Introduction

Timothy S. Huebner

This summer marks another transition in the history of the Court. After nearly twenty-eight years of service, Justice Stephen Breyer retires and, when the justices gather again for a new term in the fall, a new justice, Ketanji Brown Jackson, will replace him. It has always been the case that the arrival of a new justice changes the dynamic on the Court, but the arrival of Judge Jackson—the first Black women to take her seat on the nation's highest court—is especially historic. It will be the first time in the Court's history that White men will not comprise a majority of the Court's members. It is worth reminding ourselves that for the first one hundred and seventy-eight years of its history—until the appointment of Thurgood Marshall in 1967—*all* of the justices on the Court had been White men.

This important shift in the makeup of the Court got me thinking about the evolution of the field of constitutional history. For decades, the focal point of scholarly interest was the early twentieth century, the period from roughly *Lochner v. New York* to *West Coast Hotel v. Parrish*. In the midst of industrialization and world war, these years witnessed the emergence of the civil liberties issue, the rise and decline of the doctrine of "liberty to contract," and the constitutional clash over the New Deal and Court-packing. Holmes, Brandeis, and Hughes all figured prominently in this historical narrative, but Holmes especially attracted the attention of scholars. This consequential era in Supreme Court history continues to receive its due, of course, and this issue features a terrific review essay on Holmes by my predecessor, Editor Emeritus Mel Urofsky, who considers two recent biographies, along with a transcript and commentary on Holmes' *Black Book*. Mel needs no introduction to the readers of these pages, and I know you will enjoy his thoughtful exploration of why the "Yankee of Olympus" continues to fascinate.

Despite the continued popularity of Holmes and his times, many scholars have recently shifted their attention to the Black freedom struggle. Whether focusing on the Reconstruction Era or the mid-twentieth century Civil Rights Movement, their work continues to reveal astonishing insights, and this issue includes three such essays. James A. Feldman uncovers the work of a late nineteenth-century Black advocate of civil rights, Cornelius Jones of Mississippi. Born into slavery, Jones emerged as a leader of the state's Black community during Reconstruction and ended up arguing voting rights cases before the U.S. Supreme Court, as

DOI: 10.1111/jsch.12302

well as leading the first significant legal effort to obtain reparations for ex-slaves. Feldman, now an attorney in private practice, was serving as Assistant to the Solicitor General from 1989 to 2006, when he first came across Jones' name while researching a case. Catherine Ward's article, meanwhile, takes a landmark 1971 church and state case, *Lemon v. Kurtzman*, and reframes it as a segregation case. Alton T. Lemon, a Black civil rights activist, brought a claim of racial discrimination in Pennsylvania public schools under the Fourteenth Amendment, but the Court dismissed this argument and instead focused on the First Amendment's Establishment Clause. Ward's essay explores the consequences of the decision to concentrate on the religious, rather than racial aspect of the case. She is a third-year student at the University of Virginia School of Law. Daniel Kiel, finally, examines Thurgood Marshall's career-long struggle to abolish the death penalty by focusing on the litigation surrounding *Payne v. Tennessee*, the 1991 Eighth Amendment decision. Kiel, FedEx Professor of Law at The University of Memphis Cecil C. Humphreys School of Law, offers a richly detailed and moving account of the case of Pervis Payne, an intellectually disabled Black defendant, including the recent decision by the state of Tennessee to withdraw his death sentence. All of these essays, in one way or another, draw our attention to the struggles for racial equality and justice.

The other major subject of current scholarly interest is the era of the Warren Court and Burger Court. You may have noticed that our last two issues each contained a piece written by a law student from Georgetown University Law Center on the Warren Court. These two essays, and a third published here, all came from Prof. Brad Snyder's seminar on the subject. Brett Bethune, a third-year student, examines the oft-mentioned but seldom-studied movement to impeach Chief Justice Earl Warren. In highlighting the leadership of the ultra-conservative John Birch Society in the impeachment movement, Bethune offers valuable perspective on how a segment of the public perceived the Court during the 1950s and 1960s. Michael Nelson's essay, in contrast, provides a glimpse into the internal workings of the Court, as the justices grappled with the landmark welfare case, *Goldberg v. Kelly*. Nelson, an authority on the American presidency, has recently immersed himself in the work of the Reveleys, a leading Virginia family in the field of higher education. Before he served as Dean of the Law School and President of the College of William and Mary, Taylor Reveley III clerked for Justice William Brennan, and Nelson utilizes his interviews with Reveley to offer fresh insights into Brennan and the opinion-writing process in *Goldberg*, decided during the early years of the Burger Court. Nelson, a close friend and colleague, is the Fulmer Professor of Political Science at my institution, Rhodes College.

