Tucker. In part due to his advocacy, the idea became the primary emblem of redemption politics in the South.\(^{106}\)

Randy Tucker cautioned his students and his son:

[i]n a question which involves your own conduct or rights, if there be doubt about it when first presented to you, give the benefit of the doubt against yourself; for in a tribunal in which you are both judge and advocate it will be difficult to convince yourself that your own interest should not be maintained against that of others.\(^{107}\)

But he was seemingly unable to apply that discipline to his own pleading with respect to states’ rights. In every important instance, the state right he invoked and defended served to veil the claims of the governing class in the South to use the power of local government to protect and enhance their advantage over the weakest citizens in their communities: the freedmen and their descendants.

Tucker seldom if ever made false claims such as those made by Lamar regarding the benign desires of Southern state governments to advance the welfare of black citizens.\(^{108}\) But in his many pious utterances about civic duty, it is hard to find any evidence that the duties he proclaimed ran to black citizens as well as white.

\(^{104}\) See Francis Lieber, On Civil Liberty and Self-Government (Da Capo Press 1972) (1877).

\(^{105}\) See 1 Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 190-93 (Little, Brown & Co. 1927) (1868).

\(^{106}\) See Stephen Osborne Southall, Inaugural Address Delivered to the Law Class of the University of Virginia . . . October 4th, 1866, in Essays on Legal Education in Nineteenth Century Virginia 171 (W. Hamilton Bryson ed., 1998).

\(^{107}\) Laughlin, supra note 88, at 635.

Tucker and those for whom he spoke resolved their cognitive dissonance by ceasing to notice their African-American neighbors.

In this respect, Randy Tucker, indeed all the descendant Tuckers, were oblivious not only of their fellow citizens, but of the teaching of their patriarch, St. George. Randy must surely have read St. George's 1796 book urging that emancipation is "an object of the first importance, not only to our moral character and domestic peace, but even to our political salvation." He must also have read his grandfather's poetry. Consider St. George Tucker's Fable:

I dreamed last night, the debt of nature paid,
I, cheek by jowl, was by a Negro laid;
Provoked at such a neighborhood, I cried,
"Rascal! begone. Rot farther from my side."
"Rascal!" said he, with arrogance extreme,
"Thou are the only rascal here, I deem;
Know fallen tyrant, I'm no more thy slave!
Quaco's a monarch's equal, in the grave."

If the poet's descendant absorbed that message, there is no evidence of it.

Because he was gracious and witty, Randy Tucker made many friends in Congress, on both sides of the aisle; among the closest of his friends was James Garfield, a New York Republican destined for the presidency. Unlike Lamar, Tucker was universally respected and even trusted. It was not to be imagined that he could have been drawn into a fist fight on the floor of Congress or even a duel on the field of honor. He was at Saratoga, in 1878, when an elite group formed the American Bar Association, and, in 1892, he became its president. He won so favorable a reputation that his merit was recognized by honorary degrees awarded by Harvard and Yale, universities seemingly eager to do their bit for intersectional reconciliation. On the occasion of the presentation at Yale, in 1887, he spoke of the history of the Constitution in terms glowing with patriotism. While now cheerfully acknowledging the permanence of the Union as a consequence of the ratifica-

tion of the Fourteenth Amendment, he called on the Sons of Connecticut to join him in renewing resistance to the centralizing trends that he and his audience could not fail to observe.112

In 1889, Randy Tucker retired from Congress to return to full-time teaching and commenced work on a treatise on the Constitution. He died in 1897 before completing his book. It was, however, completed by his son,113 who succeeded him as a law professor at Washington and Lee,114 and as an exponent of states' rights.115 As one would expect, that work is, among other things, a posthumous expression of the author's views, and the views of his son, on the appropriate autonomies of state governments.116 There is no acknowledgment of the risk that local majorities might employ their autonomy to impose a caste system on a beleaguered minority.

