

# LEGAL ARGUMENT IN THE OPINIONS OF MONTANA TERRITORIAL CHIEF JUSTICE DECIUS S. WADE

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I. Introduction.....	39
II. Background.....	41
A. The Montana Territorial Supreme Court.....	41
B. Decius S. Wade.....	45
III. A Methodological Note.....	49
A. Identifying Trial Judges.....	50
B. Length.....	50
C. Citations.....	50
IV. Wade's Opinions.....	51
A. Wade and the Territorial Court.....	53
B. Sources of Law.....	55
C. Using Precedent.....	58
D. Statutory Interpretation.....	61
E. Women and the Law.....	63
F. Political Issues.....	65
G. Frontier Conditions.....	70
H. The Role of the Jury.....	73
I. Disagreement and Dissent.....	76
V. Conclusion.....	78

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## I. INTRODUCTION

Decius Spear Wade was the longest serving member of the Montana Territorial Supreme Court, holding the Chief Justiceship between 1871 and 1887, more than sixteen years.<sup>1</sup> Wade authored an impressive 192 majority opinions, along with fourteen concurrences and dissents, of the total of 637 reported majority opinions issued by that court.<sup>2</sup> By productivity and length of service alone, Wade stands out on the Montana court and among territorial judges generally. Unlike many territorial judges, including some of his brethren on the Montana court, Wade was well-regarded by his contemporaries.<sup>3</sup> Subsequent observers have also ranked Wade among the best of the judges of the territorial courts generally.<sup>4</sup>

In addition to his long tenure on the Territorial Supreme Court, Wade played an important role in other aspects of nineteenth century Montana. He wrote the chapters on law and the courts for a popular nineteenth century history of Montana,<sup>5</sup> authored a novel with a legal theme that was read (and apparently well thought of) in Montana Territory,<sup>6</sup> and wrote an article on self-government in the territories.<sup>7</sup> In addition to his writings, Wade served on the 1889-1895 Code Commission and delivered two crucial speeches on the common law<sup>8</sup> and codification<sup>9</sup> in the 1890s that helped pave the way for Mon-

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<sup>1</sup> Wade's four terms were a record unequaled in Montana, Colorado or Wyoming. JOHN D. W. GUICE, *THE ROCKY MOUNTAIN BENCH* 74 (1972).

<sup>2</sup> Oddly, Wade claimed there were 1300 "published opinions and decisions" of the court. Decius S. Wade, *The Bench and Bar 1880-1894*, in *AN ILLUSTRATED HISTORY OF THE STATE OF MONTANA* 634, 655 (Chicago, Lewis Publishing Co. 1894) [hereinafter "Wade, 1880-1894"].

<sup>3</sup> One contemporary wrote that Wade gave the court's decisions "a weight and reputation that none other among the Territories enjoys or even approaches." *Quoted in* CLARK C. SPENCE, *TERRITORIAL POLITICS AND GOVERNMENT IN MONTANA 1864-89*, at 229-30 (1975). Wade was not above a bit of self-promotion, writing in 1894 that "the Montana Reports always have been well thought of by the profession at home and abroad" although he gave credit to "the strength of the bar behind them" as well. Decius S. Wade, *Second Chapter on the Bench and Bar*, in *AN ILLUSTRATED HISTORY OF THE STATE OF MONTANA* 308, 315 (Chicago, Lewis Publishing Co. 1894) [hereinafter "Wade, *Second Chapter*"].

<sup>4</sup> See e.g., GUICE, *supra* note 1, at 74-75 (lauding Wade's record); SPENCE, *supra* note 3, at 229 ("able, conscientious jurist"); MICHAEL P. MALONE ET AL., *MONTANA: A HISTORY OF TWO CENTURIES* 110 (rev. ed. 1976) (same); JAMES MCCLELLAN HAMILTON, *FROM WILDERNESS TO STATEHOOD: A HISTORY OF MONTANA 1805-1900*, 329 (1957) (same).

<sup>5</sup> See generally, Decius S. Wade, *The Bench and Bar*, in *AN ILLUSTRATED HISTORY OF THE STATE OF MONTANA* 260 (Chicago, Lewis Publishing Co. 1894) [hereinafter "Wade, *Bench and Bar*"]; Wade, *Second Chapter*, *supra* note 3; and Wade, *1880-1894*, *supra* note 2.

<sup>6</sup> See DECIUS S. WADE, *CLARE LINCOLN* (1876). On the novel's popularity, see C.P. Conolly, *Three Lawyers of Montana*, 1 *MAG. OF W. HIST.* 59, 62 (1891).

<sup>7</sup> Decius S. Wade, *Self-Government in the Territories*, 6 *INTERN. REV.* 299 (1879).

<sup>8</sup> Decius S. Wade, *The Common Law*, Address before the Montana Bar Association (February 1895), in *PROCEEDINGS OF THE MONTANA BAR ASSOCIATION* 173 (1914), *reprinted in*

tana's adoption of Civil, Political, Penal, and Civil Procedure codes originally drafted by David Dudley Field for New York.<sup>10</sup>

Wade's career spanned the formative years of Montana's growth from gold rush camps to statehood. Writing of his career in the third person with characteristic rhetorical flourishes, Wade described his service thusly:

he had seen the Territory grow up from a few scattered settlements to a strong and rich commonwealth, having all the conveniences and comforts of modern civilized life; he had seen the log cabin give way to homes of comfort, culture and luxury, and mining camps become thriving cities with electric railways and lights, with free public libraries, schools and churches; the ancient pastures of the buffalo and antelope become covered with domestic cattle, sheep and horses; the Indian trail and wigwam vanish away as public roads and comfortable homes appeared; he had seen the overland freight wagons and emigrant trains disappear from the plains and mountain passes before the all-conquering iron rail and locomotive, whose thundering roar and shrill whistle awoke the slumbers of the desert and the silence of the rugged range; he had seen the ancient trail of the adventurous captains, Lewis and Clarke, through unexplored regions occupied by hostile Indian tribes and wild beasts, and blocked by majestic and unknown rivers and mountains, become the highway of commerce from ocean to ocean, through a land richer in gold and precious stones than Ophir and India; he had seen the log courthouses supplanted by imposing temples of justice; he had seen how commonwealths grow, how a great State spends its youth, how laws and institutions are planted and take root, and how the American spirit and civilization builds, and with what fibres holds together, a nation.<sup>11</sup>

Yet we must be careful not to overestimate Wade's influence. Wade is far from the judicial stalwart portrayed in the brief summaries of Montana's judicial history present in general historical works. He was a thorough and careful (if overly wordy) writer, as discussed below, but he was also surprisingly sloppy about attributing his lengthy quotes from others' works in at least some of his published writings.<sup>12</sup> He was an able common law judge, but enthusiastically threw himself into an attempt to dismantle the common law system in the

Andrew P. Morriss, *Decius Wade's "The Common Law,"* 59 MONT. L. REV. 225 (1998) [hereinafter "Morriss, *Wade*"].

<sup>9</sup> DECIOUS S. WADE, NECESSITY FOR CODIFICATION: PAPER READ BEFORE THE HELENA BAR ASSOCIATION (Helena, Williams & Sons, 1894), reprinted in Andrew P. Morriss, *Decius Wade's "The Necessity for Codification,"* 61 MONT. L. REV. \_\_ (forthcoming 2000).

<sup>10</sup> I describe Montana's adoption of the Field codes in Andrew P. Morriss, *"This State Will Soon Have Plenty Of Laws"—Lessons from One Hundred Years of Codification in Montana,* 56 MONT. L. REV. 359 (1995). See also Andrew P. Morriss, Scott J. Burnham, and James C. Nelson, *Debating the Field Civil Code 105 Years Late,* 61 MONT. L. REV. 371 (2000). For discussion of the American codification movement generally, see DAUN VAN EE, *DAVID DUDLEY FIELD AND THE RECONSTRUCTION OF THE LAW* (1986); CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT* (1981); and ANDREW P. MORRIS, *Right Answers and Codification,* 74 CHI.-KENT L. REV. 355 (1999) [hereinafter, "Morriss, *Right Answers*"].

<sup>11</sup> Wade, *1880-1894,* *supra* note 2, at 652.

<sup>12</sup> See Morriss, *Wade,* *supra* note 8; Wade, *The Common Law,* *supra* note 8, showing many instances of unattributed material.

1890s. He played an important role in ensuring the common law's stability, yet disparaged that stability in his public pronouncements. Paradoxically it is the role that Wade seems to have been least concerned with, that of common law judge, rather than his more grandiose attempts at a legacy of legal reform, that form his most significant contribution to Montana jurisprudence.

The combination of Wade's prominence, prolific opinion-writing, other legal writings, and reputation make him a fitting subject of study today.<sup>13</sup> In Wade's writings we see the combination of what Gordon Bakken termed the "habitual modes and forms of official thought and action and the innovations produced by the frontier."<sup>14</sup> In section II below, I give a brief biographical overview of Wade. I outline the methodology I used to extract data from Wade's opinions in section III. I present the results of this analysis, along with a more traditional legal analysis in section IV.

A brief note is in order on what this article is not. It is not a legal history of Montana Territory, something that has yet to be written. It is also not an examination of the federal-territorial relationship, an important area for territorial judges who were under the supervision of the federal attorney general.<sup>15</sup> The focus is on Wade and his writings, which means it is also not a full fledged analysis of the national or regional territorial bench or legal systems as a whole, something that has already been written and written well, by several authors.<sup>16</sup> Rather the goal is to examine how Wade dealt with the legal challenges posed by Montana Territory's rapid growth.

## II. BACKGROUND

Understanding Wade's opinions and role requires understanding the context in which he wrote. This section briefly describes the court and Wade.

### A. *The Montana Territorial Supreme Court*

Territorial courts in general, and Montana's in particular, were quite different institutions from the state courts that succeeded them. They had a peculiar institutional structure, the imperfections of which, John Guice suggested, "strained to the utmost the human frailties of the men on the bench."<sup>17</sup> That structure also made "official life in the Territories" into "a personal warfare,

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<sup>13</sup> I am also drawn to Wade because he was born in and lived both the early and final years of his life in Ashtabula, Ohio, not far from where I now live, but nonetheless managed to spend a great deal of time in Montana, a worthy goal even today. Others seem drawn to Wade for other reasons. See *FIGJA Reports on the Montana Freeman Trials* (visited Sept. 2, 2000). <[http://www.iahushua.com/T-L-J/please\\_help.htm](http://www.iahushua.com/T-L-J/please_help.htm)>.

<sup>14</sup> GORDON M. BAKKEN, *THE DEVELOPMENT OF LAW ON THE ROCKY MOUNTAIN FRONTIER* 7 (1983).

<sup>15</sup> GUICE, *supra* note 1, at 5.

<sup>16</sup> See, e.g., GUICE, *supra* note 1; BAKKEN, *supra* note 14.

<sup>17</sup> GUICE, *supra* note 1, at 11.

which is neither pleasant to the officer nor beneficial the people.”<sup>18</sup> The court had wide-ranging jurisdiction, essentially combining law and equity and federal and state courts into one body.<sup>19</sup>

Judges served at the pleasure of the president, lacking any meaningful job security.<sup>20</sup> As job security is generally thought to be critical to the independence of the judiciary.<sup>21</sup> Thus the territorial courts were less independent than even those state courts with brief terms for their judges. Wade was critical of the effect of “this precarious tenure of offices” and found it “especially detrimental to a harmonious and symmetrical system of decisions by the courts.”<sup>22</sup> In his 1879 essay *Self-Government in the Territories*, Wade identified the lack of job security as a major impediment to adequate governance.<sup>23</sup> (To solve the problem Wade recommended greater local control of territorial government, including the judiciary.<sup>24</sup>)

Nor were territorial judges financially independent – judicial salaries in Montana were \$3,000 per year during Wade’s tenure,<sup>25</sup> much less than good attorneys could earn in the territory at the time.<sup>26</sup> The occasional willingness of territorial legislatures to supplement judges’ salaries and outside investment opportunities were thus areas in which many territorial judges took a keen interest.<sup>27</sup>

This lessened independence from the appointing authority was not entirely

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<sup>18</sup> Wade, *Self-Government*, *supra* note 7, at 307.

<sup>19</sup> Wade, *Second Chapter*, *supra* note 3, at 309 (“Never were any courts organized by Congress or by any State government that had so extensive jurisdiction as the Territorial courts.”).

<sup>20</sup> Wade termed them as “kept within the gift of the president to be bestowed as rewards for political service.” Wade, *Second Chapter*, *supra* note 3, at 14.

<sup>21</sup> See generally, Richard A. Posner, *What Do Judges Maximize? (The Same Thing Everybody Else Does)*, 3 S. CT. ECON. REV. 1 (1993). Richard A. Epstein, *The Independence of Judges: The Uses and Limitation of Public Choice Theory*, 1990 BYU L. REV. 827 (1990). Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920*, 1984 AM. B. FOUND. RES. J. 345 (1984).

<sup>22</sup> Wade, *Second Chapter*, *supra* note 3, at 314.

<sup>23</sup> Wade, *Self-Government*, *supra* note 7, at 306. Wade wrote:

The tenure of office is another fault of the Territorial system. The duration of the official life depends on the will of one man, and he thousands of miles removed from the officer himself. Good officers are often removed without cause or provocation to make room for others whose claims are thought to be superior by reason of their services to the party in power, or whose importunity becomes unendurable, or whom some one wishes to banish to make room for himself or others, or who are supported by influences that can not be disregarded.

<sup>24</sup> Wade, *Self-Government*, *supra* note 7, at 307 (“Certainty of official tenure would remedy evils, but not remove it. Local self-government would heal the wounds, cure the jealousies, and bring satisfaction.”).

<sup>25</sup> GUICE, *supra* note 1, at 39. Since salaries were paid in greenbacks, their real salary was approximately \$1,950. *Id.* at 41.

<sup>26</sup> GUICE, *supra* note 1, at 41 (quoting Montana’s congressional delegate that “any lawyer in Montana” could earn twice the judicial salary).

<sup>27</sup> See GUICE, *supra* note 1, at 38-46, 147-48.

a dependence on local authority. Territorial judges were, like the territorial executive, creatures of the federal government. An angry territorial legislature might petition Washington, D.C. for the replacement of a particular judge<sup>28</sup> or “sagebrush” a judge into an undesirable judicial district,<sup>29</sup> but it could not remove the judge. The practice of appointing most judges from outside the territories where they served furthered the judges’ dependence on Washington.<sup>30</sup>

Despite the problems the lack of tenure posed for judicial independence, Montana Territory had an unusually stable and qualified bench. Two judges in particular, Wade and the highly regarded Hiram Knowles, served individually or together from 1868 to 1887, the vast majority of the court’s existence. The presence of these two men ensured that the Montana Territorial Supreme Court had an institutional memory and, particularly from 1871 to 1879 while both men were on the court, adequate intellectual firepower to address the difficult legal questions that arose.

One feature of the territorial court that seems particularly odd today was the practice (until 1886) of having the three territorial judges do double duty as trial judges.<sup>31</sup> As a result, the trial judge had a vote in determining the outcome of the appeal. Where the other two members of the court were split, the trial judge’s views determined the outcome of the appeal.<sup>32</sup> Whether as a matter of

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<sup>28</sup> Wade identified this as a problem himself. “Another brood of petty attacks is engendered by the same cause. . . . A lawsuit is decided. The unsuccessful party vents his spite in an attempt to procure the removal of the judge. The feeble official tenure is constantly inviting attack; and jealousy, envy, personal hatred, and ill-will are constantly tempted to engage in a crusade that can do them no injury and may bring great satisfaction.” Wade, *Self-Government*, *supra* note 7, at 306-07. Wade probably had in mind the attack on his colleague Hiram Knowles by a disgruntled litigant, Anson Bangs, and, several years later, by Territorial Governor Benjamin Potts. See GUICE, *supra* note 1, at 51-52 (describing incidents).

<sup>29</sup> The Montana legislature sent two members of the court to “unorganized and uninhabited districts” in retaliation for their votes to invalidate the acts of the second and third legislatures. EARL S. POMEROY, *THE TERRITORIES AND THE UNITED STATES 1861-1890* 57 (1947). After the struggle over the second and third legislatures, Congress removed the power to determine districts from the Montana legislature, eliminating the possibility of sagebrushing for Wade personally. See GUICE, *supra* note 1, at 59; Wade, *Second Chapter*, *supra* note 3, at 319-20.

<sup>30</sup> Table 10 lists the state of residence at the time of first appointment for Montana’s judges.

<sup>31</sup> Congress expanded the court to four members in 1886 and provided that the judge who tried the case should not participate in the appeal. HAMILTON, *supra* note 4, at 337. See also Wade, *Second Chapter*, *supra* note 3, at 309-10 (“This was a better arrangement and gave satisfaction alike to the judges and the lawyers.”).

<sup>32</sup> See, e.g., *Meyendorf v. Frohner*, 3 Mont. 282 (1879) (trial judge: Blake; majority opinion by Knowles; dissent by Wade). Guice suggests that the trial judges recused themselves regularly, but there is no indication in the *Montana Reports* that this was the practice in Montana and some evidence (as described herein) that they did not. GUICE, *supra* note 1, at 12.

It is also likely that Wade wrote two brief opinions in cases without dissents where he served as the trial judge, since both were trials from the Third District where he usually tried cases. (Unusually for the reporter, those opinions did not identify the trial judge.) See *McKinney v. Powers*, 2 Mont. 466 (1876); *Hale v. Park Ditch Co.*, 2 Mont. 498 (1876). The

style or because they were uncomfortable with the practice, opinions in these cases did not acknowledge the potential conflict.<sup>33</sup> Although cases where the trial judge cast the deciding vote were comparatively rare in Montana Territory, the presence of the trial judge on the appellate bench made an appeal more difficult in all cases. In his 1894 history of the Montana courts, Wade defended the record of the court despite this institutional flaw.<sup>34</sup>

Territorial courts in general, and Montana's in particular, also had to adapt to the challenges posed by the territories' rapid development. Montana, like other gold rush areas, grew rapidly after the first major discovery of gold in 1862.<sup>35</sup> From virtually uninhabited, Montana swiftly developed into a well populated and economically thriving region. Along the way Montana experienced two well-organized vigilante movements. The first, in 1863-1864, eliminated a ruthless criminal gang that had captured some of the fledgling Territory's legal institutions.<sup>36</sup> Like many other nineteenth century Montanans, Wade looked favorably on the vigilantes.<sup>37</sup> The success of the vigilantes gave many early Montanans a somewhat skeptical attitude toward official courts and a willingness to rely on extra-legal solutions. This willingness surfaced most notably in the 1880s when a second vigilance committee, again with participa-

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opinion in *Hale* seems particular inappropriate to be written by the trial judge – the issue was a conflict between the trial judge and counsel for one party's dispute over the substance of the testimony of a witness in the appellate record. The Montana judges were aware that there were circumstances in which they should recuse themselves, as when they had represented a party in the trial below. *See, e.g.,* *Ryan v. Kinney*, 2 Mont. 454, 457 (1876) (“Blake, J., having been of counsel in the court below, did not participate.”) Having served as the judge below thus did not meet this standard for the judges.

Trial judges also dissented in cases where their colleagues overturned their decisions. *See, e.g.,* *United States v. Upham*, 2 Mont. 170 (1874) (majority opinion by Wade; dissent by trial judge Knowles); *Frohner v. Rodgers*, 2 Mont. 179, 183 (1874); (trial judge (Wade) dissents); *Ryan v. Gilmer*, 2 Mont. 517, 525 (1877) (trial judge Wade dissents).

<sup>33</sup> The conflict was not always fatal, as in one case Wade wrote the opinion overturning his actions as trial judge. *Ney v. Orr*, 2 Mont. 517 (1877). *See also* *Wiebbold v. Hermann*, 2 Mont. 609 (1876) (Knowles votes with Wade to overturn his trial court ruling; Blake dissents). This led to a rather odd opinion in which Wade attempted to justify his conduct below without mentioning that it was his own rulings at issue. At the end of the opinion, Wade wrote that “[f]rom the opinion delivered in the district court, which is in the transcript, this case seems to have been tried [on a particular theory] . . . If this view could be upheld, the decision of the court below would be correct . . .” *Ney v. Orr*, 2 Mont. 559, 564 (1877).

<sup>34</sup> Wade, *Second Chapter, supra* note 3, at 309 (“But the criticism was hardly just, for a reference to the Reports will show that the decisions of the district courts were often reversed, and that the decisions of the Territorial Supreme Court were in a large majority of cases affirmed on appeal to the United States Supreme Court.”).

<sup>35</sup> MALONE, ET AL., *supra* note 4, at 64-65.

<sup>36</sup> *See* Andrew P. Morriss, *Miners, Vigilantes and Cattlemen*, 33 LAND & WATER L. REV. 581, 636-49 (1998) (describing Montana vigilante committee). This experience is still prominently officially sanctioned by the use of the vigilance committee's symbol on state police uniforms and statutes of the main vigilantes in the state capitol. *See* Andrew P. Morriss, *Private Actors & Structural Balance: Militia & the Free Rider Problem in Private Provision of Law*, 58 MONT. L. REV. 115, 115-16 (1997).

<sup>37</sup> *See* Wade, *Bench and Bar, supra* note 5, at 267-70.

tion of prominent Montanans, rid eastern Montana of cattle rustlers to widespread popular acclaim.<sup>38</sup> Wade's silence on these later vigilantes in his history suggests that he was less enthusiastic about their activities.

Political turmoil in Montana's early years also created long term problems for the territorial courts. A dispute over redistricting led to a lengthy struggle over the legitimacy of two early legislatures, and judicial and Congressional disapproval of those legislatures' acts threw the territory's statutes into a state of confusion from which they never emerged.<sup>39</sup> This struggle also created long-lasting political animosities.<sup>40</sup>

Montana's economy grew rapidly in the 1870s and placer mining was quickly joined by more diverse and more capital-intensive businesses, like free range cattle, hydraulic mines, the massive copper mines in the Butte area, and the Northern Pacific railroad. Increased economic activity produced new and more complex legal issues for the territorial courts.

In sum, the Montana Territorial Supreme Court faced the difficult problem of building a legal system from the ground up with an inadequate institutional framework. Underpaid, and with one or more occasionally underqualified members, the court had to wrestle with a series of diverse legal problems and resolve legal issues for people scattered over almost 150,000 square miles, with primitive communications and transportation. Its great strength was in its two longest serving members, Hiram Knowles and Decius Wade. The quality of their colleagues varied widely, but the presence of Knowles and Wade for the vast majority of the court's history meant that the court at least had one member, and often more, who had both experience and commitment to the fledgling legal order.

### *B. Decius S. Wade*

As John Guice wrote in his definitive book on the territorial bench, until recently "the carpetbagger theme dominate[d] most accounts" of American territorial courts.<sup>41</sup> As a result "too many authors classify the judiciary as the weakest branch of an administration rife with corruption and incompetence. The bench has been caricatured as a virtual haven for judicial derelicts – party hacks who were unschooled, unskilled fortune seekers, serving without personal involvement or sincere interest in the destiny of their territories."<sup>42</sup> Superficially Montana fits those stereotypes. Montana rarely experienced judicial appointees from within the Territory. Only three of the eighteen men who served were residents of Montana at the time of their initial appointments.<sup>43</sup>

<sup>38</sup> See Morriss, *supra* note 36, at 663-66.

<sup>39</sup> Wade briefly discussed these events in *Necessity for Codification*, *supra* note 9, at 10-11, and in his history chapter. Wade, *Second Chapter*, *supra* note 3, at 317.

<sup>40</sup> See GUICE, *supra* note 1, at 55, 57-58.

<sup>41</sup> GUICE, *supra* note 1, at 1.

<sup>42</sup> GUICE, *supra* note 1, at 1.

<sup>43</sup> See Table 10.



None rank among the worst of the political hacks foisted on the other territories, but few had distinguished backgrounds before their appointments.

As Guice recognized, Decius Wade fits none of those stereotypes.<sup>44</sup> Serving as Chief Justice longer than any other territorial official held office, and remaining an important figure in the legal and political life of Montana long afterward, Wade became deeply involved in creating Montana's legal system. As much as anyone could be in a territory whose first significant white settlement occurred in 1862,<sup>45</sup> Wade was soon a real Montanan.

Decius Wade was born and raised in northeastern Ohio. He studied law in the office of his uncle Benjamin F. Wade, a powerful figure who served in the U.S. Senate from 1851 to 1869,<sup>46</sup> including serving as chair of the committee on territories.<sup>47</sup> Wade married Bernice Galpin while living in Ohio.<sup>48</sup> Decius was admitted to the bar in 1857. In 1860 he was elected probate judge of Ashtabula County, a position he held for seven years. In 1867 he was elected to a term in the Ohio Senate.<sup>49</sup>

Far from being merely an Ohio probate judge, Decius had many influential friends and relations both in and outside Ohio, including President James Garfield and Wade's brother-in-law, Vice President Schuyler Colfax.<sup>50</sup> Although he had no personal experience with the West before his appointment, he was better placed to appreciate the nature of the West than most easterners. As John Guice notes, despite his inexperience in western matters, Wade benefited from "the tutelage of two more worldly uncles." In addition, coming from "the more western state of Ohio—whose frontier was still within memory," Wade had an advantage that many eastern judicial appointees to the West did not.<sup>51</sup>

Wade thus came west to Montana Territory in 1871 as far more than a stereotypical carpetbagger. He would have had a keen appreciation for politics, at both the local and national levels, from his own experiences as well as his uncles' experiences. His service as a probate judge and his term in the Ohio Senate would have exposed Wade to the realities of legislatures and law mak-

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<sup>44</sup> GUICE, *supra* note 1, at 74-75.

<sup>45</sup> MALONE ET. AL., *supra* note 4, at 64 (placer boom started in summer 1862).

<sup>46</sup> Wade, Benjamin F., in OHIO BIOGRAPHICAL DICTIONARY 329 (1986).

<sup>47</sup> Wade's description of the study of law in the chambers of a well respected lawyer by CLARE LINCOLN's hero suggests his enthusiasm for his studies. Responding to comments by one of the villains who disparages the hero's slow pace in reading Blackstone, the hero retorts "I am not here to rummage law books. A smattering of the law is a dangerous thing to any man. Drink deep or taste not. . . . A lawyer never gets through with his books." WADE, *supra* note 6, at 192.

<sup>48</sup> The marriage was an evidently a happy marriage from Wade's dedication of his 1876 novel to her as a someone "whose nobility of character and world of love is an inspiration ever of noble thoughts; and whose daily walk and conversation is a perpetual illustration of a beautiful life and an exalted soul." WADE, *supra* note 6, at 5.

<sup>49</sup> HAMILTON, *supra* note 4, at 329.

<sup>50</sup> SPENCE, *supra* note 3, at 236.

<sup>51</sup> GUICE, *supra* note 1, at 79.

ing.<sup>52</sup> Wade's political skills were obviously well above the level of the average territorial judge, since he managed to be appointed to an amazing four terms.<sup>53</sup>

Wade thus had the background necessary to be a success. Background, however, was not sufficient. Wade's important role in Montana's legal system was also due to his legal ability. Quite simply, Wade could not have served out his terms and had the impact he did without possessing considerable legal talent. Examining how Wade used those skills, how he dealt with legal questions – what he saw as authority and how he used authority – can thus tell us much about how Americans on the frontier viewed the law.

Wade's decision to go west was undoubtedly akin to those made by thousands of others in the nineteenth century. Wade gave up the comparative comforts of Ohio and a secure place in Ohio politics and society for the more primitive conditions and uncertain opportunities of Montana Territory. Wade left no writings on why he went west, but a passage of the novel he wrote in the first years after his arrival in Montana offers a hint. In the book, a judge, described as "an old gray-haired man, ripe in experience, and learned," advises the hero's father about career choices for the man's son:

You ask me to give advice upon a subject of the utmost concern to yourselves

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<sup>52</sup> Wade's writings at both ends of his career show a thorough appreciation of political realities. *Clare Lincoln*, written early in Wade's time in Montana, reveals a less than entirely positive view of politics. William Stacy, one of its main villains, is considering politics as a career and his thoughts are described thus:

He thought politics opened a field for unlimited plunder, and this tempting sphere he resolved to enter at the earliest possible moment. He had learned that professional politicians were unscrupulous in the means employed to obtain office; that they were willing to sacrifice all their self-respect and all their honor, by going about the country begging for office, and by heralding their own qualifications; and he found that the sharp, smooth, oily fellows obtained the offices when they had no qualifications or fitness for the same, while the men of ability and self-respect, who would not resort to trickery and corruption, were left at home; and he had noticed that, however paltry the office, the officer sometimes came out of it rich, and therefore most highly respected and honored, and to the tempting whirlpool of politics he would therefore make his way without any delay.

WADE, *supra* note 6, at 148-49. It is hard not to hear the echoes of Wade's uncles' experience with territorial office-seekers in this passage. In his history of the bench and bar, written at the close of his career, Wade expresses similar views.

In theory, the best and wisest men are selected to make laws, but in practice the office of law-maker is secured, not by the best man, but by the best wire-puller and professional politician; and the member thus chosen, in order to show that in some miraculous manner and in a night he has become a statesman, finds at once that existing statutes are wrong, while his real purpose is to offer himself for sale to those who are using the legislature to promote their private schemes and at the same time he must attempt to do something for the people of his district, in order to secure a reelection; and so each session brings forth numberless bills concerning everything but the public good. The desire for re-election demoralizes and controls both the national and State legislation.

Wade, *1880-1894*, *supra* note 2, at 663-64.

<sup>53</sup> Pomeroy lists the judges for each territory in the west. POMEROY, *supra* note 29, at 110-49. According to these records, only one judge besides Wade, Kirby Benedict in New Mexico Territory, was appointed to four terms.

and your son, and as carefully as I would counsel a man respecting his life or his liberty, will I now respond to your request. You speak of preparing your son for business. This is a mistaken idea. The boy must prepare *himself*, -- *make himself*. I use the words *make himself* purposely, for whatever he is, whatever he achieves, whatever he accomplishes, *he must do it himself*. Others cannot help him. His wealth, his standing in society, his family name, or his ancestry or his poverty, will not make or unmake him; but he must work out the problem of life for himself, and by his own efforts and his own labor. Whatever he engages in he must labor to succeed.<sup>54</sup>

A short time later, the same judge concludes his career advice by summing up the law as "an honorable profession, a noble employment; it opens a wide field for doing good, if the right foundation is laid upon which to build; it points the road to official preferment and distinction, but it leads to a lifetime of labor, care, and anxiety . . . ."<sup>55</sup> Wade's journey west offered him a chance to "make himself" in a "noble employment." He put this chance to good use.

Wade's most well-known contribution to Montana jurisprudence is his service on the code commission between 1889 and 1895 that produced the Civil, Political, Procedure and Penal Codes adopted by the fourth state legislature.<sup>56</sup> As the most vocal member of the commission, Wade provided significant intellectual support for the adoption of the codes it produced.

The codes were adapted from codes first adopted by California in 1871. The California codes were, in turn, derived from drafts prepared by well-known New York lawyer David Dudley Field for New York in the 1860s. Although New York never adopted Field's drafts, the New York legislature and bar regularly debated the codes' merits through the 1870s and 1880s.<sup>57</sup> The New York drafts also provided the basis for both California and Dakota Territory's codifications. Dakota Territory adopted the Field draft Civil Code in 1866 virtually unchanged; California adopted more heavily modified versions of all four codes in 1871. Dakota Territory then adopted versions of all four based on the California revisions in 1877.<sup>58</sup>

Wade's participation in the code commission and the passage of the

<sup>54</sup> WADE, CLARE LINCOLN, *supra* note 6, at 43.

<sup>55</sup> WADE, CLARE LINCOLN, *supra* note 6, at 45. Not all lawyers merited such praise, however. All three of CLARE LINCOLN's villains are lawyers, and one studies law explicitly "to learn how to become an accomplished thief, robber, and villain." *Id.* at 148. Later the novel contrasts "the good and great of the profession" with "the shyster and pettifogger . . . the pretenders, the demagogues, the disciples of deception, low trickery, and fraud, -- the evil plotters of evil, the dark schemers of darkness; . . . those who make the law an instrument of oppression and wrong, the vampires and pests of civilization, those worse than useless creatures, who live by blighting the lives of others, and whom only Omnipotence knows why they were created. . . ." WADE, CLARE LINCOLN, *supra* note 6, at 379-80. Although Wade's novel is set in New England, one wonders at the reaction of the Montana bar to these descriptions.

<sup>56</sup> GUICE, *supra* note 1, at 75 (Wade "most noted" for leadership on codification).

<sup>57</sup> See Morriss, *Right Answers*, *supra* note 10, at 361-68.

<sup>58</sup> The spread of the Field Codes in the west is discussed in Morriss, *Plenty of Laws*, *supra* note 10, at 372-78.

four codes in 1895 certainly had an impact on Montana's jurisprudence. His actions during the 1890s code debate also reveal information about how he interpreted his experience in Montana as a judge. Wade's support for codification was inconsistent in some respects with his role as a judge in developing the common law.

In assessing Wade's career and contributions to Montana jurisprudence, we must do so against the backdrop of a man with considerable ability in a situation that regularly demanded creativity and initiative. To be a judge in frontier Montana required working under difficult conditions, often with inadequate legal and other resources. It also required an ability to adapt precedent to new conditions and to make the law comprehensible to a rough-and-ready lay audience that had alternative sources of law available in the vigilante and mining camp experiences.

### III. A METHODOLOGICAL NOTE

A brief explanation of the methodology used in this article is in order. As an economist, I tend to think in terms of things to count. Opinions, therefore, are data. As a lawyer, however, I believe opinions are more than data points to be counted. In this instance, my lawyer's soul convinced my economist's heart that this was a project that need not provoke cognitive dissonance and would allow both aspects of my training to express themselves.

To collect Wade's opinions I examined every volume of the Montana Reports covering the Territorial Court (volumes 1-9), checking each opinion for the author.<sup>59</sup> Wade's opinions, and the opinions of others in the cases where Wade dissented or concurred in a separate opinion, were then examined for their content. (I also read a sampling of opinions by other justices for comparison purposes.)

In addition to reading the text of Wade's opinions, I also examined all the written opinions of the Territorial Supreme Court and quantified various aspects of the opinions. These included cataloging who authored each opinion, whether there was a dissent or concurrence, whether the opinion involved criminal or civil matters, whether the opinion reversed or affirmed the court below, the judge in the court below, the length of the opinion, and the number of citations to three categories of cases: Montana decisions, California decisions, and other decisions. Several of these aspects require brief further methodological discussion.

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<sup>59</sup> The focus on territorial supreme court opinions, rather than district court files, is justified in part by Guice's conclusion that "[w]hile district court files shed considerable light on social and economic conditions in the territories, they do not add significantly to an understanding of the law made during the judicial process." GUICE, *supra* note 1, at 134.

### A. *Identifying Trial Judges.*

Identifying the trial judge, an important bit of information in evaluating Wade's performance as a trial judge, required making some assumptions about the data in some instances. For several volumes of Montana Reports, the reporter identified the judge who tried the case.<sup>60</sup> In addition, after 1886 when the court was expanded to four members to allow a three member appellate panel that excluded the trial judge, the trial judge could be determined by seeing which judges voted.<sup>61</sup> For the remainder of the opinions, I relied on the assumption that a case appealed from a particular judicial district would have been tried by the judge assigned to that district. This assumption appears to be reasonable because among opinions with the trial judge reported this is almost always the case. Nonetheless the statistics based on trial judge identity should be considered as less reliable than those based on appellate judge identity. Of course, this tells us only about the cases where there was an appeal. Wade estimated that approximately one tenth of trial court decisions were appealed.<sup>62</sup>

### B. *Length*

The page calculations are based on page counts that followed these rules: briefs, arguments, and factual summaries separately reported were not counted and page counts were rounded to the nearest page. As exact counts of the number of lines of text, these are only approximations. As proportions of pages, they are a reasonable proxy.

### C. *Citations*

The Territorial Court cited to opinions from many courts, including federal courts, courts in other states and courts in England. Compiling a complete list of source states would have been interesting, although it would have required a degree of investigation that seemed well beyond any promised reward.<sup>63</sup> I opted, therefore, to examine a smaller set of sources for information. I counted the number of citations to Montana court decisions to search for evidence of how the court and Wade viewed the development of Montana's common law. I also counted citations to California cases as a proxy for the importance of other courts because of California's particularly influential role in Montana legal history.<sup>64</sup> Finally I lumped all other citations into a single category of "other."<sup>65</sup>

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<sup>60</sup> Volumes 1, 2, and 3 all provided this information in most cases.

<sup>61</sup> Volumes 6, 7, 8, and 9 generally made this possible.

<sup>62</sup> Wade, *1880-1894*, *supra* note 2, at 655.

<sup>63</sup> The citations themselves were not in accord with modern citation practice and so determining which jurisdiction was being cited was not always (or even often) possible from the citation itself. Nineteenth century judges and lawyers may have recognized the abbreviated names of many of the reporters cited, but twentieth century law professors do not.

<sup>64</sup> Not only did many early Montanans come from California, following the discovery of gold, but Montana adopted California's civil practice code in 1867 (Wade, *Necessity*, *supra*

## IV. WADE'S OPINIONS

As noted earlier, Wade wrote a great deal. The reader of Wade's opinions will be struck by several things. First, Wade was not a man of few words – he rarely used one where three would do or one example where two or three could be provided.<sup>66</sup> Second, despite the somewhat excessive length of some of his opinions, he was not a hack writer. His sentences may be numerous, but they are well-written and generally a pleasure to read. Third, Wade's opinions reveal a dry sense of humor. Wade was no Mark Twain, but he was also no Wilbur F. Sanders.<sup>67</sup> Although not demonstrating the elaborate cleverness of some modern judges, Wade often skillfully turned a phrase to skewer a particular argument. Rejecting a statutory interpretation claim in an 1887 case, for example, he noted that “[i]t is apparent to everyone except lawyers what the legislature intended” in a particular statute.<sup>68</sup> In another case a defendant who

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note 9, at 10) and based the 1895 Civil, Political, Civil Practice and Criminal Codes (heavily influenced by Wade) on California's versions of those laws. In an 1880 case Wade noted that “Our habit is to follow the supreme court of California when applicable, having taken our [civil practice] code from that state.” *Hershfield v. Aiken*, 3 Mont. 442, 449 (1880). Thus both ends of Montana Territory's legal history were bracketed by California influences.

<sup>65</sup> In many instances these decisions were judgment calls based on my assessment of the costs and benefits of collecting further data – examining patterns of citations to statutes might, for example, have produced interesting results. Those alternatives must wait for further work and other investigators, however.

<sup>66</sup> Wade must have heard some contemporaneous criticism of the court's opinions' length, for he noted in his contribution to Miller's history of Montana, that

perhaps a severe critic would pronounce against the length of many of the opinions, but when it is remembered that the three justices of the Supreme Court were required to hold district court in the several counties of the Territory for eight or nine months of the year, besides two terms of the Supreme Court, it will be realized that they did not have time to make their opinions brief.

Wade, *1880-1894*, *supra* note 2, at 655-56.

<sup>67</sup> Sanders was a contemporary to Wade and a legal figure in Montana who stands out in my research as unrelievedly humorless.

<sup>68</sup> *Carruthers v. Comm'rs of Madison County*, 6 Mont. 482, 484 (1887). Other examples of Wade's humor (and what better use is there for a law review footnote?) include: In rejecting a claim that a woman who had given notice of being a sole trader in too many places, for example, Wade wrote that “The defendant ought not to complain that the plaintiff gave too much notice of her rights.” *Herman v. Jeffries*, 4 Mont. 513, 526 (1883). Refusing to allow a defendant company to overturn a verdict on the ground the plaintiff had been allowed to amend his complaint to correct his mistake in suing it as the “Cortland Cattle Company” instead of as the “Cortland Cattle Company, Limited,” Wade noted that “[t]hese gentlemen had the right to give their firm or company any decent and respectable name, and to insist on being sued in that name; but after disclosing their true name in the answer, they ought not to object to being given the same firm name and style in the complaint.” *Ramsey v. Cortland Cattle Co.*, 6 Mont. 498, 499 (1887). In another case Wade rejected an argument that an amendment to the prayer for relief had been inappropriate by noting that “The prayer is no part of the complaint, and amending it was not material. A party is entitled to the relief

admitted in his demurrer that he wrongfully and unlawfully seized and converted the plaintiff's property was admonished that "Confessions of this kind may do the defendant good, but they are bad for his demurrer."<sup>69</sup>

Courts were an important source of entertainment on the frontier<sup>70</sup> and Wade must have held his own as a "content provider" for his audiences. Having a sense of humor strong enough to peek through into his written opinions also helped Wade get through some of the more difficult moments caused by frontier conditions.<sup>71</sup>

One crucial issue is understanding the tension between Wade the proto-legal realist and Wade the judge. In the midst of his novel *Clare Lincoln*, for example, he pauses the action for an extended dialogue between his hero and villain, both studying law in the chambers of a distinguished lawyer. The villain argues that he will prosper by using his admittedly less thorough knowledge of the law together with his more practical skills to "rake up lawsuits" that will make his fortune. The villain scorns the hero's devotion to the law:

The science of the law is a myth, and the more one studies it the less he understands it; it is full of technicalities and quibbles, designed to cheat and to deceive, and if one is inclined to be honest, this noble science will teach him how to steal. There is nothing stable and certain about it; its decisions are as variable as the wind, and the man with the longest purse generally wins. I have seen poor scoundrels plunged into prison, while rich ones, guilty of similar offenses, have gone unpunished. Yea more. I have seen the poor murderer hung, while the one with plenty of money not only escapes all punishment but becomes the pet of society. Then don't talk to me anymore of the law being an exact science that secures justice to all men. It is an instrument of injustice, and I mean to take advantage of this to make money, for money, after all, is the god that rules the world.<sup>72</sup>

The hero responds at length, denying that the rich escape justice or that "the man with the money generally wins the case." Rather law uplifts, as does its study, because

It teaches the purest principles of justice. The very first principle that a law student learns is that law is right reason, and that it is a rule of civil conduct prescribed by the supreme power of the State commanding what is *right* and prohibiting what is *wrong*; and every maxim of the law is of like character, and their study necessarily expands and enlarges the mind, and the quibbles and technicalities you spoke of are simply safeguards thrown around the law to protect the innocent from the trickery of the knave, from the plots of your

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which the facts alleged and proved warrant, whether his prayers are answered or not." Gillett v. Clark, 6 Mont. 190, 192 (1886).

<sup>69</sup> Palmer v. Murray, 6 Mont. 125, 128 (1886).

<sup>70</sup> See SPENCE, *supra* note 3, at 216.

<sup>71</sup> Interestingly, one of the villains of Wade's novel resolves to flee west when his misdeeds are discovered: "I will make my way to the West, if possible. There is a place in that benighted region 'beyond the genial influences of civilization,' and that is just the place for me." WADE, CLARE LINCOLN, *supra* note 6, at 421.

<sup>72</sup> WADE, CLARE LINCOLN, *supra* note 6, at 195.

model lawyers.<sup>73</sup>

Similarly, in his 1894 essays on the legal history of Montana, Wade began the first chapter by proclaiming that “In every age and in every country, the law has been and is an index to the moral and intellectual development of the people.”<sup>74</sup>

The dispute between Wade’s villain and hero in his 1876 novel mirrors a conflict in Wade’s own career and writings. On the one hand, Wade could assert in his chapters in Miller’s history of Montana that finality, not the content of the decision, was the most important characteristic of the territorial supreme court.<sup>75</sup> Indeed, in his arguments for codification, Wade did not sound much different from *Clare Lincoln’s* villain. On the other, he could argue that the law expressed morality, not only by directly forbidding or requiring certain conduct, but through its entire structure and development. A sophisticated, nuanced legal system that substituted the rule of law for rule of might demonstrated that a society had reached an advanced stage of development. The growth of the legal system also helped produce the society’s development.

#### A. *Wade and the Territorial Court*

Decius Wade served as Chief Justice of the Territorial Supreme Court from March 17, 1871 to May 2, 1887. During that time he authored 197 written opinions deciding cases (not including concurring and dissenting opinions), slightly over 30% of the 637 written opinions issued in the entire history of the Territorial Supreme Court from its creation in 1864 until statehood in 1889. Wade’s opinions made up 999 pages of the 2,965 total pages, or slightly more than 33%, of territorial court opinions. This may be due in part to his tendency toward “the expression of his views in many sentences.”<sup>76</sup> The volume of judicial opinion writing indicated by Wade’s totals is impressive, and all the more so when he is compared with other members of the Territorial Court. Table 1 lists the justices and their contributions.

Purely in terms of volume, Wade’s contributions are impressive, if not quite of the volume his contemporaries estimated.<sup>77</sup> This is partly due to Wade’s lengthy tenure on the Territorial Court – serving over sixteen years, Wade was on the court longer than any other member. Only Wade’s colleague

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<sup>73</sup> WADE, CLARE LINCOLN, *supra* note 6, at 196.

<sup>74</sup> Wade, *1880-1894*, *supra* note 2, at 260.

<sup>75</sup> Wade, *Second Chapter*, *supra* note 3, at 310 (“if there were still higher courts to which appeals might be taken, the process of reversing and affirming would still go on. That which makes a court of last resort important is the fact that from its decisions there is no appeal”).

<sup>76</sup> Henry Blake quoted in SPENCE, *supra* note 3, at 230. Ironically, Wade criticized the common law for “the inclination among the judges to write long opinions, when by the use of more time and study they might write shorter and better ones.” Wade, *Necessity*, *supra* note 9, at 8.

<sup>77</sup> Guice and Spence both give the estimate of half of the first six volumes of *Montana Reports*. GUICE, *supra* note 1, at 75; SPENCE, *supra* note 3, at 230.



Hiram Knowles managed to serve into the double digits and even he served only two thirds of Wade's tenure. (Table 10 lists the territorial court justices and their tenures.)

Wade was not merely around for a long time, however, he was also a prolific writer. Even controlling for length of tenure, Wade's output is impressive – he authored opinions at a rate of more than eleven per year of service and wrote almost sixty-two pages (not counting dissents and concurrences) of opinions per year.<sup>78</sup> In terms of pages of opinions per year, Wade produced more than all but five Territorial court judges, four of whom outrank Wade only by virtue of writing regularly during notably short tenures. Based on either length of service or volume of output, Wade has only two real rivals for the title of most influential territorial court justice: Hiram Knowles and William Galbraith, with both of whom Wade served for most of their relatively long tenures.

Wade's productivity as a judge was consistent. Table 3, Table 4, and Table 5 give appellate judicial outputs by court term and show Wade was often the most productive member of the court in both number of opinions and number of pages written. Wade's opinions also met the test of appellate review – he was reversed by the U.S. Supreme Court only twice in that court's review of seventeen of Wade's opinions.<sup>79</sup>

Wade also has impressive statistics as a trial judge. He sentenced a reported 500 men to prison and sent twelve to the gallows.<sup>80</sup> For the ten territorial court judges who served long enough and at the right times to identify their trial court records with reasonable accuracy,<sup>81</sup> Wade had a better reversal rate among cases appealed than five judges and was not too far off from several of those ahead of him.<sup>82</sup> Wade can thus reasonably be said to have been a dominant figure on the territorial court in terms of the volume of Montana law.

Perhaps because territorial judges were both trial and appellate judges, and because of Wade's experience as a litigator, Wade was also quite deferential to

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<sup>78</sup> See Table 1.

<sup>79</sup> GUICE, *supra* note 1, at 75.

<sup>80</sup> SPENCE, *supra* note 3, at 229. Wade apparently often made “a personal but pessimistic appeal for repentance” to condemned men. *Id.* Spence quotes one such appeal: “Does your soul now writhe in agony because of your bloody crime? Has your conscience become so awakened that it tortures you with horrors untold and indescribable, because of the innocent life that your bloody hand sacrificed for paltry gold?” *Id.* at 229, n. 74. Wade expresses similar views on the effects of crime on the perpetrators in CLARE LINCOLN.

Even if the crime is concealed in the breast of the criminal, and no suspicions or circumstances point towards him, yet the terrible secret impels him to his fate, and sooner or later he confesses, and is executed, rather than be harassed by the grim enemy that renders life a burden. There is no peace for the wicked. The guilty flee when no man pursues. Every sound startles them; they are afraid of their own thoughts; they fear the winds and the trees; they tremble lest the blocks and the stones rise up and whisper the story of their crimes.

WADE, CLARE LINCOLN, *supra* note 6, at 209-10.

<sup>81</sup> See section 3.1 *supra*.

<sup>82</sup> See Table 2.

trial judges and juries. He rejected a criminal defendant's appeal in one case by tersely stating that the theory on appeal amounted to asking the appeals court "to say that the jury and the judge who tried the case made a mistake in a matter of fact."<sup>83</sup>

One interesting gap in Wade's opinions is that he rarely wrote in cases about water law. The clearest case of innovation in the West, the development of the prior appropriation system, occurred while Wade was on the Montana bench but without his participation as a significant author.<sup>84</sup>

### *B. Sources of Law*

Particularly early on, Wade's opinions rarely took the form of simply applying an existing precedent or statute, something that is unsurprising given the relatively small number of Montana precedents available to him during the early parts of his career and the wide range of legal questions facing a new territory. To fill this gap, Wade (and the other judges of the court) relied on a variety of means.<sup>85</sup> First, he looked to case law from outside Montana. Second, he relied on a wide range of legal treatises that summed up the law in particular areas. Third, he often applied logic to the legal problem at hand, reasoning out the solution without resort to outside authority.<sup>86</sup>

Relying on these sources, Wade answered most legal questions in a straightforward manner. Although the Montana court occasionally recognized that it was addressing a case of first impression, for the most part Wade did not indicate that he felt free to choose the rule he preferred. Rather, Wade wrote as if legal questions on which there was no Montana precedent were not open but had been settled by the collective body of common law as expressed in opinions from other jurisdictions, in treatises, and in the underlying logic of the common law. As Wade indicated in one of his essays on the bench and bar of the territory, he believed that "[i]n this age of the world the discovery of new principles of law is rare, but there is a constant application of old principles to new facts and conditions."<sup>87</sup> This approach was consistent with the then-dominant "legal formalism" school of legal reasoning.<sup>88</sup>

Wade's use of treatises was wide ranging and regular. He used a considerable number of different treatises. When relying on a treatise, Wade often quoted (sometimes at length) from the treatise and then applied the rule there stated to the facts of the case just as if he were citing a case. The way Wade

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<sup>83</sup> *Territory v. Reuss*, 5 Mont. 605, 607 (1885).

<sup>84</sup> See Andrew P. Morriss, *Lessons from the Development of Western Water Law for Emerging Water Markets: Common Law vs. Central Planning* (unpublished manuscript on file with author).

<sup>85</sup> My survey of other Montana judges' opinions was less thorough and systematic but I uncovered no indication that they applied substantially different methods than Wade.

<sup>86</sup> See, e.g. *Black v. Black*, 5 Mont. 15 (1883).

<sup>87</sup> Wade, *1880-1894*, *supra* note 2, at 670.

<sup>88</sup> See WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT* (1998).

used treatises suggests that they were an alternative statement of the law, rather than a secondary source. A quote from Cooley, Greenleaf or Blackstone was thus as much a statement of the law as a quote from another court. In his 1894 essay, *Necessity for Codification*, Wade described the leading treatises as having done “much to bring to light and make accessible the principles of the common law.”<sup>89</sup>

Logic also mattered as a source of law because Wade treated the common law as a conceptual whole governed by an internal logic. Nineteenth century courts used logic (or assertions) to support even strong conclusions, and so Wade was far from alone in reasoning without citations.<sup>90</sup>

Montana Territory’s law, then, had more sources than the opinions collected in *Montana Reports* and the territorial statutes. Wade’s reliance on a wide range of sources of authority, treated as essentially interchangeable, makes clear an implicit understanding of the common law framework as a constraint on his activities as a judge.

Wade took a broad view of the common law in his 1895 speech *The Common Law*. He opened his remarks by tracing the common law, “one of the marvels of human history,” through Rome, Greece, “India, Egypt, and all the East,” back to “the beginning of history.”<sup>91</sup> Although I found no evidence that he cited to any precedents from those times, Wade clearly saw his own work as a judge as part of the historical development of the common law and the common law itself as part of the heritage of at least the “English-speaking race.”<sup>92</sup> Wade quoted Sir Matthew Hale, for example, that “the common law of England is not the product of the wisdom of some one man or society of men in any one age; but it is the wisdom, counsel, experience, and observation of many ages of wise and observing men.”<sup>93</sup> Case reports were a “monument of learning” unequaled in “all the world of intellectual effort and endeavor.”<sup>94</sup> For Wade the judge and Wade the author of *The Common Law*, the common law was a coherent functioning body of law that effectively constrained judges.

Just two years earlier, however, in his influential speech *The Necessity for Codification* and his contribution to Miller’s history, Wade had taken a much dimmer view of precedent and the common law. Men were charged with knowledge of the law, including the case law in “seven thousand volumes of reports, covering a period of a thousand years.”<sup>95</sup> These decisions were not

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<sup>89</sup> Wade, *Necessity*, *supra* note 9, at 9.

<sup>90</sup> See, e.g., ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895, at 15-16. (reprint 1979) (1960) (discussing Pennsylvania Supreme Court case striking a statute on freedom of contract grounds “[i]n an opinion containing but two-thirds of a page on the constitutional questions and with no citations....”).

<sup>91</sup> Morriss, *Wade*, *supra* note 8, at 235.

<sup>92</sup> Morriss, *Wade*, *supra* note 8, at 271.

<sup>93</sup> Morriss, *Wade*, *supra* note 8, at 265, quoting James Kent, commentaries on American Law (10<sup>th</sup> ed. 1960).

<sup>94</sup> Morriss, *Wade*, *supra* note 8, at 266.

<sup>95</sup> Wade, *Necessity*, *supra* note 9, at 2.

only in “ponderous volumes,” Wade argued, and required training to understand, they also included

decisions contradictory and irreconcilable; decisions overruling, modifying, limiting or enlarging other decisions; right decisions supported by wrong reasons, and wrong decisions supported by good reasons, by technicalities, or by no reasons at all; verbose and involved decisions, obscured by *obiter dicta* and speculative theories; broad and learned decisions, and narrow and ignorant ones; and decisions that decide the same thing over and over again.<sup>96</sup>

### Judges and lawyers

spend their lives searching for decisions that will determine the question in hand, but as precedents may generally be found on both sides of the question, the law is rendered doubtful and uncertain as to the most learned, and as to those who by intuition are presumed to know it in all its length and breadth, with its thousand variations and exceptions, it is a dark and insoluble mystery.<sup>97</sup>

Cases would never end without a court from which there was no appeal as “there may be found precedents upon the opposite side of almost every question.”<sup>98</sup>

Wade’s views on precedent as expressed in *Necessity for Codification* and Miller’s book have no foreshadowing in his work as a judge and are inconsistent with his views in *The Common Law* two years later. I found no indication that Wade experienced any difficulty distilling out the relevant common law principles from far-flung precedent as a judge, nor did he appear to find the existence of multiple precedents anything but helpful in that role. When he turned to praising the common law in 1895 as part of his general theme of reassuring Montanans that codification would not change any of the good things they had experienced as the common law, he spoke more consistently with his experience.

How then to explain the view of precedent in *Necessity for Codification*? When he delivered that speech, Wade was engaged in a political campaign to not only persuade Montanans to accept the code commission’s work, but to gain the attention of the Third Legislature. During early 1893, when the speech was delivered, the Montana legislature was deadlocked over the choice of U.S. Senators, and no other business was being transacted in Helena. Only a crisis in law could possibly persuade the legislators to focus on codification. Wade, thus, had an incentive to overstate the case.

Moreover in doing so, Wade was echoing the other American codification advocates in his 1893 address. Over the course of the second half of the nineteenth century, code advocates cast codification as a grand battle between enlightened progress (which they represented) and narrow, self-interested law-

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<sup>96</sup> Wade, *Necessity*, *supra* note 9, at 3. Here Wade was repeating a common theme among American codification advocates. See Morriss, *Right Answers*, *supra* note 10, at 369-371.

<sup>97</sup> Wade, *Necessity*, *supra* note 9, at 3.

<sup>98</sup> Wade, *Second Chapter*, *supra* note 3, at 310.

yers determined to preserve their monopoly on law through retrograde legal forms.<sup>99</sup> Wade appears to have gotten caught up in this vision of a titanic struggle between progress and self-interest and forgotten his own experience.

### C. Using Precedent

To study Wade's use of precedent, I examined three categories of case law precedent: Montana cases, California cases, and all other cases. Montana case authority, sparse at the beginning of Wade's career, gradually accumulated over the course of his tenure on the court. Wade's citation of Montana authority was in the middle of the range for all justices, as was his use of California authority. Wade, however, cited much more case authority from other states than his fellow judges.<sup>100</sup> When Wade found a Montana case on point, his opinions were short and to the point. For example, in an 1884 case involving a statutory interpretation question addressed in an earlier opinion, Wade cited that earlier case and stated that it "ought to settle the question conclusively, unless there is something in the case that takes it out of the ordinary rule."<sup>101</sup>

When a case fell within an existing precedent, that ended the discussion for Wade. Thus, for example, when confronted with a challenge to a criminal indictment that had been rejected by earlier Montana cases, Wade held that "we are compelled to say that this indictment is clearly within the *Stears* and *McAndrews* decisions, and those decisions we cannot disturb."<sup>102</sup> Of course, in a new territory, determining when there was a precedent could be challenging. In one case, for example, Wade rejected an attempt to rely on "precedent" from "the early days" of the court based on "the recollection and memory of the pioneers of the Montana bar, as the record of the cases, if the mutilated document produced here may be called a record . . ."<sup>103</sup>

Wade's use of case authority changed over the course of his career. Wade relied relatively more heavily on California authority and relatively less on Montana authority in the opinions he authored in the 1870s than he did in the opinions he authored in the 1880s.<sup>104</sup> This is to be expected, since there was relatively little Montana authority available in the early years of Wade's tenure. Interestingly, however, Wade sharply increased the amount of non-California, out-of-state authority he cited in the 1880s opinions over the 1870s opinions. This might also reflect the increasing availability of opinions to cite

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<sup>99</sup> See Morriss, *Right Answers*, *supra* note 10, at 374-75.

<sup>100</sup> See Table 6.

<sup>101</sup> *Stebbins v. Savage*, 5 Mont. 253, 254 (1884).

<sup>102</sup> *Territory v. Young*, 5 Mont. 242, 245 (1884). See also *Berry v. Comm'rs of Missoula County*, 6 Mont. 121, 122 (1886) (rejecting tax claim against Northern Pacific Railroad on the basis of prior precedent).

<sup>103</sup> *Chumasero v. Potts*, 2 Mont. 242, 248 (1886).

<sup>104</sup> See Table 7.

as Montana law libraries grew in volume.<sup>105</sup>

Wade's opinions used three different approaches to integrating precedent into the opinions: case summaries, string cites, and detailed analysis. The three were often mixed in the same opinion.

In summarizing an opinion, Wade frequently just quoted at length from the opinion. For example, in *Smith v. Freyler*,<sup>106</sup> Wade devoted almost two pages of the opinion to an extended series of quotations from a Wisconsin opinion on the point in question.<sup>107</sup> In *Parchen v. Anderson*,<sup>108</sup> fifteen of twenty pages of the opinion consisted of direct quotes from other opinions. This is also consistent with Wade's writing style in his pamphlets in the 1890s, when he relied heavily on quotations (not always attributed) from outside authorities.<sup>109</sup> Such opinions were undoubtedly helpful to lawyers who did not have the out-of-state reports available.

When using string cites, Wade massed the citations at the end of a discussion to make a point overwhelming. For example, in *Smith v. Freyler*,<sup>110</sup> Wade bolstered a quotation from a treatise by citing twenty-seven cases from a wide range of jurisdictions.<sup>111</sup> Since Wade indicated that he had taken the citations from the treatise,<sup>112</sup> he was not claiming original research. Moreover, since Wade (as he did routinely) cited multiple opinions from a single state within these string cites, he was not simply indicating that many jurisdictions followed the rule. The operative unit was not the number of jurisdictions but the number of judges. These massive string cites thus indicated that a principle was firmly established in the common law because it had been repeatedly recognized by many judges.

Note what the string cites are not. The common law's strength, at least as articulated by its strongest nineteenth century advocates,<sup>113</sup> lay in the application of principle to fact. String citing a rule contributed nothing to such analysis – indeed it was the antithesis of the common law process of the law's development. Wade's heavy reliance on them is thus a strong signal that he was not developing but merely applying settled principles in those instances. He may have been writing on a technically blank slate, but Wade often seems to have seen his options as thoroughly circumscribed.

*Freyler* also provides a good example of Wade's ability to analyze and distinguish precedents in a more sophisticated way. The appellants relied on some

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<sup>105</sup> See Wade, *1880-1894*, *supra* note 2, at 656 (noting availability of adequate libraries improving with time).

<sup>106</sup> *Smith v. Freyler*, 4 Mont. 489 (1882).

<sup>107</sup> *Smith v. Freyler*, 4 Mont. 489, 496-97 (1882).

<sup>108</sup> *Parchen v. Anderson*, 5 Mont. 438 (1885).

<sup>109</sup> See, e.g., note 12, *supra*.

<sup>110</sup> *Smith v. Freyler*, 4 Mont. 489 (1882).

<sup>111</sup> *Smith v. Freyler*, 4 Mont. 489, 493 (1882).

<sup>112</sup> Wade's citation is "Brandt on Sur. And Guar. sec. 208, referring to . . ." followed by the string cites. *Smith v. Freyler*, 4 Mont. at 493.

<sup>113</sup> See Morriss, *Right Answers*, *supra* note 10, at 376-78.

California decisions reaching the contrary result to the Montana trial court. Wade carefully distinguished the leading California case and, thus, those following it, and concluded that the cited cases were not inconsistent with the Montana rule.<sup>114</sup> Similarly, in a criminal case turning on interpretation of a Montana statute that was similar to a California one, Wade distinguished a California precedent on point by noting that it had been written by a divided court and that the dissent had the better argument.<sup>115</sup>

Wade's view of the law was thus not a totally static one, although he hinted in his other writings that the common law's development was complete.<sup>116</sup> The law could change with the times, as he noted in commenting that while a rule might have been one thing "[at] one time . . . and it is, perhaps, now held in some jurisdictions" to remain that way, "the weight of American authority is now opposed to this doctrine."<sup>117</sup> Changes in political structure could also reopen questions previously settled: The 1886 reorganization of the territorial court and the appointment of two new justices, for example, led Wade to state that previously settled issues were "still open, and as if presented here for the first time"<sup>118</sup> despite his authorship of the earlier opinion first addressing the issue.<sup>119</sup>

Wade did use the common law method and distinguish precedents based on factual circumstances. One thing he did not do, however, was look to the policy rationale for rules to distinguish cases. Wade relied instead on factual classification to determine if there was a factual distinction that required modification of the rule.

In particular, Wade recognized that common law rules were not necessarily based on policy choices that would be made the same way if addressed for the first time. Confronting the rule that individuals must be sued using their Christian names, for example, Wade rejected a challenge based on a claim that this was an outmoded practice.

It is not material how this doctrine became engrafted into the law, or the reasons for it, so long as we find it so thoroughly and conclusively established. That its foundation rests in a religious right or ceremony cannot be doubted. But this consideration is of no moment whatever. The question before us is one of law and not of religion, and though many principles of the law may have had their origin in the religious observances of our ancestors, and though the religious significance of the principle may have entirely passed away and become obsolete, yet the law remains, and, when a long course of decisions has established and defined a principle, we are not at liberty to disregard or impair it.<sup>120</sup>

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<sup>114</sup> *Smith v. Freyler*, 4 Mont. 489, 492-93 (1882).

<sup>115</sup> *Territory v. Duncan*, 5 Mont. 478, 484 (1885).

<sup>116</sup> Wade, *1880-1894*, *supra* note 2, at 670.

<sup>117</sup> *Heinbockle v. Zugbaum*, 5 Mont. 344, 347 (1885).

<sup>118</sup> *Butte City Smoke-House Lode Cases*, 6 Mont. 397, 400 (1887).

<sup>119</sup> *Silver Bow M. & M. Co. v. Clark*, 5 Mont. 378 (1885).

<sup>120</sup> *Wiebold v. Hermann*, 2 Mont. 609, 610 (1876).

Wade's use of precedent shows a judge who found room within the framework of the common law to adapt the principles of the law to Montana's unique circumstances. These adaptations were relatively few and usually on the margin rather than wholesale revisions of existing principles of law. (The great exception, of course, is prior appropriation.<sup>121</sup>) The adaptations Wade sought were rooted in fact, not policy.

#### *D. Statutory Interpretation*

Statutory interpretation was a significant part of the workload of a judge in Montana Territory. Guice, for example, calls interpretation of the lode mining statutes alone "[p]erhaps the jurists' most demanding task."<sup>122</sup> Montana's territorial statutes were not especially well drafted, reflecting the varied backgrounds of their drafters who, as Wade put it, "came to Montana from widely separated States and . . . brought with them recollections of the statutes in force in the place of their former homes, and thereby have been enacted into the statutes of Montana detached, fragmentary, and incomplete portions of the statutes of other States."<sup>123</sup> Further, as the result of a series of political disputes, Montana's were in particularly bad condition.<sup>124</sup> As a result, Wade wrote later, "the courts have consumed much time and study in an effort to make known what the legislative assembly intended by the statutes enacted."<sup>125</sup>

Wade hewed to a literal approach to statutory interpretation. He emphasized plain meaning and logical coherence of the statutes in question, two items that were sometimes in short supply. He summed up his approach in an 1874 opinion: "It is our duty to execute the will of the law-making power, where they have plainly expressed it, and where their intention is doubtful and obscure, to discover it by the well-known rules of statutory interpretation."<sup>126</sup>

Construing the federal statute governing mineral claims, for example, Wade dismissed the plaintiffs' explanation for why they had not complied with the statutory requirements by noting that "[T]he terms of the law are absolute. There are no exceptions."<sup>127</sup> In another case where two of three arbitrators made a ruling in the absence of the third, with his consent, Wade overturned

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<sup>121</sup> See Morriss, *Development of Western Water Law*, *supra* note 84.

<sup>122</sup> GUICE, *supra* note 1, at 121.

<sup>123</sup> Wade, *Necessity*, *supra* note 9, at 11.

<sup>124</sup> This was a major theme of Wade's in *Necessity for Codification*, *supra* note 9, at 10-11. See Morriss, *Plenty of Laws*, *supra* note 10, at 378-80 for a description of these events.

<sup>125</sup> Wade, *1880-1894*, *supra* note 2, at 661. Wade also expressed impatience with the legislature's repeated failure to improve the statutes.

The legislative assembly must cease to be the breeder of lawsuits; it must cease to levy taxes to pay for the interpretation of its own statutes or for explaining its own blunders. None but shysters and legal brigands and vampires hope to add to their gains by lawsuits that arise from confused and imperfect statutes.

Wade, *1880-1894*, *supra* note 2, at 664.

<sup>126</sup> *Smith v. Williams*, 2 Mont. 195, 201 (1874).

<sup>127</sup> *Saunders v. Mackey*, 5 Mont. 523, 534 (1885).



the award because the statute required that all three “shall meet and act together.”<sup>128</sup> Since the third arbitrator was absent, the terms of the statute were not met.<sup>129</sup> Wade took the same literal approach in a case involving Montana’s cattle drivers’ lien statute, giving those “intrusted” with the care of animals a lien on the animals. Rejecting a claim by men employed on a cattle drive, Wade held that the plaintiffs had not had the cattle “intrusted” to them.<sup>130</sup>

As with the common law, Wade rejected the idea that the court should consider policy in construing statutes.<sup>131</sup>

With the policy of the statute we have nothing to do; as to the motive of the legislature in enacting it, it is not our province to speak. Whether it is wise or foolish, whether it meets the demands and requirements of the country is a matter for the legislature, and not the courts. . . . If the law is a bad one, nevertheless it should be enforced until the rightful authority repeals it.<sup>132</sup>

Unlike those modern judges who may be strict constructionists one day and find more latitude in interpretation the next,<sup>133</sup> Wade was consistent in his approach. Despite the confusion and obscurity caused by Montana’s periodic “reforms” of her statute law and poor drafting, Wade consistently clung to enforcing statutes according to their terms, as can be seen in Wade’s opinions in the sole traders’ cases.<sup>134</sup> As described below, Wade’s language in divorce and married women’s sole trader act cases suggest he strongly favored women’s rights in those types of cases. Yet he did not hesitate to enforce the terms of the

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<sup>128</sup> *Dunphy v. Ford*, 2 Mont. 300, 301 (1875).

<sup>129</sup> *Manton v. Tyler*, 4 Mont. 364, 367 (1882). Full compliance with technical requirements of statutes and contracts was clearly part of Wade’s view of the role of the law – he made a central plot point in the early portion of his novel turn on whether an interest payment was made precisely on the day it was due. See WADE, CLARE LINCOLN, *supra* note 6, at 38-58. *McCormick v. Hubbell*, 4 Mont. 87, 100 (1881). This same insistence on full compliance could also benefit women. In another case Wade read the act to allow a married woman to file for protection in any county where she might be temporarily resident since “any other construction of the statute would deprive a married woman of its benefits, unless she remained a permanent resident of the county in which her separate list was first filed, and would expose her property to seizure for her husband’s debts, if she undertook in good faith to change her residence.” *Herman v. Jeffries*, 4 Mont. 513, 526 (1883).

<sup>130</sup> *Underwood v. Birdsell*, 6 Mont. 142, 146 (1886).

<sup>131</sup> Note that Wade was writing before the “conservative oriented revolution” of the 1890s “which vastly expanded the scope of judicial supremacy.” PAUL, *supra* note 90, at 2.

<sup>132</sup> *Smith v. Williams*, 2 Mont. 195, 201 (1874).

<sup>133</sup> See, e.g. Andrew P. Morriss *Recent Supreme Court Rulings Remove Power from Montanans*, in THE MISSOULIAN (Missoula, Montana) (Sunday, November 21, 1999) (discussing Montana Supreme Court rulings in 1999 cases in which the court adopted widely varying methodologies for constitutional interpretation to suit the result). Compare *Armstrong v. State*, 989 P.2d 364 (Mont. 1999) (ignoring intent of drafters of constitution) and *Montana Environmental Information Center, Inc. v. Department of Environmental Quality*, 988 P.2d 1236 (Mont. 1999) (stressing intent of drafters).

<sup>134</sup> Wade did not leave a clear record of his own political views; his survival across four terms in heavily partisan Montana and through Reconstruction and beyond suggest that those views were not sufficiently extreme to cost him the local or national support necessary for reappointment.

sole trader acts firmly even when doing so cut against the larger goal of protecting women.

Literalness in the face of the chaotic statutes derived, in part, from the lack of democratic legitimacy in both the territorial courts and executive. Only the territorial legislature was representative of the people of the territory directly, and the lack of a presidential vote meant that the territory's residents lacked even an indirect voice in the other branches. While elected judiciaries were spreading throughout the country,<sup>135</sup> Wade and the territorial court remained an institution imposed from above. Wade's writings on self-governance and the history of the territorial courts show that he was acutely aware of these political limitations. Sticking literally to the statutes' language, even when the statutes were incomprehensible or harsh reflected, in part, the court's lack of legitimate political authority to go beyond or behind the language.

### *E. Women and the Law*

"Territorial law early accepted the natural heritage of women's rights and accelerated its growth."<sup>136</sup> Wade played a role in this through a number of opinions concerning married women's rights to independent legal existence. Montana Territory adopted married women's rights legislation early, passing a statute to allow married women to transact business under their own names and on their own account in 1874.<sup>137</sup> In addition to construing this act, Wade also wrote significant decisions in several cases concerning women's rights in divorce actions.

Although, as with other statutes, Wade read the sole traders act literally,<sup>138</sup> Wade also was willing to fill gaps in meaning in this area. For example, Wade rejected an attempt by a creditor of a woman's husband to seize her property on the grounds that the type of property was not specifically described in the declaration. "There is no limit to the kind of property she becomes entitled to purchase in her own name, and on her own account, by virtue of this declaration. . . . The sole-trader act gives the right to a married woman to carry on business in her own name. Her right does not depend upon the consent of her husband."<sup>139</sup> Wade also held that a technical failure that led to the recording of the list of separate property under the wife's maiden name rather than her married name (as the statute required) could be excused where "no one seems to

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<sup>135</sup> See Hall, *supra* note 21.

<sup>136</sup> BAKKEN, *supra* note 14, at 16.

<sup>137</sup> The sole traders' acts were a major western contribution to expanding women's rights, as married women's rights were much more limited in the east. See BAKKEN, *supra* note 14, at 30-31.

<sup>138</sup> In *Manton v. Tyler* Wade held that the statute did not protect a woman who had neglected to state in her filing that she intended to carry on business on her own account as well as in her own name. *Manton v. Tyler*, 4 Mont. 364, 366 (1882).

<sup>139</sup> *Shed v. Blakely*, 6 Mont. 247, 249 (1886).

have been deceived or injured by the mistake.”<sup>140</sup> Similarly, he rejected a defense to a suit by a married woman who had been deserted by her husband, in which the defendant objected that the woman had not alleged desertion and failed to qualify under the sole trader’s act since she had not filed the required list of property with the county clerk. Wade held that a deserted woman had to be able to sue and be sued as a practical matter.<sup>141</sup>

Wade’s short opinion in the divorce case of *Albert v. Albert* is notable for his brief but eloquent defense of women’s right to be free from physical abuse by their husbands. The trial court had instructed the jury that the fact that the husband had struck the wife more than once was not enough to support a finding of extreme cruelty. Rather, the trial court said, the jury must consider whether the wife had provoked the husband. If so, the trial court had told the jury, then “the act of plaintiff is a legal excuse to the defendant in treating her in a harsher manner than if plaintiff had been free from fault.” Wade rejected this view of the law simply and eloquently:

We think one beating or whipping of a wife by her husband sufficient to establish the charge of extreme cruelty. Such an act could not be accidental or by mistake; and if not, the probabilities would be that it might be repeated again and again, subjecting the wife to constant fear and rendering her life miserable. It is extremely cruel for a husband to beat or whip his wife, even once. Mere words can never afford any provocation or excuse for such an act; no words can justify an assault. A husband is not authorized to whip his wife because she calls him hard names, nor can he graduate the force of his chastisement by the vigor of the language used. A husband may not raise his hand against his wife, except in absolute defense of his life, or to prevent his receiving great bodily harm; and then he can only use force sufficient to protect himself from the danger.<sup>142</sup>

In *Black v. Black*, another extreme cruelty case, Wade upheld an instruction that told the jury that the husband’s forcing of his wife to live in the same house with his brothers could constitute extreme cruelty.<sup>143</sup> Noting that the defendants had failed to properly bring the record before the court, Wade held that although the court could not know what the facts and circumstances were, it would presume that such facts and circumstances existed. If the brothers had entered into a conspiracy to defraud the wife of her separate property as the complaint charged, then the husband’s taking his wife to live with the other conspirators could be extreme cruelty.

Wade was equally vigilant about women’s financial rights in divorce actions. In *Black*, for example, Wade also affirmed an award of costs to the wife against her ex-husband’s brother. Wade held the award a valid exercise of the trial judge’s discretion because “[i]f one unnecessarily intrudes himself into a divorce case, and contests a wife’s right to a divorce, for purposes of his own,

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<sup>140</sup> *Palmer v. Murray*, 6 Mont. 125, 128 (1886).

<sup>141</sup> *Palmer v. McMasters*, 6 Mont. 169, 171 (1886).

<sup>142</sup> *Albert v. Albert*, 5 Mont. 577, 578-79 (1885).

<sup>143</sup> *Black v. Black*, 5 Mont. 15, 23-24 (1883).

and a divorce is granted notwithstanding, he ought to be compelled to pay the expenses consequent upon such intrusion."<sup>144</sup> In another case, he rejected an appeal from some defendants who had been found to have engaged in a conspiracy with the plaintiff's former husband to help him evade an alimony decree. Wade concluded that such defendants "stand in poor plight to resist the demands of the injured wife who comes with an adjudication in her favor establishing the validity and justness of her claim."<sup>145</sup>

Wade was not a proto-feminist, however. He quickly dispatched a claim in a breach of promise to marry case where the man and woman had previously lived together without being married, under an arrangement by which the man paid the woman \$25 per month to live with him. "We think the fact that a man has lived with a woman as his mistress raises a very strong presumption that he does not intend to marry her at all."<sup>146</sup> The woman's claim for damage to her affections also received short shrift: "The record does not show that the plaintiff's affections were in any way implicated in this matter. She lived and cohabitated with the defendant as his mistress for money, at so much per month, and the evidence fails to show that her affections have been wounded in the least degree by his failure to marry her. . . ."<sup>147</sup>

Wade's opinions in actions involving women's rights shed light on his approach to the law. Reading statutes literally in most cases, Wade refused to allow his sympathy for women's rights to lead him to a less literal reading. Where the legislature left a key term undefined, however, Wade was able to read the statute to allow greater protection for women. In the common law action for alienation of affections and breach of promise to marry, Wade was unwilling to disturb the structure of the common law rule. Both the common law rule and the statute were thus subject to the same set of literal, formal readings.

#### *F. Political Issues*

Wade was chief justice during a time when Montana was creating itself as a political entity. It was also a time in which Montanans were held in an extended territorial purgatory, largely for partisan reasons.<sup>148</sup> As a result, Wade participated in numerous decisions defining the boundaries of Montana's legal structures. He brought to this endeavor a clear sense of what were the proper provinces of the legislature and the courts.<sup>149</sup>

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<sup>144</sup> *Id.* at 25.

<sup>145</sup> *Twell v. Twell*, 6 Mont. 19, 29 (1886).

<sup>146</sup> *Dupont v. McAdow*, 6 Mont. 226, 231 (1886).

<sup>147</sup> *Id.* at 232-33.

<sup>148</sup> See MALONE, ET AL., *supra* note 4, at 194-200 (describing struggle for statehood).

<sup>149</sup> For example, Wade wrote a concurrence in one case to tell the losing party that his argument "would be a forcible proposition to urge before a legislature whose province it is to make laws, but before a court the law must be taken as it is, and not as it ought to be." *Johnston v. Lewis and Clarke County*, 2 Mont. 174 (1881) (Wade, C.J., concurring).

Unlike the common law and statutory interpretation cases, Wade saw a role for policy analysis in political cases. For example, in *People ex. rel. Boardman v. City of Butte*,<sup>150</sup> Wade dealt with a challenge to the act chartering the City of Butte, which limited the vote on accepting the charter to tax-paying households who had been actual residents of the city for at least three months. Wade upheld the act, with frequent references to Thomas M. Cooley's treatise on *Constitutional Limitations*,<sup>151</sup> by reasoning that the people had given the legislature the power to act, including the power to have a subset of voters decide whether to accept a city charter or not:

The theory of a government by the people is that they act through their representatives. They delegate their authority to their agents, who speak and act for them in making laws. The act of an agent, within the scope of his authority, binds the principal. Hence, laws enacted by a properly constituted legislature, within the scope of its authority, and not in conflict with the constitution or organic law [establishing the territory], bind the people. They give their consent to laws by clothing their agents with power and authority to make them. There is no reserved power in the people to consent or to reject laws properly enacted by their lawfully constituted agents. If they object to the laws for the reason that they are not within the limits of the organic law, they may have that question determined in the proper tribunals; if they object to them because they are oppressive, or do not fulfill their expectations, they may elect new agents to alter or abolish them, and to enact others in their places.<sup>152</sup>

Wade was not content to let the decision rest on this theory, however, but went on to defend the legislature's decision:

Submitting the charter to the resident tax-paying householders of the city was equal and fair; it was not illegal or immoral; nor was it idle or arbitrary or opposed to sound policy. This limitation of the right to vote upon the charter, and for officers created by it, was intended to place the government of the city in the hands of those who had to bear its burdens and provide funds for paying its necessary expenses.<sup>153</sup>

Wade's views in *City of Butte* on the legislative power were consistent with his earlier decision in *Wilcox v. Deer Lodge County*,<sup>154</sup> in which Wade had upheld the legislature's requirement that the county assume the debt of a privately constructed road. Although Wade conceded that "[t]he spirit of our institutions and the sources from which we derive political rights seem to forbid" the legislature from forcing this obligation on the county, the county was nonetheless a "subordinate" part of the larger government and so the legislature

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<sup>150</sup> *People ex rel. Boardman v. City of Butte*, 4 Mont. 174 (1881).

<sup>151</sup> Cooley's treatise was "the first great step" toward development of the doctrine of freedom of contract. "Although Cooley was conscientious enough to mark out areas of state power as well as restrictions upon states, the overall emphasis of the book was on 'Limitations.'" PAUL, *supra* note 90, at 12.

<sup>152</sup> *People ex rel. Boardman v. City of Butte*, 4 Mont. 174, 206-07 (1881).

<sup>153</sup> *Id.* at 214.

<sup>154</sup> *Wilcox v. Deer Lodge County*, 2 Mont. 574 (1877).

had the power to impose the obligation.<sup>155</sup> Not only could it do so, Wade argued, but it was right that it do so based on the county's "moral obligation . . . to pay for the municipal benefits it has derived and is enjoying" from the road.<sup>156</sup> His views in *City of Butte* are also consistent with his earlier article on self-government, in which he complained bitterly of the lack of representation allowed the citizens of the territories, comparing their situation to that of the American colonists before the Revolution.<sup>157</sup>

Wade was a strong believer in private property, but also a firm advocate of using the power of government to improve conditions in Montana,<sup>158</sup> so long as it did not infringe on property rights. Thus, for example, Wade upheld the Northern Pacific's right to be free of county taxation on its property<sup>159</sup> but required the railroad to pay compensation when its acts injured others by causing fires.<sup>160</sup> The railroad's charter created property interests in the company, a key element in the tax decision, but "the property of one man cannot be imperiled by giving a charter to another. Men do not own their property subject to any such right unless it is lawfully taken upon just compensation and condemned to a public use."<sup>161</sup> In this regard, Wade fit better within the structure of legal conservatism which "while assigning the protection of private property to a high status in the hierarchy of values, was especially concerned with the problems of maintaining an ordered society in a world where the forces of popular democracy might become unmanageable" rather than within the *laissez-faire* tradition.<sup>162</sup>

Wade's views on property rights also can be seen in his upholding, over a vigorous dissent from Justice Knowles, the property rights of aliens against anti-Chinese legislation that attempted to confiscate the placer mining claims of all aliens for the benefit of the territorial government.<sup>163</sup> "[A]s between citizen and alien, their titles are equally sacred and secure, and equally entitled to the protection of the law."<sup>164</sup> The federal government might, Wade conceded, demand forfeiture of an alien's property based on "the right of self-protection which inheres in every government," but the such power was "a great sovereign prerogative right, which belongs only to the supreme power in a State, and cannot be exercised by any subordinate, secondary or limited depository of

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<sup>155</sup> *Id.* at 577.

<sup>156</sup> *Id.* at 580.

<sup>157</sup> Wade, *Self-Government*, *supra* note 7, at 303.

<sup>158</sup> See, e.g., *The Hope Mining Co. v. Kennon*, 3 Mont. 35, 37 (1877), in which Wade discusses taxation: "Every form of government necessarily provides some system of taxation. This results from the objects and purposes for which governments are instituted and organized. . .")

<sup>159</sup> *Northern Pac. R.R. v. Carland*, 5 Mont. 146 (1884).

<sup>160</sup> *Diamond v. Northern Pac. R.R. Co.*, 6 Mont. 581 (1887).

<sup>161</sup> *Id.* at 595.

<sup>162</sup> PAUL, *supra* note 90, at 4-5.

<sup>163</sup> *Territory v. Lee*, 2 Mont. 124 (1874).

<sup>164</sup> *Id.* at 129.

power."<sup>165</sup> Territories thus did not qualify to exercise such power as they had "no sovereign power or authority whatever."<sup>166</sup> (In Wade's 1879 essay on self-government he listed this lack of lawmaking power as a grievance.<sup>167</sup>)

In *Northern Pacific Railroad v. Carland*,<sup>168</sup> Wade authored a major decision touching on a number of important legal issues of the 1880s in the West. The combination of taxation, territorial status, and railroads raised by this opinion make it an excellent vehicle for examining Wade's views on these important subjects.

Custer County assessed the Northern Pacific a tax on "twenty miles of railroad and rolling stock" located within the county. The railroad brought a bill in equity to attempt to restrain the collection of the taxes, arguing that it was exempt from taxation by territorial governments under federal law. The railroad also argued that it should not have to follow the usual procedure in tax cases and first pay the taxes and then seek a refund in court because Custer County was so indebted that it would not be able to repay the taxes if the railroad prevailed. The case thus raised issues of procedure, constitutional law, statutory interpretation, and judicial power.<sup>169</sup>

Three aspects of Wade's analysis bear particular attention. First, Wade had to determine whether the railroad's personal property (rails, stations, and the like) were within the congressional grant of immunity from territorial taxation, as applied to the railroad's right of way. Wade held that the right of way was a property interest. "It is an easement in the land described in the right of way. It is a freehold interest in the soil, having all the properties of realty."<sup>170</sup> Noting that personal property attached to real property became part of the real property, Wade then held that the property taxed was attached to the right of way. In doing so, Wade made a lengthy survey of other decisions on various conflicts between owners of rights of way and governments over the attachment of personal property. As a result, Wade held, "[i]t follows from these propositions that the road-bed, the rails fastened to it, station buildings, workshops, depots, machine shops, etc., constructed over, upon or through the right of way granted to the plaintiffs and attached to the soil, and annexed to the easement, become a part of the real estate of the railroad company."<sup>171</sup>

Wade did not stop here, however. "There is another principle that ought to

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<sup>165</sup> *Id.* at 129.

<sup>166</sup> *Id.* at 134.

<sup>167</sup> Wade, *Self-Government*, *supra* note 7, at 304.

<sup>168</sup> *Northern Pac. R.R. v. Carland*, 5 Mont. 146 (1884).

<sup>169</sup> Wade summarized the issues as: "(1) Was the action commenced in the proper court? (2) What is included in the right of way, which, by the terms of the act, is exempt from taxation? (3) Was it within the constitutional power of congress to so exempt said property from taxation? (4) If the property was subject to taxation, was the tax assessed and levied as our statute requires? (5) In what cases and under what circumstances will the collection of taxes be enjoined?" *Id.* at 155.

<sup>170</sup> *Id.* at 157.

<sup>171</sup> *Id.* at 168.

give some light on this question."<sup>172</sup> The grant of rights to the railroad was to accomplish a public purpose, the building of a transcontinental railroad and implies the authority to take the actions necessary to accomplish that purpose. The railroad required rights equivalent to those of an owner of the land itself, Wade concluded, and therefore had acquired just such an interest.<sup>173</sup> Interestingly, Wade reached this conclusion in a little more than a page of text, compared to the twelve pages devoted to the attached personalty argument.

Having found the property within the congressional exemption, Wade now had to resolve the issue of whether such an exemption was constitutional. After an extensive review of the relevant authorities on the powers of Congress, Wade summed up the constitutional issue thus:

Briefly, the situation is this: The United States owns the public lands, and has the right to dispose of them as it will. In order to bring about the construction of a railroad from Lake Superior to Puget Sound, which it might use for certain public and national purposes; to strengthen the government and to facilitate its operations; to promote the happiness and prosperity of the people; to consolidate the Union; and to invigorate and strengthen the nation,— it enters into a contract whereby it agrees to give certain of the public lands, and to exempt the right of way through such lands in the territories from taxation, in consideration that a road be constructed upon the terms and conditions named in the contract. The government had the right to make such a contract. It had the unlimited right to dispose of its own property. The provision exempting the right of way from taxation was no more illegal than was the grant of lands to the company. Both the exemption and the grant were for the same purpose, viz., to aid in the construction of the road. A territorial legislature cannot defeat this solemn obligation. It cannot repeal an act of congress. It cannot take upon itself the attributes of sovereignty, and interfere in the disposal of property that does not belong to it. Our organic act (section 6) forbids the territorial legislature from passing any law interfering with the primary disposal of the soil.<sup>174</sup>

As noted above, Wade was no apologist for the Northern Pacific, holding it liable for fire damage caused by its negligence in failing to remove flammable material from its tracks and right of way and creating a rebuttable presumption that there was negligence in such circumstances, for example.<sup>175</sup> Nonetheless, like most Montanans, he understood the importance of the Northern Pacific to the Territory's future.<sup>176</sup>

In the political issue cases we see a quite different approach than Wade took in the private law areas. Far from disclaiming policy analysis, as he had for both statutes and the common law in private law, in political cases Wade actively sought to justify his conclusions on policy grounds. Acutely aware of

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<sup>172</sup> *Id.* at 168-69.

<sup>173</sup> *Id.* at 169.

<sup>174</sup> *Id.* at 187.

<sup>175</sup> *Diamond v. Northern Pac. R.R. Co.*, 6 Mont. 581, 594 (1887).

<sup>176</sup> See BAKKEN, *supra* note 14, at 4 ("the railroad was the most significant factor in bringing economic vitality to the region").



the tremendous political problems posed by territorial status – as shown by his 1879 essay on the subject – Wade took care to defend his political decisions on policy grounds.

In these decisions we also see a more complete vision of Wade's beliefs about the role of government. Wade clearly sympathized with the territorial urge to seek the active support of the federal authorities, even as Montana chafed under federal rule. The end of that activity, however, was statehood, self-rule, and economic prosperity through private action. As Wade's opinions in *City of Butte* and the Northern Pacific cases showed, he was also aware of the dangers of diversion of resources from public goods to private gains.

### G. Frontier Conditions

Under any definition of the frontier,<sup>177</sup> Wade's tenure included substantial portions of Montana's frontier experience. Being on the frontier meant that Wade sometimes had to confront less than ideal conditions for a judge in Montana.<sup>178</sup> The sheer size of Montana made service as a judge a challenge. "Whereas the first district judge of Montana had his residence at Virginia City, in the most populous part of the district, most of the United States cases arose at Custer City, 433 miles distant. . . . A judge spent four weeks on the road between Virginia City and Miles City to hold two terms of court in 1879."<sup>179</sup> Wade once spent six hours lost in thirty-below-zero weather.<sup>180</sup> Given that court was often a major event in an isolated area, people expected judges to provide entertainment well as justice.

As Wade remarked in an early opinion, the early days of the territory were a time when "the records and the forms of practice and procedure were in a state of chaotic uncertainty and disorderly confusion. . . ."<sup>181</sup> The combination of the relative inexperience of many members of the Montana Territorial legislature and the disorganization of Montana's statutes<sup>182</sup> meant that interpreting the statutes was often a challenge. Creative arguments, like that of the criminal defendant convicted of violating a statute requiring licenses for bars offering

<sup>177</sup> See BAKKEN, *supra* note 14, at 9-19 (for a thorough review of the varying definitions possible with respect to law).

<sup>178</sup> See GUICE, *supra* note 1, at 22-24 (describing early conditions for judges).

<sup>179</sup> POMEROY, *supra* note 29, at 53-54.

<sup>180</sup> SPENCE, *supra* note 3, at 215.

<sup>181</sup> *Chumasero v. Potts*, 2 Mont. 242, 248 (1875).

<sup>182</sup> See note 124 and associated text, *supra*. Inexperienced territorial legislatures and printers also sometimes just made mistakes. In 1872, the legislature passed contradictory statutes on succeeding days. *Higgins v. Edwards*, 2 Mont. 585, 586 (1877). A printer's error could also cause confusion. In a case on the issue of the appropriate penalty for a particular offense, where the statutes suggested that the penalty had been changed by a new statute in 1872, ". . . [u]pon further investigation it is ascertained that the statute of 1872, as published, was erroneous, and that the act of 1872, as it was enacted by the legislature and approved, was and is an exact copy of the statute of 1865 . . . ." *Territory v. Ashby*, 2 Mont. 89, 96 (1874) (Wade, C.J., concurring).

games of chance that poker was not a game of chance,<sup>183</sup> also offered Montana Territory's judges a different set of issues than their brethren in more established state courts. The lack of settled Montana precedent and short legal history of the territory also spawned attempts that were creative at best and frivolous at worst to circumvent statutes.<sup>184</sup>

Frontier conditions also made some improvising necessary at times. For example, Wade held, because judges had "the inherent right and authority to do every act proper and necessary" to keep the system functioning, a missing district attorney could not bring the courts and criminal justice system to a halt.<sup>185</sup> Wade is credited with "establishing far-reaching court procedures fitted to Montana's peculiar circumstances."<sup>186</sup>

Wade generally took a broad view of the inherent powers of the territorial courts. For example, in *Broadwater v. Richards*,<sup>187</sup> Wade confronted a gap in the administration of an estate in the probate system that left the estate's funds unprotected by a bond.<sup>188</sup> Despite a lack of explicit authority to do so, Wade found that the district court had the inherent power to order the estate administrator to give a bond to protect the estate funds.<sup>189</sup>

Flexibility in filling gaps did not mean Wade did not have a strong regard for what he viewed as necessary requirements for justice. He swiftly overturned a capital verdict in which one juror was excused for illness during the trial, leaving only eleven jurors to reach the verdict.<sup>190</sup> Wade did not simply rely on the traditional use of twelve jurors, but went beyond that to argue:

Security to the defendant and to the public is only found in a strict compliance with the law of the land. Jurisdiction comes by following the law. Disorder and uncertainty follow a departure therefrom. Neither the prosecution or the defendant, by any act of their own, can change or modify the law by which criminal trials are controlled.<sup>191</sup>

Similarly, Wade also reversed a criminal indictment because the statute forbidding "assault with intent to commit murder" could not include "assault and battery" as a lesser included offense.<sup>192</sup>

<sup>183</sup> *Kenyon v. King*, 2 Mont. 437, 438 (1876).

<sup>184</sup> For example a bank chartered under the national banking laws argued that its shares could be taxed only by a state and not a territory under the federal law. *See Board of Comm'rs of Silver Bow County v. Davis*, 6 Mont. 306 (1887).

<sup>185</sup> *Territory v. Harding*, 6 Mont. 323, 329 (1887). The absence of officials was a constant problem on the frontier. *See* GUICE, *supra* note 1, at 24-25.

<sup>186</sup> SPENCE, *supra* note 3, at 218.

<sup>187</sup> *Broadwater v. Richards*, 4 Mont. 52 (1881).

<sup>188</sup> The administrator of the estate had come to the district court without a proper record upon which to confirm his actions and without a bond to protect the funds entrusted to him.

<sup>189</sup> *Broadwater v. Richards*, 4 Mont. 52, 80 (1881).

<sup>190</sup> *Territory v. Ah Wah and Ah Yen*, 4 Mont. 149 (1881).

<sup>191</sup> *Id.* at 168.

<sup>192</sup> *Territory v. Dooley*, 4 Mont. 295, 297-98 (1882). *See also* similarly strict interpretations of criminal statutes in *Territory v. Stears*, 2 Mont. 324 (1875) (reversing conviction because jury did not specify degree of murder directly) and *Territory v. Fox*, 3 Mont. 440 (1880) (re-

Wade took the roles of the court and the court officers seriously. Summing up an opinion overturning a conviction because the prosecution's opening statement referred to a witness to the crime but then failing to call the witness, Wade sternly lectured the prosecutor that the prosecutor's opening statement had been "an official statement made under the solemnity of his official oath" and quoted an English case that the role of the prosecutor was "not a plaintiff's attorney, but a sworn minister of justice, as much bound to protect the innocent as to pursue the guilty. . . ."<sup>193</sup> Nor was Wade willing to tolerate attempts to delay through pointless appeals.<sup>194</sup>

Wade was equally severe with judges in *Clare Lincoln*:

His was an exalted position, the highest to which a man can attain. In his hands he held the rights and the liberties of the people: the responsibility was oppressive, for a mistake or an error in judgment was fraught with far-reaching consequences, -- it was almost a crime. The polar star of his position, the very foundation upon which he stood, was incorruptible honesty and integrity; with these he was the master of every complication; with these he touched the tangled web, and as if by magic the right was made to appear; with these he was strong and self-possessed, and his satisfied conscience covered him as with a shield; but losing these, he becomes the wicked tool of wicked men, a waif upon the world of troubled waters without an anchor, a curse to mankind.<sup>195</sup>

Wade also did not find that the frontier meant that Montanans were anything less than the full heirs of the common law's guarantees of liberty. In resolving a habeas corpus speedy trial challenge, where the defendant's trial had been delayed for almost a year because Congress had not provided funds for juries, Wade put the question into a larger context:

Among the principles that adorn the common law, making it the pride of all English-speaking people, and a lasting monument to the noble achievements of liberty over the encroachments of arbitrary power, are the following: No man can be rightfully imprisoned except upon a charge of crime properly made in pursuance of the law of the land. No man, when so imprisoned upon a lawful charge presented in a lawful manner specifying the crime, can be arbitrarily held without trial.

These principles are in accord with the enlightened spirit of the common law, and form a part of the framework of the English Constitution. They are guaranteed and secured by Magna Charta, the Petition of Rights, the Bill of Rights, and by a long course of judicial decision, and they belong to us as a

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versing conviction because charge of grand larceny held not to include a lesser offense of burglary).

<sup>193</sup> *Territory v. Hanna*, 5 Mont. 248, 250-51 (1884).

<sup>194</sup> *See, e.g., Clark v. Nichols*, 3 Mont. 372, 375-76 (1879) ("there was no good reason for appealing this case to this court. The appellant's purpose evidently was to delay the execution of the judgment against him, and in such cases it becomes our duty, under the statute, not only to tax the costs to the appellant, but to add thereto a judgment against him for such damages as may be just.").

<sup>195</sup> WADE, CLARE LINCOLN, *supra* note 6, at 380.

part of our inheritance from the mother country. These rights were claimed by our ancestors in Colonial times, and they have been engrafted into and secured by our Constitution, the supreme law of the land . . . .<sup>196</sup>

Although the western territories and states generally favored simplified pleadings and reduced emphasis on the technicalities of the common law,<sup>197</sup> Wade was something of a stickler for accuracy in court papers. For example, in a case where the judgment and complaint were inconsistent in describing the location and size of a piece of property, Wade reversed, saying “To affirm a judgment not supported by the complaint is simply to breed another law-suit to do away with the effect of this one.”<sup>198</sup>

Wade’s unwillingness to loosen standards to account for frontier conditions and insistence on the unbroken chain between Montana Territory and Magna Carta (and beyond) give us further insight into his view of the role of law as both a civilizing influence and index of civilization. Far from rejecting “technicalities” as unsuited to the frontier, the insistence on accuracy and literalness of interpretation indicate a man acutely aware of the thin line between the rule of law and anarchy on the frontier. The second major outbreak of vigilantism in Montana Territory in the 1880s,<sup>199</sup> to popular acclaim, brought home the fragility of the official order in Montana. Against this backdrop, Wade’s insistence on the technicalities of the law represent an important distinction between the law and vigilantism.

#### H. *The Role of the Jury*

In Wade’s address on *The Common Law*, he put great emphasis on the role of the jury. “More clearly than anything else, jury trials have brought home to the people the fact of liberty and equality. Neighbors and strangers, the rich and the poor, are upon a level and their voices and their ballots are absolutely equal, in this tribunal, where rights are ascertained and adjudicated.”<sup>200</sup> Jurors also learned the law in the “college of the people,” the jury trial.<sup>201</sup> “There is no

<sup>196</sup> *United States v. Fox*, 3 Mont. 512, 515 (1880).

<sup>197</sup> See BAKKEN, *supra* note 14, at 25.

<sup>198</sup> *Foster v. Wilson*, 5 Mont. 53, 58 (1883). See also *Lowell v. Ames*, 6 Mont. 187, 189 (1886) (rejecting an attorney’s claim of “legal customs and professional courtesy” entitling him to rely on silence in response to a letter requesting a continuance as acceptance); *Magee v. Fogerty*, 6 Mont. 237 (1886) (rejecting “substituted motion” as basis for evading deadline). In Wade’s novel a judge described the law as “a warfare of the intellect,” noting that when a suit is brought the other side will employ learned, acute men to examine your papers, and if they are wrong, because of your ignorance, you are exposed at once . . . . So the law becomes a combat of sharp learned minds. In this profession men are brought into constant contact with each other, and all they do or say is scrutinized and criticised by astute learning, and so they are *obliged* to be right, or be exposed. . . . Dealing with and counseling upon the multiform and infinitely complicated affairs of mankind, the lawyer *should* know everything.

WADE, CLARE LINCOLN, *supra* note 6, at 44.

<sup>199</sup> See Morriss, *Miners, Vigilantes & Cattlemen*, *supra* note 36, at 659-66.

<sup>200</sup> Morriss, *Wade*, *supra* note 8, at 270.

<sup>201</sup> Morriss, *Wade*, *supra* note 8, at 271.

better school than the court room. Jurors listening day after day to the great maxims of the law, as discussed and expounded in their presence, by lawyer and judge, are taught lessons of morality and justice that they cannot forget, and which abide with them during the period of their lives.<sup>202</sup> Indeed, Wade concluded that “government could have no higher purpose” than to use “all the machinery of government . . . for its sole object and end, the bringing of twelve men into the jury box.”<sup>203</sup>

Wade showed the importance he placed on impartial juries during his judicial career in two 1874 opinions. In *United States v. Upham*,<sup>204</sup> one juror had made some comments about the class of cases known as “Indian Ring” cases, stating, for example, that “I want to be on the jury, I would like to send up the defendants.”<sup>205</sup> Although the jury member later claimed he was merely making general and joking references, and there was evidence that he was a “joking and extravagant man” and among the last members of the jury to be convinced of the defendant’s guilt,<sup>206</sup> Wade nonetheless found him incompetent and ordered a new trial. Corruption in the “Indian Ring” cases generally touched even the judiciary<sup>207</sup> and so Wade’s outrage in this case may be in part a reaction to the scandals more generally.

In *Ruff v. Rader* jury problems were even more extensive.<sup>208</sup> Six members of the jury were challenged for cause on the grounds that they were biased. All six admitted that they had spoken with the plaintiff about the case before being seated and revealed on *voire dire* that they thought the plaintiff should prevail. Nonetheless, because the jurors also indicated that they thought that they could be persuaded otherwise by the evidence, the trial judge rejected the defendant’s challenges to the jurors being seated. As Wade summed it up, the six jurors “had tried the case out of court, and had their minds made up as to how it should be decided, but were willing to be convinced that the plaintiff’s statements were untrue, although they did not doubt their absolute truth.”<sup>209</sup> Writing with obvious outrage, Wade prefaced his discussion of the legal issue by stating:

[W]e wish to say that jurors summoned to attend court in that capacity, who will talk with parties having causes for trial about their causes, and thereby form an opinion of the merits of the cause, are guilty of contempt of court, and should receive the highest punishment therefore, and a party who would approach a juror and talk with him out of court about his case, is likewise guilty of contempt, and should be punished accordingly. Such conduct shows corruption of the gravest character, or gross ignorance, amounting to criminal-

<sup>202</sup> Morriss, *Wade*, *supra* note 8, at 271.

<sup>203</sup> Morriss, *Wade*, *supra* note 8, at 270.

<sup>204</sup> *United States v. Upham*, 2 Mont. 170 (1874).

<sup>205</sup> *Id.* at 176.

<sup>206</sup> *Id.* at 178 (Knowles, J., dissenting).

<sup>207</sup> GUICE, *supra* note 1, at 78 (“The so-called. . .”).

<sup>208</sup> *Ruff v. Rader*, 2 Mont. 211 (1874).

<sup>209</sup> *Id.* at 217.

ity.<sup>210</sup>

Wade was also realistic in his view of how conditions might affect courts and juries as well. In assessing a claim that popular pressure had influenced a verdict, Wade held that merely seating an impartial jury was insufficient to guarantee a fair trial.

The pressure of public feeling might make itself felt during the trial, in very many ways, upon the jury, upon the witnesses and officers of the court, and upon the court itself. Jurors, witnesses and officers cannot be insensible to a strong and excited public feeling and sentiment concerning the trial that is going on, and are liable to be influenced by it, unconsciously, and with an honest intention of doing their whole duty. The court room is a public place, and a trial, in which a community is deeply interested, brings the people there, and the pressure of their presence and feeling is a strong argument, and almost irresistible, one way or the other. The influence of their presence, and the expression of their interest in the event of the trial, in divers ways, might give a false coloring to the testimony, or warp and bias the judgment in weighing and considering it. And so it is not all of an impartial trial to secure a fair and impartial jury.<sup>211</sup>

Putting together Wade's view of the role of the jury in educating the people and his reaction to attempts by "the people" to educate specific juries about the people's view of a particular case, we can see that Wade saw the jury system primarily as a means of spreading the law out from the courts and the bar, rather than as a means of bringing community attitudes into the courts. The bias Wade condemned among the jurors in *Ruff* and *Upham* was harmful not only because it was unfair to the defendants but because it prevented the jurors from being educated properly by their experience in court. "Education of the people is the strength of every nation" and the cause of progress; "the jury trial is not among the least of the causes that produce these results."<sup>212</sup>

The importance of the people's understanding the law is made apparent in *Clare Lincoln*, where Wade pauses the plot midway through for a chapter devoted to praising the law.<sup>213</sup>

To a well-balanced mind a knowledge of the law quickens the perception of right and wrong, and makes strong the natural inclination to deal justly and fairly. It points out every fraud, every deception, and every concealment; it exposes the tricks, the schemes, the plots of every villainy; it probes to the depths every meanness, and brings to view the deception, the double-dealing, and the falsehood of every knave; it marches forward to the right conclusion,

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<sup>210</sup> *Id.* at 216.

<sup>211</sup> *Kennon v. Gilmer*, 5 Mont. 257, 264 (1885). Wade mocked florid arguments about jurors' roles in *CLARE LINCOLN*. One of the villains finishes his opening statement in the climactic court room scene, full of elaborate phrases on the importance of juries, and resumes his seat greatly satisfied with his performance, only to be reprimanded by his coconspirator "Why did you not say something about the case?" WADE, *CLARE LINCOLN*, *supra* note 6, at 384.

<sup>212</sup> Morriss, *Wade*, *supra* note 8, at 271.

<sup>213</sup> WADE, *CLARE LINCOLN*, *supra* note 6, at 301-05.

and brushes away the web of fraud, falsehood, perjury, deception, and crime; it sounds every pool of corruption, fathoms every depth of iniquity, and pierces through and through the most consummate plans to rob the individual or the people of their rights; it is the guardian of the weak and the innocent, while it protects, and at the same time restrains, the strong and the powerful.<sup>214</sup>

Wade's belief in the jury as an educational device, a means of civilizing Montanans, is also evident in his discussion of the jury system in *The Common Law*. One of the odder features of that essay is his insistence that the jury system was a Roman invention.<sup>215</sup> Stringing together a variety of sources, Wade devoted several pages of that essay to this topic. Wade was wrong about the history, at least with respect to modern views of what is important about juries,<sup>216</sup> and his claim did little to support his main point. Even if Rome had juries that resembled modern juries, Wade was forced to gloss over hundreds of years of history to link Roman "juries" with English common law.

Seen from the point of view of the need for education, however, Wade's story makes a great deal more sense. Rome, a high point in civilization and law, had to educate her diverse population in the law and participation in the legal system was a principle means to do so. When the dark ages came, and "juries" vanished, so too did the benefits of the legal education they provided. The English legal system degenerated from its Roman period glories to "one hundred and fifty years of [Norman] misrule and administrative despotism."<sup>217</sup> With the resurrection of the jury came the resurrection of the common law.

### I. *Disagreement and Dissent*

Judges on the Territorial Supreme Court rarely (in writing, at least) differed with their colleagues, publishing only fifty-nine non-majority opinions in the court's history.<sup>218</sup> As Wade put it, "There were but few dissenting opinions and the influence of the court was maintained and strengthened by that fact."<sup>219</sup> Of these, thirty-five (five percent of cases) were dissents and twenty-four (less than four percent) were concurring opinions.

Wade was among three justices who wrote more than sixty percent of the non-majority opinions. Adjusted for the number of majority opinions written and number of years on the bench, however, Wade falls well back in the pack. Dissents sometimes took the form of a brief statement of disagreement,<sup>220</sup> but

<sup>214</sup> WADE, CLARE LINCOLN, *supra* note 6, at 302-03.

<sup>215</sup> MORRIS, *Wade*, *supra* note 8, at 269.

<sup>216</sup> See BRUCE L. BENSON, TO SERVE AND PROTECT: PRIVATIZATION AND COMMUNITY IN CRIMINAL JUSTICE 210-11 (1998) (tracing development of jury system and noting that early criminal juries "virtually guaranteed" a guilty verdict.).

<sup>217</sup> MORRIS, *Wade*, *supra* note 8, at 263.

<sup>218</sup> See Table 9.

<sup>219</sup> Wade, *1880-1894*, *supra* note 2, at 656.

<sup>220</sup> See, e.g., *Ming v. Woolfolk*, 3 Mont. 380, 387 (1879) (Wade, C.J., dissenting) (entire dissent consisting of "I cannot agree to the construction put upon the contract by the majority of the court.")

were more often full opinions explaining the disagreement in some detail.

Wade and his long-time fellow Justice Hiram Knowles formed the most frequent dissenting pair, with each dissenting four times from the other's opinions for a total of eight disagreements. (The second most disagreeing pair were Justices McConnell and Bach, with a total of four published disagreements.) The number of Wade's disagreements with Knowles are dwarfed by the number of cases in which they agreed and their status as the most frequently disagreeing pair is clearly the result of longevity rather than philosophy.<sup>221</sup>

One typical disagreement on the court was in a contract interpretation case in which Wade wrote the majority opinion and Judge Galbraith dissented. The case concerned a government contractor who had subcontracted to another for the supply of beef cattle to the Crow Indian Agency.<sup>222</sup> Under the prime contractor's agreement with the government, the government was to receive a twenty percent discount on the weight of any cows furnished, paying full price only for steers. This discount was reflected in the vouchers issued by the government on receipt of the cattle. The subcontract did not mention this discount but provided only that the subcontractor receive the full rate per pound of any cattle it provided. Since the government agent subtracted the cow discount from the weight of the cows delivered, the prime contractor paid the subcontractor only for the poundage shown on the vouchers, and hence obtained the discount from the subcontractor.

Wade argued that since the subcontract required payment according to government vouchers issued under the prime contract, and hence including the discount, this was sufficient to justify interpreting the subcontract to include the discount for cows.<sup>223</sup> Judge Galbraith dissented, contending that this was a clear case of parol evidence modifying a written contract and so inadmissible.<sup>224</sup>

There is something to be said for both sides of the argument. Wade's construction of the contract is clever and allows him to avoid the parol evidence

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<sup>221</sup> I could discern no theme to their disagreements except that Knowles tended to be slightly more pragmatic in cases where they disagreed and less concerned with theoretical niceties. *See, e.g., Territory v. Lee*, 2 Mont. 124 (1874) (the alien property case, Knowles says territory exercises powers and so must be sovereign; Wade take more theoretical approach and prevails, not sovereign); *United States v. Upham*, 2 Mont. 170 (1874) (Knowles, the trial judge, dissents; the issue concerned competence of a jury member who was biased and Knowles takes a more pragmatic approach); *Hartley v. Preston*, 2 Mont. 415 (1876) (a mortgage action, dispute is over trial judge's actions and lack of information in the record on dates; appears that Knowles, in dissent, was probably trial judge; again Knowles takes a more pragmatic approach). Wade generally praised Knowles in his history of the bench and bar, but he did note that Knowles was "patient and plodding" along with being a "careful thinker." Wade, *1880-1894, supra* note 2, at 634.

<sup>222</sup> *Dawes v. Powers*, 5 Mont. 59 (1883).

<sup>223</sup> *Id.* at 61-62.

<sup>224</sup> *Id.* at 68. (Galbraith, J. dissenting).



point almost entirely.<sup>225</sup> Galbraith's opinion is less clever but more plausible as an interpretation of the rules. As the *Dawes* dispute suggests, the relatively rare disagreements were most often about the proper application of law to facts, not grand issues of philosophy.

## V. CONCLUSION

Decius Wade has been called the "Father of Montana Jurisprudence," largely for his role in the code commission after statehood.<sup>226</sup> Far more important than the mass of statutes created by that commission (which Montana has still not completely digested),<sup>227</sup> however, was Wade's role in beginning Montana's common law.

The title "father" implies a role quite different from that actually played by Wade, however. The Montana Territorial Supreme Court discovered law, rather than created it. Wade and his fellow judges largely recognized the body of common law already existing outside Montana and applied it to Montana. Where they did change it, they did so to adapt it to the conditions in Montana rather than to reform it. Wade did this skillfully, but his skill was not that of an innovator, as with many highly praised twentieth century judges, but that of a skilled interpreter. Wade clearly understood the distinction. He also understood the importance to Montanans of maintaining continuity with the common law.<sup>228</sup>

Wade's role in creating Montana's legal system, and thus, in part at least, in creating Montana, is perhaps more appropriately termed midwife than father. "In the beginning, the territories needed law and there was law, the English common law."<sup>229</sup> Wade helped bring the common law into Montana and nursed it through its infancy. Like many a nineteenth century medical professional, however, Wade had only a confused idea of the impact of his prescribed medications. Calling for codification, Wade wrote in 1894 "Montana, in the morning of its jurisprudence, young, vigorous and strong, is in condition to aid in any needed law reform . . . ."<sup>230</sup> The patient proved less "vigorous and

<sup>225</sup> As Wade notes, if the prime contract's method for ascertaining the cattle's weight was incorporated into the subcontract, as the practice clearly was, then the prime contract's other provisions affecting the weight should also be incorporated. If the subcontractor "is exempt from this deduction, then the provision as to the time when the cattle shall be weighed does not attach to his contract; and he might as well demand pay for the loss occasioned in the weight of the cattle by the twelve hours without food or water, as for the twenty per cent. deduction on cows." *Id.* at 62.

<sup>226</sup> MALONE, ET AL., *supra* note 4, at 110.

<sup>227</sup> Morriss, Burnham & Nelson, *supra* note 10, at 402-404.

<sup>228</sup> His addresses in connection with the codification debate stressed, falsely as it turned out, the codes' continuity with the common law and sought to create the impression that the radical changes in Montana law the codes created were simply restatements of existing common law rules.

<sup>229</sup> BAKKEN, *supra* note 14, at 129.

<sup>230</sup> Wade, *1880-1894*, *supra* note 2, at 669.

strong” than anticipated, however, and the dose of statute law produced by the code commission, “bolted like a dose of castor oil” by the legislature in 1895,<sup>231</sup> produced unanticipated harmful effects.<sup>232</sup>

What then is Wade’s legacy? In part his legacy stems from the link between Montana Territory and the state of Montana. As Wade wrote, “The Territory is the parent to the State.”<sup>233</sup> Although Wade did not attempt to create a legal structure for Montana that embodied particular policy preferences,<sup>234</sup> he helped erect a structure nevertheless.

The law for Wade was more than precedent and rules. It also had a deep moral role. In rejecting a probate court ruling that awarded a man’s estate to a nonfamily member without giving the family adequate time to object to the will in question, Wade wrote: “We do not understand by what process of reasoning, or by what sense of morality or justice, these children can be cut off from their legal right to contest the admission of this will to probate; and without giving them their day in court, or an opportunity to be heard, to hand the property of their father over to a stranger.”<sup>235</sup> The law played a vital role in safeguarding the weak. In Wade’s novel, for example, he characterizes a contract not to foreclose on a mortgage given by the villain “in a moment of weakness before the scorching fire had entirely blackened his soul” as protecting the hero’s farm “like a magician’s wand.”<sup>236</sup>

Before the codes’ passage, Wade saw his legacy as linked to his ability to find “the language of justice” in his opinions:

And so Montana jurisprudence enters upon its enduring life. Judges and lawyers disappear, but others take their places; generations march across the narrow stage in endless procession; parties are forgotten; the throbbing, pulsing life of the court-room, with its hopes and fears, subsides; time sends to oblivion the actors in the scene; lawyer and client, friend and foe, the trembling criminal and the judge who pronounces sentence – all vanish into shadows, but the decisions and opinions become precedents, and, if they speak the language of justice, live forever. And thus Montana jurisprudence is linked to all the past and will live in all the future.<sup>237</sup>

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<sup>231</sup> *Code Bills Passed*, DAILY INDEPENDENT (Helena), Jan. 26, 1895, at 5.

<sup>232</sup> See, e.g. Robert G. Natelson, *Running with the Land in Montana*, 51 MONT. L. REV. 17, 92 (1990) (arguing code “constricts” growth of appropriate law concerning real covenants); Andrew P. Morriss, *Lessons from the American Codification Debate for Environmental Law*, in THE COMMON LAW AND THE ENVIRONMENT (Roger Meiners and Andrew Morriss, eds., 2000). See also Morriss, Burnham & Nelson, *supra* note 10, at 396-397 (arguing codes made law less settled).

<sup>233</sup> Wade, *1880-1894*, *supra* note 2, at 656.

<sup>234</sup> Guice, who is generally favorable to the Montana bench including Wade, contends that that court showed “determination to secure the economic development of the territory” and that to do so “the highest priority was clearly assigned to mining.” GUICE, *supra* note 1, at 120-21. To the extent this is true, it is because it is true of the nineteenth century vision of the common law generally rather than true of Wade personally.

<sup>235</sup> *Charlebois v. Bourdon*, 6 Mont. 373, 378 (1887).

<sup>236</sup> WADE, CLARE LINCOLN, *supra* note 6, at 37.

<sup>237</sup> Wade, *1880-1894*, *supra* note 2, at 666.

Although after codification, Wade saw the codes as his legacy, Wade's earlier view, quoted above, is more accurate. His contribution is really his role in creating a framework for Montana's development of a common law jurisprudence. In some sense, he crippled his own legacy through his codification efforts, warping Montana jurisprudence to static legal concepts designed for New York almost half a century earlier. It is a tribute to the strength of the common law foundation he laid, however, that the common law survived codification in Montana in any form.

**Table 1: Territorial Court Opinions by Judge**

Judge	Opinions	% of All Opinions	Opinions Per Year	Pages	% of All Pages	Pages per Year
Decius S. Wade	192	30.14%	11.90	999	33.69%	61.91
Henry N. Blake	60	9.42%	11.11	222	7.49%	41.11
Everton J. Conger	7	1.10%	0.82	57	1.92%	6.64
William J. Galbraith	69	10.83%	17.38	356	12.01%	89.68
Hiram Knowles	74	11.62%	6.75	280	9.44%	25.55
John Coburn	9	1.41%	3.65	48	1.62%	19.49
James H. McLeary	31	4.87%	18.70	217	7.32%	130.92
Thomas C. Bach	45	7.06%	13.25	174	5.87%	51.22
Newton W. McConnell	36	5.65%	19.64	225	7.59%	122.76
Moses J. Liddell	24	3.77%	13.73	109	3.68%	62.36
Charles R. Pollard	1	0.16%	12.59	7	0.24%	88.10
Henry L. Warren	24	3.77%	9.01	57	1.92%	21.40
Francis G. Servis	15	2.35%	5.20	45	1.52%	15.60
George G. Symes	15	2.35%	8.27	47	1.59%	25.91
John L. Murphy	11	1.73%	6.66	27	0.91%	16.34
Stephen De Wolfe	24	3.77%	12.46	95	3.20%	49.32
<b>Totals</b>	<b>637</b>			<b>2,965</b>		

Notes: Chief Justice Hezekiah L. Hosmer and Justice Lyman E. Munson and Lorenzo P. Williston are omitted as the Court did not publish any opinions during their tenure.

**Table 2: Reversal Rates for Selected Justices**

Justice	All Cases	Reversed	% Reversed
Everton J. Conger	22	12	54.55%
William J. Galbraith	100	38	38.00%
George G. Symes	31	11	35.48%
Stephen De Wolfe	50	17	34.00%
John Coburn	34	10	29.41%
Decius S. Wade	154	42	27.27%
Hiram Knowles	55	12	21.82%
Francis G. Servis	28	6	21.43%
James H. McLeary	20	4	20.00%
Henry N. Blake (both terms)	23	4	17.39%
<b>All Judges</b>	<b>588</b>	<b>191</b>	<b>32.48%</b>

Notes: Judges included are those for whom 20 or more trial court attributions could be made. Trial court attributions made based on notations in reporters and district assignments of judges.

**Table 3: Decisions by Term of Court, 1868-1876**

<b>Term of Court</b>	<b>Justice</b>	<b># of Opinions</b>	<b>% of Opinions</b>	<b>Pages of Opinions</b>	<b>% of Pages of Opinions</b>
December 1868	Warren	10	52.63%	20	43.48%
	Knowles	9	47.37%	26	56.52%
August 1869	Warren	1	20.00%	9	40.91%
	Knowles	1	20.00%	3	13.64%
	Symes	3	60.00%	10	45.45%
January 1870	Warren	1	50.00%	2	33.33%
	Knowles	1	50.00%	4	66.67%
August 1870	Warren	2	11.11%	10	15.15%
	Knowles	8	44.44%	29	43.94%
	Symes	8	44.44%	27	40.91%
January 1871	Wade	1	5.26%	1	2.78%
	Warren	10	52.63%	16	44.44%
	Knowles	4	21.05%	9	25.00%
	Symes	4	21.05%	10	27.78%
August 1871	Wade	3	27.27%	14	35.00%
	Knowles	5	45.45%	19	47.50%
	Murphy	3	27.27%	7	17.50%
January 1872	Wade	3	50.00%	21	75.00%
	Knowles	0	0.00%	0	0.00%
	Murphy	3	50.00%	7	25.00%
August 1872	Wade	11	42.31%	86	54.78%
	Knowles	10	38.46%	58	36.94%
	Murphy	5	19.23%	13	8.28%
January 1873	Wade	2	100.00%	2	100.00%
	Knowles	0	0.00%	0	0.00%
August 1873	Wade	1	33.33%	2	22.22%
	Knowles	1	33.33%	5	55.56%
	Servis	1	33.33%	2	22.22%
January 1874	Wade	6	42.86%	37	46.84%
	Knowles	3	21.43%	15	18.99%
	Servis	5	35.71%	27	34.18%
August 1874	Wade	4	30.77%	22	51.16%
	Knowles	4	30.77%	10	23.26%
	Servis	5	38.46%	11	25.58%
January 1875	Wade	1	20.00%	15	75.00%
	Knowles	0	0.00%	0	0.00%
	Servis	4	80.00%	5	25.00%
August 1875	Wade	6	66.67%	21	67.74%
	Knowles	3	33.33%	10	32.26%
January 1876	Wade	15	34.88%	45	37.82%
	Knowles	9	20.93%	24	20.17%
	Blake	19	44.19%	50	42.02%
August 1876	Knowles	1	50.00%	5	83.33%
	Blake	1	50.00%	1	16.67%

**Table 4: Decisions by Term of Court, 1877-1885**

<b>Term of Court</b>	<b>Justice</b>	<b># of Opinions</b>	<b>% of Opinions</b>	<b>Pages of Opinions</b>	<b>% of Pages of Opinions</b>
January 1877	Wade	7	36.84%	19	30.65%
	Knowles	4	21.05%	14	22.58%
	Blake	8	42.11%	29	46.77%
August 1877	Wade	1	20.00%	8	28.57%
	Blake	3	60.00%	12	42.86%
	Knowles	1	20.00%	8	28.57%
January 1878	Wade	8	40.00%	46	49.46%
	Blake	6	30.00%	25	26.88%
	Knowles	6	30.00%	22	23.66%
August 1878	Wade	6	50.00%	35	53.03%
	Blake	5	41.67%	29	43.94%
	Knowles	1	8.33%	2	3.03%
January 1879	Wade	5	33.33%	18	28.13%
	Blake	7	46.67%	29	45.31%
	Knowles	3	20.00%	17	26.56%
January 1880	Wade	3	50.00%	15	46.88%
	Blake	2	33.33%	13	40.63%
	Galbraith	1	16.67%	4	12.50%
August 1880	Wade	6	75.00%	31	65.96%
	Conger	1	12.50%	7	14.89%
	Galbraith	1	12.50%	9	19.15%
January 1881	Wade	6	60.00%	23	33.82%
	Conger	1	10.00%	21	30.88%
	Galbraith	3	30.00%	24	35.29%
August 1881	Wade	2	50.00%	17	73.91%
	Conger	0	0.00%	0	0.00%
	Galbraith	2	50.00%	6	26.09%
January 1882	Wade	13	56.52%	43	50.00%
	Conger	5	21.74%	29	33.72%
	Galbraith	5	21.74%	14	16.28%
August 1882	Wade	1	50.00%	10	76.92%
	Conger	0	0.00%	0	0.00%
	Galbraith	1	50.00%	3	23.08%
January 1883	Wade	16	88.89%	76	82.61%
	Conger	0	0.00%	0	0.00%
	Galbraith	2	11.11%	16	17.39%
January 1884	Wade	2	33.33%	61	58.65%
	Conger	0	0.00%	0	0.00%
	Galbraith	4	66.67%	43	41.35%
August 1884	Wade	5	71.43%	12	70.59%
	Coburn	0	0.00%	0	0.00%
	Galbraith	2	28.57%	5	29.41%

**Table 5: Decisions by Term of Court, 1885-1889**

Term of Court	Justice	# of Opinions	% of Opinions	Pages of Opinions	% of Pages of Opinions
January 1885	Wade	19	52.78%	123	53.95%
	Coburn	9	25.00%	48	21.05%
	Galbraith	8	22.22%	57	25.00%
January 1886	Wade	25	62.50%	113	59.16%
	Pollard	1	2.50%	7	3.66%
	Galbraith	14	35.00%	71	37.17%
August 1886	Wade	2	33.33%	5	45.45%
	McLeary	1	16.67%	2	18.18%
	Bach	1	16.67%	1	9.09%
	Galbraith	2	33.33%	3	27.27%
January 1887	Wade	12	29.27%	78	29.66%
	McLeary	10	24.39%	99	37.64%
	Bach	10	24.39%	40	15.21%
	Galbraith	9	21.95%	46	17.49%
July 1887	McConnell	8	25.81%	58	37.66%
	Bach	5	16.13%	19	12.34%
	Galbraith	8	25.81%	32	20.78%
	McLeary	10	32.26%	45	29.22%
January 1888	McConnell	7	22.58%	47	27.17%
	Bach	7	22.58%	32	18.50%
	Galbraith	7	22.58%	23	13.29%
	McLeary	10	32.26%	71	41.04%
July 1888	McConnell	12	30.77%	74	35.75%
	Bach	9	23.08%	39	18.84%
	De Wolfe	9	23.08%	50	24.15%
	Liddell	9	23.08%	44	21.26%
January 1889	McConnell	9	25.00%	46	35.94%
	Bach	8	22.22%	21	16.41%
	De Wolfe	10	27.78%	27	21.09%
	Liddell	9	25.00%	34	26.56%
July 1889	Blake	9	36.00%	34	32.38%
	Bach	5	20.00%	22	20.95%
	De Wolfe	5	20.00%	18	17.14%
	Liddell	6	24.00%	31	29.52%

**Table 6: Citation to Case Authority in Opinions**

Justice	Average Number of Citations to:			
	Montana Cases	California Cases	Other Cases	All Cases
Thomas C. Bach	1.33	1.64	3.58	6.56
Henry N. Blake	1.12	2.47	5.60	9.18
John Coburn	0.00	0.78	5.00	5.78
Everton J. Conger	0.43	1.29	1.57	3.29
Stephen De Wolfe	0.79	0.88	1.38	3.04
William J. Galbraith	0.97	0.90	2.54	4.41
Hiram Knowles	0.31	0.85	1.30	2.46
Moses J. Liddell	1.63	1.79	2.17	5.58
Newton W. McConnell	0.83	1.25	3.78	5.86
James H. McLeary	1.55	1.19	8.39	11.13
John L. Murphy	0.36	0.27	0.45	1.09
Francis G. Servis	0.33	0.33	0.47	1.13
George G. Symes	0.07	0.33	0.47	0.87
Decius S. Wade	0.61	0.89	6.17	7.67

**Table 7: Citation to Case Authority in Wade Opinions**

Opinions	Average Number of Citations to Cases:			
	Montana	California	Other Cases	All Cases
All Wade Opinions	0.61	0.89	6.17	7.67
Wade 1870s Opinions	0.29	0.94	4.19	5.41
Wade 1880s Opinions	0.84	0.85	7.59	9.28

**Table 8: Opinion Lengths**

Justice	Average Opinion Length	Median Opinion Length
Thomas C. Bach	3.87	4.0
Henry N. Blake	3.70	4.0
John Coburn	5.33	5.0
Everton J. Conger	8.14	7.0
Stephen De Wolfe	3.96	3.0
William J. Galbraith	5.16	4.0
Hiram Knowles	3.78	3.0
Moses J. Liddell	4.54	4.0
Newton W. McConnell	6.25	6.0
James H. McLeary	7.00	4.0
John L. Murphy	2.45	3.0
Francis G. Servis	3.00	2.0
George G. Symes	3.13	3.0
Decius S. Wade	5.20	4.0
Henry L. Warren	2.38	1.5
<b>ALL OPINIONS</b>	<b>4.65</b>	<b>4.0</b>



Table 9: Nonmajority Opinions by Justice

Justice	Dissents	% of All Dissents Year	Dissents / Majority Opinion	Concur. Opinions	% of All Concur. Opinions	Concur. Opinions / Majority Opinion	Concur. Opinions / Majority Opinion Year	Nonmaj. Opinions	% of All Nonmaj. Opinions	Nonmaj. Opinions Year	Nonmaj. Opinions / Majority Opinion
Decius S. Wade	9	25.71%	0.56	5	20.83%	0.31	0.03	14	23.73%	0.87	0.07
Hiram Knowles	10	28.57%	0.91	3	12.50%	0.27	0.04	13	22.03%	1.19	0.18
Henry N. Blake	1	2.86%	0.19	0	0.00%	0.00	0.00	1	1.69%	0.19	0.02
William J. Galbraith	2	5.71%	0.50	0	0.00%	0.00	0.00	2	3.39%	0.50	0.03
Everton J. Conger	0	0.00%	0.00	0	0.00%	0.00	0.00	0	0.00%	0.00	0.00
John Coburn	1	2.86%	0.41	2	8.33%	0.81	0.22	3	5.08%	1.22	0.33
James H. McLeary	0	0.00%	0.00	1	4.17%	0.60	0.03	1	1.69%	0.60	0.03
Thomas C. Bach	7	20.00%	2.06	5	20.83%	1.47	0.11	12	20.34%	3.53	0.27
Newton W. McConnell	1	2.86%	0.55	2	8.33%	1.09	0.06	3	5.08%	1.64	0.08
Moses J. Liddell	1	2.86%	0.57	0	0.00%	0.00	0.00	1	1.69%	0.57	0.04
Stephen De Wolfe	0	0.00%	0.00	0	0.00%	0.00	0.00	0	0.00%	0.00	0.00
Henry L. Warren	1	2.86%	0.38	0	0.00%	0.00	0.00	1	1.69%	0.38	0.04
Francis G. Servis	2	5.71%	0.69	2	8.33%	0.69	0.13	4	6.78%	1.39	0.27
George G. Symes	0	0.00%	0.00	0	0.00%	0.00	0.00	0	0.00%	0.00	0.00
John L. Murphy	0	0.00%	0.00	4	16.67%	2.42	0.36	4	6.78%	2.42	0.36
<b>Totals</b>	<b>35</b>			<b>24</b>				<b>59</b>			

Notes: Chief Justice Hezekiah L. Hosmer and Justice Lyman E. Munson and Lorenzo P. Williton are omitted as the Court did not publish any opinions during their tenure.

Table 10: Territorial Supreme Court Justices

Justice	State of Residence <sup>*</sup>	Term Began	Term Ended	Years on Bench	Appointed to Replace	Replaced by on Territorial Bench	Position
Lorenzo P. Williston	PA	June 1864	July 1868	4.1	--	Knowles	Justice
Hezekiah L. Hosmer	NY	June 1864	July 1868	4.1	--	Warren	Chief Justice
Lyman E. Munson	CN	February 1865	April 1869	4.1	--	Symes	Justice
Hiram Knowles	IA	July 1868	July 1879	11.0	Williston	Galbraith	Justice
Henry L. Warren	IL	July 1868	March 1871	2.7	Hosmer	Wade	Chief Justice
George G. Symes	KY	April 1869	January 1871	1.8	Munson	Murphy	Justice
John L. Murphy	TN	January 1871	September 1872	1.7	Symes	Servis	Justice
Decius S. Wade	OH	March 1871	May 1887	16.1	Warren	McConnell	Chief Justice
Francis G. Servis	OH	September 1872	August 1875	2.9	Murphy	Blake (1 <sup>st</sup> term)	Justice
Henry N. Blake (1 <sup>st</sup> term)	MT	August 1875	March 1880	4.6	Servis	Conger	Justice
William J. Galbraith	IA	July 1879	January 1888	8.6	Knowles	De Wolfe	Justice
Everton J. Conger	IL	March 1880	February 1884	4.0	Blake	Coburn	Justice
John Coburn	IN	February 1884	August 1886	2.5	Conger	McLeary	Justice
James H. McLeary	TX	August 1886	April 1888	1.7	Coburn	Liddell	Justice
Thomas C. Bach	MT	August 1886	December 1889	3.4	--	--	Justice
Newton W. McConnell	TN	May 1887	March 1889	1.8	Wade	Blake (2 <sup>nd</sup> term)	Chief Justice
Stephen De Wolfe	MT	January 1888	December 1889	1.9	Galbraith	--	Justice
Moses J. Liddell	LA	April 1888	December 1889	1.7	McLeary	--	Justice
Henry N. Blake (2 <sup>nd</sup> term)	MT	March 1889	December 1889	0.8	McConnell	--	Chief Justice

Notes: \* Original appointee to position

\*\* New position created in 1886

# Not confirmed

† Held to end of territorial status

% Based on Pomeroy, supra note 29; Wade, Second Chapter, supra note 3, and 1880-1894, supra note 2. Table does not include appointees not confirmed or who did not serve.