The deliberations described by Nelson remind us of the constant interplay among the justices—of the clash of ideas and personalities that ultimately go into human beings' best attempts to interpret the law. And the humanity of the work of the justices brings me back to this summer of transition and to the retiring Justice Breyer. Deeply devoted to civil discourse, Breyer published in 2021 a brief but important book, *The Authority of the Court and the Peril of Politics*. In it, Breyer advises us to promote respect for the rule of law while not ignoring or excusing the racism evident in our past. "Our history, though tainted," he writes, "is not the negation of our constitutional ideals; it is rather a complicated history with advances and setbacks. It takes place in the complicated context of our labors, past and current, to try to embody those ideals in working institutions."

I hope that his issue of the *Journal*—and every issue—helps provide a more complicated understanding of our past while also deepening our shared commitment to constitutional ideals.

"So Forcibly Presented by His Counsel, Who Are of His Race": Cornelius Jones, Forgotten Black Supreme Court Advocate and Fighter for Civil Rights in the *Plessy* Era

James A. Feldman

On April 13, 1896, the Supreme Court heard argument in *Plessy v. Ferguson*, now best known for its approval of the separate-but-equal doctrine and for Justice John Marshall Harlan's stirring dissent. But something else happened at the Court that day as well: It decided two companion cases: *Gibson v. Mississippi* and *Smith v. Mississippi*.[1] On their face, they presented procedural issues regarding the civil rights removal statute and the scope of the Ex Post Facto Clause. Justice Harlan, the writer of the famed *Plessy* dissent, wrote the rather technical (and unanimous) opinions in *Gibson* and *Smith*, rejecting the defendants' claims.

Gibson and *Smith* would have been fairly routine cases, but they shared an important feature: The defendant in each case was Black, and the underlying claims arose from attacks on the disfranchisement of Black voters that occurred under the notorious Mississippi Constitution of 1890, which was expressly adopted to "legally"—i.e., in effect but not on its face—disfranchise African Americans. In the last paragraph of *Gibson*, Justice Harlan reaffirmed that "the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination … against any citizen because of his race."[2] Then he concluded:

> We recognize the possession of all these rights by the defendant; but upon a careful consideration of all the points of which we can take

DOI: 10.1111/jsch.12294

> cognizance, and *which have been so forcibly presented by his counsel, who are of his race*, and giving him the full benefit of the salutary principles heretofore announced by this court in the cases cited in his behalf, we cannot find from the record before us that his rights secured by the supreme law of the land were violated.[3]

This may be the only Supreme Court opinion that has referred to the race of the attorneys who presented the case, and *Gibson* and *Smith* were the second and third cases that Black advocates had ever argued before the Court.

Who were these counsel who "so forcibly" presented *Gibson* and *Smith* and were "of the same race" as the defendants? Mississippi attorney Cornelius J. Jones was primarily responsible for both cases, though he argued only *Smith* and enlisted Washington, D.C., attorney Emanuel M. Hewlett to argue *Gibson*. Jones is largely forgotten in the history books, but he was a remarkable figure. Mississippi's 1890 Constitution provided the model for "legally" disfranchising Black voters throughout the South over the next fifteen years. Jones, who himself was born into slavery, fought that movement in every way he could. He was one of six African Americans in the Mississippi House when the state legislature called a constitutional convention with the avowed purpose of disfranchising Black voters, and he made a dramatic and highly-praised speech opposing it. He then brought four cases to the Court in the succeeding ten years, of which three challenged the disfranchisement. At the same time, he ran for Congress twice and contested his losses before the House, again challenging the exclusion from the franchise of Black citizens, who were an overwhelming majority of the electorate in his district. He was later active in the fight for equal voting rights and against Jim Crow in Oklahoma as it was preparing for statehood, and he spearheaded the first significant legal effort to obtain reparations for ex-slaves in the 1910s, which he took all the way to the Supreme Court.

In the late nineteenth and early twentieth centuries, the time was not ripe for our legal system to live up to its promise of equality under the law, and Jones lost all of those fights. But his lifelong struggle in the most difficult possible conditions exemplified the highest traditions of the legal profession.

Early Life and Becoming a Lawyer

According to a typed, unsigned document entitled "Obituary" in family papers that found their way into the collection of the Schomburg Library in New York City, Jones was born into slavery in Vicksburg, Mississippi, on August 13, 1858. His parents were Cornelius Jones, Sr., and Hannah Jones, who recorded their marriage with the Freedman's Bureau in 1864.[4] After the Civil War, Jones attended newly-opened Freedman's Bureau primary schools in Vicksburg.[5] Here, and throughout his education, he was among the first to take advantage of opportunities that had only just become available to Black youth in the South.

In 1872, Jones entered a newly-founded university for Black students, Alcorn State University, in Claiborne County, Mississippi, about 45 miles south of Vicksburg.[6] He graduated in 1878.[7] According to one source, he then served for two years as the general purchasing agent for the Mississippi Cotton Seed Association along the Yazoo River, which runs into the Mississippi at Vicksburg. Jones is said to have been entrusted with $423,000 to purchase cottonseed for the New Orleans millers.[8]

By early 1881, Jones was living in Omega Landing, Louisiana, just up the river from Vicksburg. On January 5, he married Bettie Julienne, of Vicksburg. Reporting on the wedding, the *Vicksburg Herald* said that

Jones had "a fair education and the good sense to make money and to know how to hold it."[9] When Bettie died in 1884, Jones's mother took charge of rearing their two daughters.[10] He would marry Sarah Elizabeth Disney on September 27, 1893, but that marriage seems to have ended by 1900 for reasons that are unknown.[11]

The *Obituary* does not mention Jones's business career but instead states that he became a teacher after graduating from Alcorn.[12] In 1885, Jones was principal of a school in Mayersville, Mississippi, a town in Issaquena County in the heavily African-American Black Belt along the Mississippi River. He organized a commencement program for his pupils before a mixed-race (but predominantly White) audience that included singing, orations, calisthenics, and gymnastic exercises.[13] In 1886, Jones was a leader of a group of African Americans who lamented their inability to obtain a state-supported education and attempted to start a high school in Lake Providence, Louisiana, another town just north of Vicksburg and across the river.[14]

There were fewer than twenty African-American lawyers in post-Reconstruction Mississippi.[15] Aside from a two-year period in the late 1870s, no law school in the state would accept Black applicants.[16] But many aspiring lawyers in this era were trained in law offices rather than law schools. In Mississippi, a local judge could admit an applicant to the bar after he had satisfactorily completed an examination by three court-appointed attorneys.[17] That path to bar admission was possible in the 1870s and 1880s for Black aspirants, especially when the judge had been appointed by the post-Civil War Provisional Governor Adelbert Ames or by the Reconstruction-era Governor James Alcorn; it became progressively more difficult and then virtually impossible by the mid-1890s once the racial line in Mississippi had hardened.[18]

Jones began his study of law in the early 1880s under the tutelage of a Judge Burns (or Burnes) in Louisiana.[19] The *Obituary* says that, after studying with Judge Burnes while pursuing his teaching career in Louisiana, Jones returned to Mississippi and "continued the study of law under the tutorship of the McLaurin brothers, the senior of whom was Senator McLaurin."[20] Anselm McLaurin was one of several prominent White lawyers who served as tutors to African-American bar aspirants in the period up to the 1890s.[21] Before Jones, he had tutored African-American bar applicant Samuel Beadle and then successfully moved Beadle's admission to the bar after a grueling hearing in 1884 before a racist judge.[22] McLaurin and his two brothers were later delegates to the convention that adopted the Constitution of 1890. The McLaurins were among the handful of delegates who voted against the adoption of the Constitution, though there could have been many reasons for their votes other than disagreement with its disfranchising provisions.[23] Anselm McLaurin later served as Governor of Mississippi from 1896–1900 and U.S. Senator (D-MS) from 1894–1895 and 1901–1909.[24]

Jones was admitted to the bar on January 28, 1888, after examination by three White attorneys before Judge Ralph North in a Vicksburg court. According to a Vicksburg newspaper, "[t]he committee reported that Mr. Jones showed a fine knowledge of the law," and he planned to practice law in Issaquena County.[25]

Post-Reconstruction Mississippi and the Constitution of 1890

Cornelius Jones came of age in the turbulent world of racial politics in post-Reconstruction Mississippi. During this period, Mississippi's Black population ranged from 54% in 1870 to 58% in 1890.[26] In 1868, 96.7% of the Black male voting age population was registered to vote, as compared to only 80.9% of the White male voting age population, perhaps because of

In the 1880s, Mississippi attorney Anselm McLaurin (above) tutored Cornelius Jones and other African-American bar aspirants, who were barred from Mississippi law schools. McLaurin and his two brothers were among the handful of delegates who voted against the adoption of the Mississippi Constitution of 1890, which effectively disfranchised Blacks. He later served as governor and U.S. Senator (D-MS).

the numerous White ex-Confederate soldiers who were excluded from the franchise.[27] Blacks never held office in numbers close to their proportion of the population, but during Reconstruction, they were elected to many federal, state, and local offices, including the U.S. Senate and House of Representatives.[28] The Republican Party, which consisted of Black voters and their White allies, generally controlled the state government and many local governments during Reconstruction, especially in the Black Belt.

From the beginning, there had been opposition and racial violence from many White Democrats.[29] This came to a head with the "Revolution of 1875," which was explained by the Mississippi Supreme Court in 1896 as "a semimilitary, semicivil uprising, under which the white race, inferior in number, ... was restored to power."[30] It involved a campaign of intimidation, fraud, and murder by armed White groups that acted with impunity, with the goal of suppressing and nullifying the Black vote.[31] The number of murders of African Americans is chilling.[32]

The Revolution of 1875 brought the Democratic Party to power and began the virtually complete elimination of the civil and political rights of African Americans in Mississippi. After 1875, White Democrats continued when necessary to employ fraud, violence, and intimidation to control election outcomes and suppress the Black vote.[33] Nonetheless, substantial numbers of Black men still remained eligible to vote in the overwhelmingly Black counties where Cornelius Jones lived and concentrated his political and legal work. In 1890, Issaquena County was 94% Black, Bolivar County was 89% Black, and Washington County was 88% Black.[34] Jones thus began his legal and political career in a world of violently suppressed voting rights and severe limitation of other political and economic opportunities for Black Mississippians.

Jones first appears in the public record in a letter to the *Vicksburg Herald* published on May 1, 1879.[35] The increasing repression of Blacks, as well as more general economic difficulties, had led to significant Black emigration from the Deep South to Kansas and other Western states.[36] Mississippi planters were concerned about a possible labor shortage if the trend continued. To counteract it, Governor John Marshall Stone and a group of White citizens scheduled a "labor convention" to be held in Vicksburg beginning on May 5, 1879. They called on "every county, parish and city" in the Mississippi Valley "to send delegates of both races to this Convention," and in particular "call[ed] upon the colored people to send to the Convention such delegates as they choose to appoint, to participate in its deliberations, and discuss with us fully and freely" the issues surrounding the potential labor shortage.[37]

On May 1, Jones, age 20, had called a meeting of Yazoo-area citizens to select delegates to the convention. The opening speaker praised Jones as "a young man of whom the citizens of Yazoo Beat might well boast on account of his religious, moral and intellectual possessions." Young Jones was selected to head the delegation after giving what was termed "a very able and interesting speech" that ensured confidence he would "advocate the true causes in the Convention of the great dissatisfaction of the laborers of this Beat."[38] Though the convention was under the control of White planters, it adopted resolutions noting the "irrational system of planting" that victimized laborers, the "vicious system" of credit tied to sharecropping, and the "apprehension on the part of many colored peopled, produced by insidious reports" that "their civil and political rights are endangered."[39] But in the end, the convention's resolutions largely blamed the exodus on misinformation and urged the Black population simply to remain in Mississippi. Ultimately, the emigration to Kansas dwindled in the face of the difficult conditions there.[40]

Two years later, Jones himself came frighteningly close to the post-1875 political violence, in what may have been a seminal moment for his later fight against disfranchisement. Republicans, third parties, and even some Democrats sometimes combined on a "fusion ticket" to challenge White Democratic domination.[41] In 1881, a mixed-party Sharkey County Fusion ticket was running against the Democratic regulars. On October 28, Jones, described as "an able advocate of the Fusion cause," was scheduled

to address a meeting at a local plantation. A group of Blacks on their way to the meeting was "hailed by parties hid in ambush and commanded to halt." When they failed to do so, the attackers opened fire with double-barreled shotguns, killing three and wounding at least two more. According to one report, the attackers had intended "to shoot a colored candidate on the Fusion Ticket and a prominent colored politician"—possibly Jones himself. The following day, an "indignation meeting" of Black and White citizens met to condemn the murders. Jones, who was elected secretary of the meeting, told the group that "cold-blooded villainy was committed to intimidate you," but urged them to "show[] your manhood by hurling this deed back in the teeth of the bush-whackers." He added, in words that could be said to explain much of his later career: "'Tis true we cannot provide against a mob of vile cut-throats, but make this our theory, the more that fall by the savages in ambush, the more ambitious the survivors must rally."[42]

By 1886, Jones was a member of the Issaquena County Republican Congressional Executive Committee. He introduced a resolution before the committee supporting the Republican candidate and, no doubt optimistically, asking "of all with whom we are to deal for a full vote and a fair count."[43] The Third Congressional District had been created to limit any possible African-American influence in the state by packing the heavily Black counties along the river into a single district.[44] Jones was elected secretary of the 1888 Third District Republican Convention, and later that year was sent to Indiana to campaign for the national Republican ticket headed by Benjamin Harrison.[45]

In 1873, Mississippi had elected a state legislature in which 55 of the 115 state representatives and 9 of 37 senators were Black.[46] After the Revolution of 1875, those numbers dropped from sixteen representatives and five senators in 1876 to six representatives and no senators in 1890.[47] In 1888, Jones himself was elected from Issaquena County as one of the six Black representatives (out of a total of 160) to sit in the state house for the 1889–1890 session.[48] He served a single, notable term.

A major issue before the legislature was a proposal to call a convention to adopt a new state constitution to "legally" disfranchise Blacks. As stated by one member of the constitutional convention that was ultimately called for the summer of 1890, it had been "no secret that there has not been a full vote and a fair count in Mississippi since 1875—that we have been preserving the ascendency of the white people by revolutionary methods." He added that "no man can be in favor of perpetuating the election methods which have prevailed in Mississippi since 1875, who is not a moral idiot, and no statesman believes that a government can be perpetuated by violence and fraud."[49] A new constitution would replace those methods with "legal" disfranchisement. In addition, convention supporters worried that continuing electoral violence and fraud risked provoking federal intervention—at that time, an issue that Congress was considering in the Lodge Force Bill that would have provided federal protection for Black voting rights in the South.[50] Even White factions—especially hill-country small farmers—were concerned that under the existing system, Black-Belt "Bourbon" elites were employing the Black vote to entrench their own overrepresented status in the state government.[51] Finally, because Black citizens continued despite everything to be registered in large numbers, convention supporters worried that they could someday be mobilized to sway an election; by one calculation, as late as 1890 there were 189,584 registered Black voters in the state, versus 118,890 Whites.[52]

While Whites generally were agreed on the desirability of disfranchising Blacks, they did not agree on the need for a new constitution that could have broader

In 1890, Jones unsuccessfully sounded the alarm about calling a convention to adopt a new state constitution to disfranchise Black citizens. Above are some members of the 1890 Mississippi Legislature that disregarded his warning and called the convention. It appears that Jones is not among the few Black legislators at the top right and far left of the picture.

effects, too. Express disfranchisement of Black citizens would have violated the Fourteenth and Fifteenth Amendments, so any method of "legal" disfranchisement would have to rely on facially race-neutral techniques such as poll taxes, literacy tests, and selective criminal disfranchisement that would disproportionately affect Black voters. All those techniques, however, could disfranchise significant numbers of White voters as well, especially in the poorer majority-White counties of Eastern Mississippi that were already chafing under the domination of the Black-Belt Bourbons.

A proposal to call a constitutional convention to "legally" disfranchise Blacks had failed in 1886 and 1888. It became an issue in the 1889 elections, especially after Senator James George threw his support behind the proposal.[53] As he explained, "[t]he plan is to invest permanently the powers of government in the hands of the people who ought to have them—the white people."[54] In January 1890, the proposal was once again before the new legislature.

On January 24, 1890, Cornelius Jones was the first African-American legislator to speak against calling the convention. The few references in modern scholarly sources to the speech, which was thought not to have been transcribed, rely on very brief, nonverbatim descriptions in the *Obituary* and the **Possibilities** biographical sketch.[55] It turns out, however, that a full transcription of the speech was published by the *Memphis Daily Commercial*, which frequently reported on events just to the south in Mississippi.[56] Until now, no modern commentator has apparently viewed it, and no published source has reproduced it.

After a beginning framed in the most florid late nineteenth-century style ("leaving my conscience as pure of political guile and as free from prejudice as the moistening dew crystalized by the exhilarating influence of the spring-time zephyrs which passionately clings to the pinkish type of a lovely rose"), Jones counseled special caution before calling a constitutional convention: "Prudence and patriotism decree that nothing but a state

of extreme necessity" that would lead to "uniform" opinions among the people would justify the adoption of a new constitution. He argued that the old constitution gives "every citizen of the State that protection he deserves" and provides a "specific guarantee[]" of the "unqualified enjoyment of the rights of suffrage." To the charge that inaction would lead to "negro domination," he noted the obvious—that even under the present constitution, Whites "are in possession of the Government of the State" and currently "enjoy unqualified supremacy."

Jones made an eloquent plea that suffrage was particularly important to the poor and uneducated:

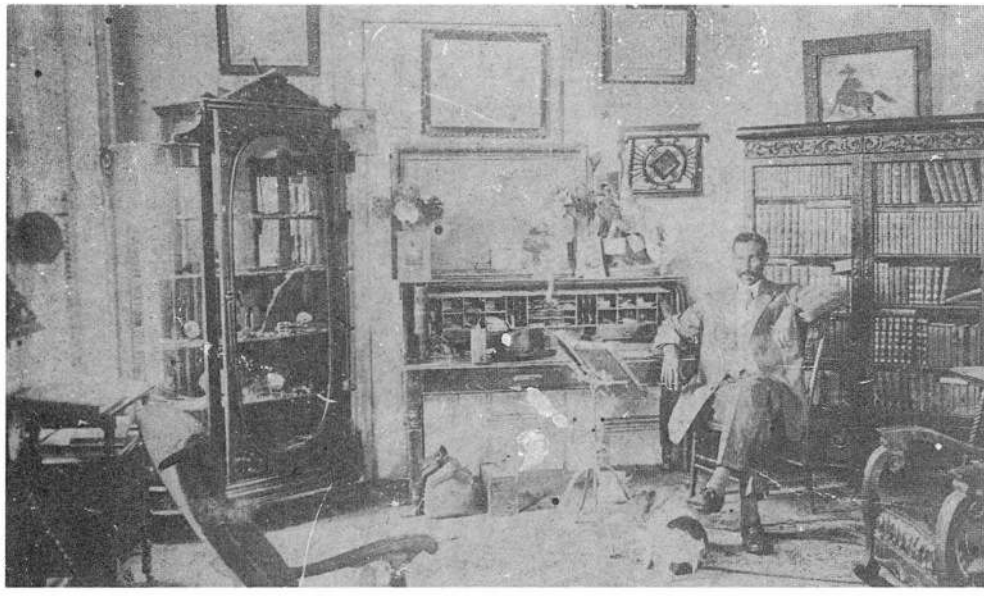
> There are thousands of ignorant and poor people of this State listening in wait under the great apprehension that their dearest and most cherished rights will be canceled, and the passage of this bill will be more convicting and convincing to them than all of the manuscript decrees of times, ancient and modern. This rash act will be the fatal blow to the dearest rights of all who fall under its crashing volumes. The same thing which makes the present Constitution odious to the gentlemen on the other side will make the proposed change odious to those opposing the change. The poor and ignorant cannot wrestle from the grasp of the proscriptive provisions proposed when saddled upon them, and their further appeals will add to your accumulated contempt for them and an increase of their misery.
>
> You can endure the just and equitable provisions of the present Constitution, with less disadvantage than an ignorant and poverty-stricken class can endure your shocking propositions.

Then, he turned to the effect of a new constitution that would likely affect White as well as Black citizens:

> I cannot claim, nor will I claim that the colored people aided you to redeem this State (as you call it) from Radical rule. But, gentlemen, you well know that the proposed change will certainly manacle the sturdy hand of many of your most active white brethren by constitutionally proscribing them in the educational qualifications.
>
> ...
>
> It has been said that the toiling yeomanry demands this convention, and I say, from the highest authority, that the yeomanry of this State are the more illiterate classes, and they, sir, will know that the day that the Governor signs such a bill—if it passes—a fatal blow is struck at the dearest rights which they under our present Constitution enjoy.

Jones presented the consequence in dire terms. He explained, "not as a menace, but as a timely admonition, that the class of persons whom you seek to injure are a submissive people, but this quiet submission by no means means that they are unobserving." And he concluded with a vision of civic conflict that would be provoked by the adoption of a disfranchising constitution:

> Revolution, gentlemen, stares you in the face. Not negroes and white men, but great men, and great men are divided in opinion. White men are opposing white men from sound principles, and your great State, which has presided so queenly over many Southern councils, is tottering upon the verge of her ruin, and soon, sir, if this bill passes, the sword of the brave Democrat



Cornelius Jones (pictured in his office in mid-career) practiced law in Mississippi until 1903. Although he lost the three cases he brought before the Supreme Court from his home state, he had some success representing Black criminal defendants before the Mississippi Supreme Court. Jones was the only attorney bringing constitutional challenges to Mississippi's disfranchisement of Black voters.

> and white man on one side and the same on the other side will be crossed in manly conflict and your State will lose her maiden grandeur; your kingdom will have fallen; your sense will have found you out, while your white dominion will be buried in the smoking ruin of destruction.

It is remarkable that in 1890 Mississippi, a Black legislator could speak so boldly as to warn that "[r]evolution … stares you in the face" and the result of adopting a constitution to disfranchise Black citizens would be that "your white dominion will be buried in the smoking ruin of destruction." It is equally remarkable that the speech drew praise from Mississippi newspapers that called it "eloquent and expressive" and noted that it was "complimented by all who heard" and was "universally conceded to have been a splendid effort."[57] The *Memphis Daily Commercial* thought it sufficiently important to put the full transcript on its front page the next day.

Despite Jones's warning, the bill passed the state House and Senate and was signed by the governor on February 5.[58] Elections were to be held for delegates to the convention on July 29.[59] Jones himself ran for a seat from Issaquena County, but that 94% Black county sent an all-White delegation.[60] Running for delegate was not without risk in violent post-Reconstruction Mississippi. One White Republican running for a convention seat, F.M.B. (Marsh) Cook, was assassinated because he refused to stop rallying (mostly Black) Republicans to fight disfranchisement.[61] Republicans in another county nominated an African American as delegate, but later rescinded the nomination because they realized it "was not wise."[62] In a state that was 58% Black, the convention wound up with only one Black delegate out of 135.[63]

The convention adopted a new constitution that, as expected, contained key

provisions that did not expressly mention race but were designed to disfranchise Black citizens. As S.S. Calhoon, the President of the Convention, contended during the debate on the franchise provisions, "their [i.e., Black citizens'] good and our own demands that we shall devise some means by which they shall be practically excluded from government control."[64] One such provision was Section 243, which required all registrants to pay an annual poll tax and then keep and show the retained receipts for two years as a prerequisite to registration.[65] Another was the infamous "Understanding Clause" in Section 244, which required registrants either to "be able to read any section of the constitution" or to "be able to understand the same when read to him, or give a reasonable interpretation thereof"—of course, as judged by a registrar who no doubt knew the racial intent underlying the new requirement. Other provisions, too, worked to disproportionately disfranchise Black voters, including one disfranchising those convicted of certain specified crimes and one requiring a secret ballot, printed by the state, that made voting difficult or impossible for those who could not read.[66] Section 244 required all voters to be newly registered after January 1, 1892, thus applying the new restrictions to the existing electorate. Section 264 extended the new qualifications from the voting booth to the jury room by requiring that all grand and petit jurors be chosen from among "qualified elector[s]."

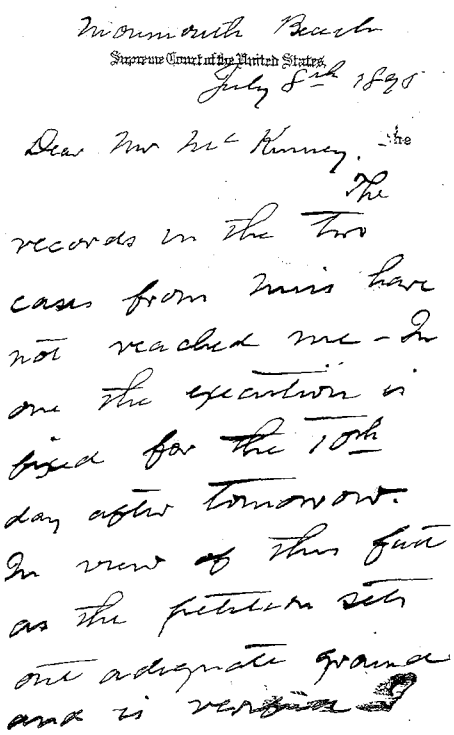
The new constitution reduced the White electorate, but it essentially eliminated the franchise for Blacks. According to one calculation, between the 1888 and 1892 presidential elections, turnout was reduced from 62% to 41% of the adult White male population, while Black turnout was reduced from 29% to 2%.[67] After the new provisions took effect in 1892, 57.7% of adult White males were registered to vote, but only 5.9% of Blacks.[68] Before 1890, Blacks were still a majority of the registered voters; in 1892, one source reported that 68,127 Whites and only 8,615 African Americans were registered to vote.[69] Black representation in the legislature went from six in 1890 to three in 1892 to zero in 1896.[70] The "Mississippi Plan" for "legally" disfranchising the Black population through facially race-neutral laws was pathbreaking for other southern states and widely followed in the succeeding two decades.[71]

The Mississippi Constitution of 1890 was not met with the revolution that Jones had warned of, and the "white dominion" in Mississippi was not "buried in the smoking ruin of destruction," as Jones had prophesied. But Jones did spend the next twelve years fighting the new constitution and the racial injustices it produced—before the Supreme Court, before the voters in Mississippi, and before Congress.

Supreme Court Litigation: *Gibson, Smith, Williams*, and *Bell*

After the notable 1890 legislative session, Jones served out his single term in the legislature and then "put out his shingle" to practice law.[72] He was active in relief efforts for the Black community after severe flooding in the spring of 1890.[73] He spoke to local civic and Republican political groups.[74] He was considered as a possible candidate for Congress in 1890 against White incumbent T.C. Catchings in the gerrymandered Black-Belt district—although that contest was not to occur for another six years.[75] Until he left Mississippi in 1903, he continued to practice law, including representing Black criminal defendants with some success before the Mississippi Supreme Court.[76]

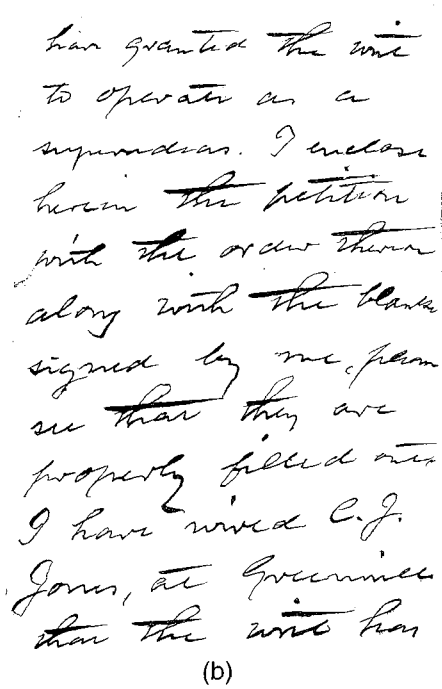
Jones's most significant cases were the three that he brought to the U.S. