

Empire in the Grasslands: The Eighth Circuit Before 1891



Prepared by...



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8TH CIRCUIT

IN THE BEGINNING: THE FEDERAL JUDICIARY BEFORE 1891

Article III of the Constitution established a U.S. Supreme Court, but left to Congress the authority to create lower federal courts as needed. During its first congressional session Congress enacted the Judiciary Act of 1789, creating a three-tier court system, staffed by two tiers of judges.

The lowest tier, the district courts, followed state lines in drawing jurisdictional boundaries. They were given jurisdiction over admiralty cases, most custom matters, and minor federal crimes. They were given concurrent jurisdiction with state courts on common law cases involving amounts over \$100. A district judgeship was created for each district, and the judge was to be a resident of the district. The judges were appointed by the President, but state politicians heavily influenced their selection.

The intermediate tier, the circuit courts, were regional courts encompassing contiguous states and serving as both appellate and trial courts. They were initially expected to hold two terms of court annually in each district, with two justices of the U.S. Supreme Court and the respective district judge. This was soon reduced to one justice and one district judge.

These lower federal courts were given limited and specialized jurisdiction during this period, with states and localities handling most of the lawmaking. The circuit courts served mainly as the federal trial courts, as they had general trial jurisdiction. From 1862 to 1890, the Eighth Circuit's caseload largely consisted of federal staples such as bankruptcy, patent, copyright, and a small number of criminal, revenue, trademark, and diversity of citizenship cases. Federal jurisdiction expanded over time, but it was not until later that the federal courts would become the primary and powerful venue for upholding the United States Constitution, laws, and treaties.

The highest tier was of course the U.S. Supreme, the court of last appellate resort. Each justice, however, also had circuit court duties, obligating him to travel far distances to hold court in his assigned circuit. "Riding the circuit" became increasingly taxing as a nation of former British colonies along the east coast grew to nine circuits extending to the west coast.

In 1869, Congress attempted to reduce the justices' circuit court obligations to one term every two years. They created a circuit judgeship for each of the nine circuits and prescribed that circuit court could be held by the circuit justice, circuit judge, or district judge, and that any two could sit as a panel. With the Eighth Circuit caseload increasing tenfold from 1869 to 1879, however, much of the work had to be handled by the district judges.

Then in 1891, Congress established the U.S. Circuit Courts of Appeals. In doing so, they reassigned jurisdiction of most routine appeals from the district and circuit courts to these appellate courts, and eliminated the circuit riding duties for the Supreme Court justices. The circuit courts remained as trial courts until 1911, when they were abolished, leaving trial jurisdiction to the district courts.

Landmark Judicial Legislation

- 1789 First Judiciary Act establishes a three-tier federal court system: district, circuit, and Supreme courts; staffed by district judges and Supreme Court justices.
- 1869 Circuit judgeships created to lessen burden of Supreme Court justices.
- 1891 U.S. Circuit Court of Appeals established.
- 1911 Circuit courts abolished.

JUDGES ON HORSEBACK

Circuit riding has a long and storied history. The concept had precedent in the English *nisi prius* courts at Westminster, but its application to the landscape of the United States caused difficulties for the traveling justices, especially as the boundaries of the nation expanded. Whether Supreme Court justices should (or could) be asked to ride circuit, traversing the country and serving at both levels of the appeals process, was a matter of much controversy in the early days of the republic. The constitutionality of circuit riding was challenged by Chief Justices John Jay and John Marshall, among others, and, with the health of the already-overworked justices at stake, many shared George Washington's view that "these disagreeable tours" could not continue for much longer.

They went by horseback or carriage. The difficulty of travel across the harsh terrain of a wide-ranging circuit was compounded by Congress's lack of provision for lodging. The justices were obliged to either stay with friends (in which case their impartiality was called into question) or seek public accommodation, which was sometimes unavailable and usually crowded. It was not uncommon to share a room with several strangers. Even after the advent of the railway, traveling was not made much easier. Because of their low salary, justices and judges sometimes accepted free passes from the railroads, but this process was considered improper, particularly when railroads so frequently were parties of appellate cases in this period.

Circuit riding presented surprising dangers, too. Justice James Iredell wrote of an attempted swamp crossing on his way to circuit court in Savannah, Georgia: "I directed Hannibal [the slave accompanying Iredell] who was before to proceed with great caution, and if he found the water grew very deep to stop. He did, and I directed him to return immediately, and I afterwards discovered that in two minutes he would have been in swimming water." The Charleston newspaper reported only that the court session had been canceled because "the judge did not attend."

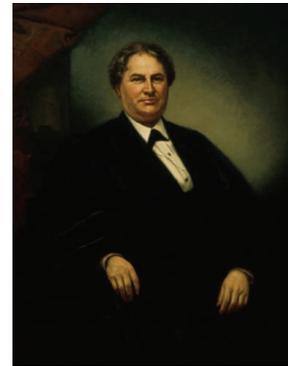
Sometimes the dangers were not due to the weather. Justice Stephen J. Field was riding circuit on the train to San Francisco when he was assaulted by a co-defendant in a suit he had heard while sitting on the Circuit Court for the Northern District of California. A deputy U.S. marshal accompanying Field shot and killed the assailant. Field and the deputy marshal were arrested for murder, and the resulting Supreme Court case, *Cunningham v. Neagle* (1890), brought criticism of circuit riding to light. It may have even been partially responsible for its overhaul the following year.

PIONEERING JUDGES: RIDERS OF THE EIGHTH CIRCUIT

Samuel Freeman Miller (1816-1890) U.S. Supreme Court Justice, Assigned to Eighth Circuit Born in Kentucky. Nominated by Abraham Lincoln. Trained as a physician, Miller studied law and passed the Kentucky bar examination in 1847. Favoring emancipation of slaves, he freed his own and moved to Iowa rather than submit to Kentucky's stronger position on slavery. Because he took a practical rather than scholarly approach to the law and served during the tumultuous Reconstruction period, historians have disagreed about his legacy. He was a pragmatic workhorse with a powerful presence who was more statesman than lawyer. Miller served as circuit justice for the same states that composed the Ninth Circuit from 1862 to 1866 and the Eighth Circuit from 1866 to 1890. During those 28 years, he wrote 616 majority opinions and 169 dissents on the Supreme Court.

During his service as Eighth Circuit justice, Samuel F. Miller exhausted himself riding a circuit that was growing in size and caseload. The following excerpt from Jeffrey Morris' *Establishing Justice in Middle America* conveys his plight:

...Samuel F. Miller rode circuit in the spring and summer, generally convening half of the circuit courts. In 1877, for example, Miller embarked on his circuit on May 6. He held a term in Des Moines during the last two weeks of May, at Leavenworth and St. Paul for ten days each in June, and in Denver from July 3 to 15. The work could be fatiguing for a sixty-year-old man. Miller wrote in 1879 that, after sitting for six weeks in very hot weather, hearing "heavy mining and railroad cases in which every move of the court involved millions of dollars, and the personal feelings of clients invaded the court room too visibly in the ill concealed temper of their lawyers," he had developed "a shaky hand, an interrupted pulse, and strong evidences of heart trouble," and was "coming very near [to] breaking down."



Justice Samuel F. Miller
(Portrait courtesy Collection
of the Supreme Court)

John Forrest Dillon (1831-1914) U.S. Circuit Judge, Eighth Circuit (1869-1879) Born in New York. Nominated by Ulysses S. Grant. Trained as a physician, he left his practice early on to study law. During his career as a circuit court judge for the Eighth Circuit (1869-1879), he wrote *Municipal Corporations* (1872) from which emerged the "Dillon Rule," giving power to state legislatures over municipalities. The "Dillon Rule" is still widely employed today. In 1879 Dillon resigned from the circuit court and became a highly-regarded railroad attorney in New York.

George Washington McCrary (1835-1890) U.S. Circuit Judge, Eighth Circuit (1879-1884) Born in Indiana. Nominated by Rutherford B. Hayes. In addition to being a circuit court judge, McCrary was a legislator and served in the executive branch as Secretary of War. Interested in judicial reform, McCrary sponsored a bill intended to correct the lack of speedy justice and lack of reasonable and prompt review. In 1884 he resigned his judgeship and served as counsel to the railroad industry.

David J. Brewer (1837-1910) U.S. Circuit Judge, Eighth Circuit (1884-1890)

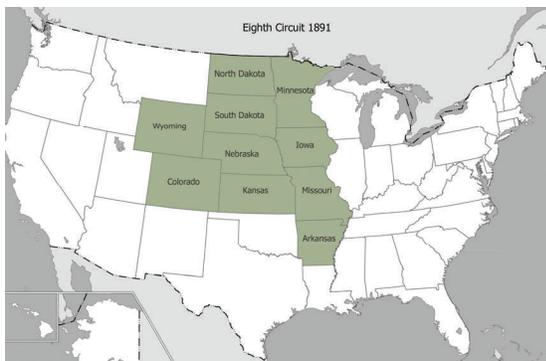
Born in Turkey to American missionaries. Nominated by Chester A. Arthur. After five years as a circuit court judge, Brewer was nominated to the U.S. Supreme Court by President Harrison, where he served for twenty years. He was a preeminent judicial conservative and a staunch supporter of judicial review. He was also an advocate for the fair treatment of minorities and women.

Henry Clay Caldwell (1832-1915) U.S. Circuit Judge, Eighth Circuit (1890-1903)

Born in Virginia. Nominated by Abraham Lincoln to U.S. District Courts for Eastern and Western Arkansas in 1864. Nominated to U.S. Circuit Courts for the Eighth Circuit by Benjamin Harrison in 1890, and reassigned to U.S. Court of Appeals for the Eighth Circuit in 1891. During his service he was considered for the Supreme Court by three presidents. He was a supporter of women's suffrage and individual property rights for married women. Earning respect and popularity in the North and the South, Caldwell was mentioned as a possible presidential candidate in both the Democratic and the Republican parties.

AN EMPIRE EVOLVES

Although the Eighth Circuit was established in 1837, it was not until the Civil War that it began to take on aspects of its modern-day configuration. In 1862, a circuit was created that largely resembled the future Eighth Circuit. Numbered the Ninth Circuit, it included Iowa, Kansas,



Minnesota, and Missouri. In 1866, it was renumbered as the Eighth Circuit, with the addition of Arkansas. Then between 1867 and 1890, Nebraska, Colorado, North Dakota, South Dakota, and Wyoming were added as they were admitted to the Union.

By 1891, when the Circuit Court of Appeals Act was passed, the Eighth Circuit had grown to ten states. Referred to as “an empire in itself,” the circuit ran the course of the Mississippi River from

Minnesota in the north to Arkansas in the south and crossed the farmlands of Missouri in the east to the mountains of Wyoming in the west.

The heart of the empire, the seven states composing today’s Eighth Circuit, was largely “grassland stretching from horizon to horizon,” with “two great rivers flow[ing] through or by each of the states, shaping their land and determining the course of exploration and settlement, as well as economic growth.” (Morris, p. 1)

Most of the seven states had rich soil, making farming a primary source of revenue. Those without profitable soil were able to use the land to raise cattle and sheep. Other areas had valuable deposits of iron, lead, and gold.

The Mississippi and Missouri rivers formed a nautical highway for steamboat traffic, steering the circuit's development and stimulating its commerce. Once bridges were constructed, railways began to compete with the rivers as channels of interstate commerce, and united the circuit with far-reaching areas of the nation.

The geography of the circuit shaped both its development and its caseload. Litigation arose to resolve disputes related to land acquisition, channels of interstate commerce, municipal bonds, farming inventions, Native American rights, and other issues.

WATERWAYS AND RAILWAYS

As westward expansion continued, communities became villages, villages became towns, and towns became cities. City, county, and state governments attempted to both encourage and control development, sometimes at the expense of other entities. Railroads, manufacturing, and land acquisition were vital to the development of the Eighth Circuit states. The courts provided guidance for government organizations by applying limits and the rule of law to the needs and aspirations of those local governments.

A recurring theme in the circuit was the clash of river and rail interests. 1856 saw completion of the Rock Island-Davenport Bridge, connecting Illinois and Iowa. It was the first railroad

bridge to cross the Mississippi, making interstate commerce via railway more possible than ever before. In some quarters, the bridge was celebrated as a milestone, but it posed a threat to established riverboat interests, and in 1859, U.S. District of Iowa Judge James M. Love ordered its removal as an obstruction to water commerce. Love was reversed by the Supreme Court three years later. Love granted another injunction against the building of a bridge at Clinton, Iowa, in 1864, but when an order was issued committing the builders for defiance of the injunction, Justice Samuel F. Miller overturned it, calling the railroad "the great highway of our Union." This was the beginning of a shift from St. Louis, the historic base of commerce along the Mississippi, to Chicago. In a few years, the golden spike was driven, connecting the Union Pacific and the Central Pacific, and commerce as the Eighth Circuit knew it was changed forever.



Eads Bridge, St. Louis, Missouri, 1873
(Image courtesy *Scientific American*)

National and state governments, towns, and private individuals supported the construction of railroads across the land of the Eighth Circuit by offering railroad promoters millions of dollars in the form of land grants and property-tax-supported bonds. However, as railroad construction waned and many large grants failed to meet their objectives, some municipalities attempted to repudiate their bond obligations, spurring intense litigation. Reversing prior judgments, state courts commonly held that legislatures did not have authority under their state constitutions to allow municipalities to issue such bonds. The U.S. Supreme Court refused to follow these state

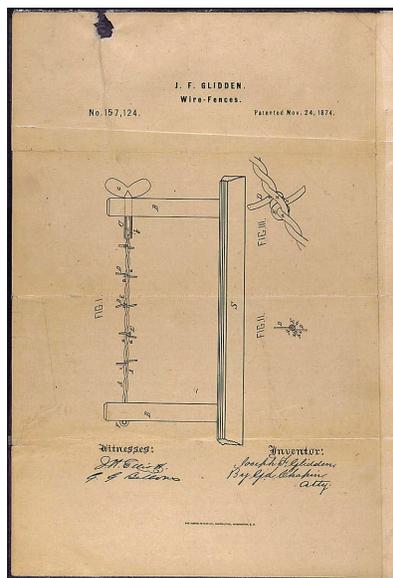
court decisions and instead discouraged debt repudiation and enforced bond obligations. Between the early 1860s and 1890, the Supreme Court heard approximately 300 municipal bond cases from Missouri, Kansas and Iowa, continuing the hostile conflict between federal and state courts on this issue. Though mindful of the importance of uniformity in the decisions of the U.S. Supreme Court and the highest local courts in giving constructions to the laws and constitutions of their own states, in *Gelpcke v. City of Dubuque*, Justice Swayne noted, “We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice.” The U.S. Supreme Court prevailed, and municipalities were ordered to pay off their bond obligations.

INVENTIONS, RIGHTS, AND NATIVE AMERICANS

Like emerging nations of yesterday and today, the fledgling states of the Eighth Circuit exploded with development often irrespective of others’ rights.

The 1880s brought about several patent cases that reflected the character of the land and the people’s relationship to it. Each of the following cases featured an invention that would prove crucial to the settlement of the West.

In *Andrews and Others v. Hovey*, also known as the “Driven Well Cases” (May 1883), Col. Nelson Green’s patent for the drive well, a device used to create wells by driving steel tubing into the ground, was held invalid, as the drive well had already been in common use. This efficient way of creating wells would become vital to the development of farms in the Midwest.



Glidden’s patent for barbed wire
(Image courtesy NARA)

Judge David Josiah Brewer called *Washburn & Moen Manufacturing Co. v. Grinnell Wire Co.* (May 26, 1885) the hardest case he had ever heard, but it was certainly one of the most important. The ruling upheld J. F. Glidden’s patent for the invention of barbed wire. “Simple though [barbed wire] is,” Brewer wrote, “Mr. Glidden first introduced it to the world.” Barbed wire has been hailed by many historians as the single most important factor in the settlement of the West, transforming the free range into private property.

In 1889, Judge Rensselaer R. Nelson heard cases involving a patent for machines that improved harvesters and harvester binders (*Deering v. McCormick Harvesting Machine Co.*; *Deering v. Winona Harvester Works*). Although the suit against Winona was sustained, the one against McCormick was dismissed. To this day McCormick and John Deere are leading farm equipment companies.

While keeping local governments in hand, the courts also dealt with issues affecting the populace of the Eighth Circuit, which included Native Americans as well as settlers.

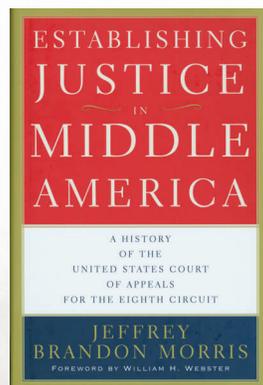
After the forced removal of the Ponca from their land in 1877, Standing Bear, a Ponca chief, returned to Nebraska two years later to bury his son and was arrested for violating his relocation order. The U.S. District Attorney's argument that Indians were "not persons within the meaning of the law" was rejected by Nebraska U.S. District Judge Elmer Scipio Dundy, who ruled in *United States ex rel. Standing Bear v. Crook* that Native Americans were persons, and as such, had the right to habeas corpus and the "inalienable right to 'life, liberty, and the pursuit of happiness.'"



STANDING BEAR AND FAMILY IN 1904.
(From photograph by A. E. Sheldon.)

In 1881, Crow Dog, a Brule Sioux Indian, killed Spotted Tail, a Brule Sioux Chief of the Dakota Territory. The tribal council dealt with the matter through a transfer of property and reconciliation between the two families. Afterward Crow Dog was prosecuted in federal court. He went on to petition for habeas corpus in the U.S. Supreme Court (*Ex Parte Crow Dog*, 1883), which held that the federal courts lacked jurisdiction when an Indian kills another Indian. An outraged Congress responded by making seven major crimes answerable to federal court. The Supreme Court upheld the changes and another level of interference in Native American affairs began.

The circuit courts of the Eighth Circuit played an important role in the development of our nation, for in resolving the disputes put before them, they ultimately expedited westward expansion and settled the vast "Empire in the Grasslands."



This booklet is based heavily upon the introduction and first chapter of Jeffrey Brandon Morris' *Establishing Justice in Middle America: A History of the United States Court of Appeals for the Eighth Circuit* (University of Minnesota Press, 2007).