VII. JOHN MARSHALL HARLAN

Not every lawyer member of the aristocratic class proved to be a proponent of "redemption." John Marshall Harlan was born, in 1833, into a slave-owning Kentucky family. His grandparents were early settlers of Kentucky, coming from Virginia, along with the legendary Daniel Boone. A member of his family, Robert, was the son of a slave mother; it is uncertain whether Robert was John's uncle or his half-brother. Their father tried to enroll Robert in school, but the village fathers of Harrodsburg would not have him. Robert overcame this disability; he amassed a fortune as a Forty-niner in California, invested in Cincinnati real estate, owned thoroughbred race horses, and for a time lived in England, hoping

112. "Joining hands, and uniting hearts, we henceforth in this federal Union, must labor to save the system in which we are equally interested, from the dangers which surround it." John Randolph Tucker, The History of the Federal Convention of 1787 and of Its Work: An Address Delivered Before the Graduating Classes at the Sixty-Third Anniversary of the Yale Law School, on June 28th, 1887, at 49 (New Haven, Law Dept. of Yale College 1887).


115. See, e.g., Henry St. George Tucker, Woman's Suffrage by Constitutional Amendment (1916).

116. See 1 Tucker, supra note 113.
there to escape racial prejudice.\textsuperscript{117} Meanwhile, John Harlan was educated at Centre College and at the Transylvania Law Department, where he studied with George Robertson, an emancipationist, whom he revered.\textsuperscript{118} He practiced law in Frankfort, and appeared in politics as a Whig. The Whig Party, to whom John Harlan owed his first political loyalty, collapsed after the death of Henry Clay, partly in the aftermath of the Compromise of 1850.

Proslavery sentiment gained strength in Kentucky in the 1850s. Even old George Robertson was socialized or intimidated away from the antislavery position he had so long defended. Young John Harlan imbibed the prevailing sentiment. For one election, in 1855, he followed his uncle and Robertson into the American or “Know-Nothing” Party, and made speeches in its behalf rousing Kentuckians against the dangers of immigration and Catholicism. He defended the \textit{Dred Scott} decision as necessary to the preservation of white supremacy.\textsuperscript{119} In 1859, he stood as an American Party candidate for Congress in Clay’s old district, but was defeated by what may have been an election fraud, an event that he later celebrated, saying “[If] I had gone to Washington at twenty-six I might have lost all the character I had.”\textsuperscript{120}

Harlan then moved his law practice to Louisville. When war broke, he devoted his energies to keeping Kentucky in the Union.\textsuperscript{121} In this, he was the political descendant of Clay, whose ghost may have appeared in support of many a Union rally across the state. He was also expressing the ardent teaching of George Robertson. He became a captain in the militia organized to keep Kentucky out of the war. When the Confederate army entered the state, he assisted General Sherman’s efforts to drive them out. For two years, he campaigned with the Union army in the west, leading a unit of German immigrants to whom he became very close. When his father died, he resigned his commission to come home and attend to family matters. He was soon elected Attorney General of Kentucky. In his campaign, still proslavery in his senti-

\textsuperscript{118} See John D. Wright, Jr., \textit{Transylvania: Tutor to the West} 144 (1975) (discussing Harlan’s encomium to his teachers).
\textsuperscript{119} See Yarbrough, \textit{supra} note 117, at 33-37.
\textsuperscript{120} Id. at 37 (footnotes omitted).
ments, he scorned the antislavery movement equally with the rebellion. In 1864, he supported General McLellan, the Democratic candidate, against Lincoln's re-election, chiefly because of his opposition to emancipation.

The Thirteenth Amendment, although ratified by Kentucky, was not well received there when it came into force in 1865. It spurred a reaction that brought back into power the anti-abolitionists who had earlier favored secession. Harlan organized support for President Johnson and favored Johnson's approach to rebuilding Southern society by empowering the slave-owning class, but he was not strong enough in that position to win support from Kentucky Democrats, and he was defeated in his campaign for re-election. The former third party, proslavery Unionists, of whom Harlan was one, were forced to choose a new party, between the antislavery Republicans or the anti-Unionist Democrats. Harlan chose to support his former commander, Ulysses Grant, for President in 1868, thus casting his lot with the antislavery Republican party. It proved a wise choice given that he hoped for a public career.

In 1870, Harlan represented an eleven-year-old black girl in an action seeking compensation for a vicious assault by her white employer. He also sought federal protection for African-American citizens of Harrodsburg, who were threatened with massacre by the Ku Klux Klan. But he provided a defense for a railway brakeman charged with assaulting a black citizen who had taken a seat in a passenger car reserved for whites and, like Lamar, he defended several men charged with participation in Klan raids. He thought his clients might be innocent, and he needed the fees.

Harlan's sometime law partner and close friend, Benjamin Bristow, as the United States Attorney, pursued the Klan under the 1868 federal law and secured twenty-nine convictions, one of them a death sentence for murder. Bristow was especially vocal in attacking the Klan and similar groups organized to terrorize black and white citizens who did not sympathize with their racist objective of subjecting blacks to a status as close to slavery as possible. Harlan joined in some of these expressions and assisted in the prosecution of voting rights violations. He also represented those Kentucky Presbyterians who had remained loyal to the national

122. See Yarbrough, supra note 117, at 67.
church in a property dispute with those wishing to transfer allegiance to a Southern organization. When the Supreme Court, after prolonged delay, affirmed the judgment he had won for them, he pronounced himself "the happiest man in Christendom."123 In 1871 and 1875, Harlan stood as the Republican candidate for governor of Kentucky. When it was observed that he had earlier defended the proslavery positions he now assailed, his response was, "Let it be said that I am right rather than consistent."124

Bristow served for a time in the Grant cabinet and provoked charges of disloyalty to cronies by exposing the corruption of a group known as the Whiskey Ring. In 1876, he was the candidate for the Republican nomination for president most in favor with those seeking to reform the corrupt practices that had soiled the repute of the Grant Administration. Harlan led the Kentucky delegation to the national convention, and when the Bristow cause was lost, threw Kentucky's support to Rutherford Hayes in preference to Senator Blaine. When Hayes took office, there was a vacancy to fill on the Supreme Court. The appointment went to Harlan, who took his seat on the Court in 1877.125

Harlan followed his mentor George Robertson by combining a law teaching career with his judicial service. He taught for a quarter century at the Columbian Law School, the antecedent to the law school of George Washington University. He also taught occasionally at the University of Virginia. His classes regularly attracted a large audience; it was reported of Harlan, as of Robertson, that "[h]is words make one bubble over with enthusiastic patriotism."126

As a Justice, Harlan seems to have had limited influence on his judicial brethren; Holmes disdained him as one whose mind was "a powerful vise the jaws of which couldn't be got nearer than two inches to each other."127 He is best remembered for his dissents. Two of those bear notice here. One was in the Civil Rights Cases.128 These were four cases in which plaintiffs sought to enforce the Civil Rights Act of 1875, an enactment originally pro-

123. Id. at 74.
124. Id. at 77 (footnote omitted).
125. See also Beth, supra note 121, at 114-29 (elaborating the politics).
126. Yarbrough, supra note 117, at 213 (footnotes omitted).
127. Letter to Frederick Pollock, April 5, 1919, in 2 Holmes-Pollock Letters 7, 8 (Mark DeWolfe Howe ed., 1941).
128. 109 U.S. 3 (1883).
posed by Charles Sumner that forbade racial discrimination in places of public accommodation. The Court invalidated the Act, thereby substantially completing the task of undercutting the Reconstruction legislation.\textsuperscript{129} It held that the Fourteenth Amendment authorized Congress to enforce the requirement of equal protection against state and local governments, but not against private railroads or hotels, because the latter are not engaged in "state action." Writing his dissent from the same inkstand used by Chief Justice Taney in writing the opinion of the Court in \textit{Dred Scott}, Harlan chastised the majority for its literal-mindedness in reading the Amendment; he read the Amendment as expressing the purpose of enabling Congress to remove the badge of inferiority from former slaves emancipated by the Thirteenth Amendment, and, therefore, authorizing Congress to forbid any form of racial discrimination impeding the freedom of freedmen. He conceded that if an individual declined to hold social intercourse with another for reasons of race that was no business of the government, but, he argued, a business engaged in working under state authority to provide public services was in no position to claim the private status of an individual.

\textit{Plessy v. Ferguson}\textsuperscript{130} presented the issue of state authority to compel segregation. As Redemption was proceeding in the 1890s, the Black Codes were increasingly in fashion. \textit{Plessy} challenged a Louisiana law\textsuperscript{131} requiring railroads to separate black passengers from white, but the Court upheld the law, holding that mere separation by race did not imply inequality, so long as the separate services or facilities were equal in quality. Harlan recognized this as a deceit, the purpose of separation being to humiliate black citizens. "What," he asked,

\begin{quote}
can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?\textsuperscript{132}
\end{quote}

\textsuperscript{129} For a forceful defense of what the Court did, see John W. Burgess, Reconstruction and the Constitution: 1866-1876 (1907).
\textsuperscript{130} 163 U.S. 537 (1896) (Harlan, J., dissenting).
\textsuperscript{132} Plessy, 163 U.S. at 560 (Harlan, J., dissenting).
He concluded that such laws were "cunningly devised to defeat the legitimate results" of the Civil War.\(^\text{133}\) As indeed they were.

VIII. Epilogue, Assessment and Conclusion

Daniel Chamberlain, the brave and embattled governor of South Carolina, left that state and built a large private law practice in New York. In 1887, he was appointed to the law faculty at Cornell,\(^\text{134}\) where he lectured on Constitutional Law for fifteen years. He returned from time to time to Charleston, becoming again welcome in the drawing rooms of that city. He had come to think of Reconstruction as a "frightful experiment," producing "unbearable misgovernment," that he blamed on the unpreparedness of black voters. In 1904, he declared "the negroes never, as a race, were fit to use the ballot. They are no more fit today." In his declining years, he attributed the frequency of lynching to the frequency of blacks raping white women. This late recantation caused the Charleston paper to acclaim him as "so luminous, so fearless, so unimpassioned, so just."\(^\text{135}\)

The remarkable contrition of Governor Chamberlain confirms the dogma, widely accepted in the North, that Reconstruction had been a mistake. Professor John Burgess of the Columbia Law School (like President Andrew Johnson, a Tennessean, but a Unionist and not a descendant of slave owners)\(^\text{136}\) was outspoken that placing political power in the hands of the newly emancipated was a blunder. He argued that civil liberty should have been left in the hands of the federal judiciary, and the government otherwise restored promptly to the loyal people of the South. He was able to declare, in 1902, that "the North has already yielded assent to this proposition."\(^\text{137}\) So it was that the scars of war were left to fester for another century.

What then is to be said of my four exemplars? One might conclude that all my stories reveal is that the restraints of culture are very strong and control lawyers much as they control others. Chamberlain, a genuine hero, was moved to recant his own hero-

\(^{133}\) Id.


\(^{135}\) McPherson, supra note 30, at 313 (footnote omitted).

\(^{136}\) For a brief account, see Julius Goebel, Jr., A History of the School of Law: Columbia University 68-89 (1955).

\(^{137}\) Burgess, supra note 129, at viii.
ism and belatedly to collaborate with evil. He surely knew what had happened to the educational reforms he had fostered as an officer of South Carolina. At the time of his return, almost nothing was being done in South Carolina to prepare the descendants of former slaves for the performance of the duties of citizenship, assuming, as he did, that such preparation was a necessary precondition to the recognition of their humanity. Life had worn Daniel Chamberlain down, and as an old man he had lost his immunity to moral influenza.

John Harlan's was a voice in the wilderness. He was right in his constitutional opinions, but it is not easy to depict him as a great moral hero. He was better able than Lamar or Tucker to see what was going on and to speak out against it, but his life experience, his status as a member of the Supreme Court, and the fact that he was from Kentucky made it infinitely easier for him than for Lamar or Tucker to see and react against the evil.

In thinking about Lamar or Tucker, it is important to keep in mind that had they uttered the words of Harlan's *Plessy* opinion, their public careers would have come to an end. Tucker could have earned a handsome living in the private sector, at least in Baltimore, but it is not clear that Lamar could have found a use for such talents as he possessed. I doubt whether self-obsessed and professionally ambitious lawyers of later generations would have done much better than did Tucker. Indeed, perhaps Tucker can be, at least, partially excused as a man who was not directly involved in Redemption, and who may not have been conscious of the degree to which his unrestrained advocacy of states' rights served the cause of evil. Under sufficient pressure, alas, many of us would succumb to such moral blindness.

It is harder to say a kind word for Lamar. It is not, in my mind, so much that he pursued an evil end, as that he did so by evil means. It would be asking for more than normal moral courage to expect a man with his connections to turn his back on the interests of former slaveowners, for they were his people. Nevertheless, his eulogy of Sumner was an extraordinarily cynical act. He repeatedly lied about events and circumstances in Mississippi. He did not deceive himself and fantasize about Sumner or about what was happening around him. He lied to defend brutality that defied the central moral premise of law and is, therefore, appropriately the object of a special reproof for his betrayal of the law. That such
morally upright persons as the trustees of Harvard University would honor such deeds cannot from this distance justify them. As a collaborator, he must take his stand in history with the White People's Party of Vicksburg, with Wade Hampton and the brutal redeemers of South Carolina, and with the Ku Klux Klan.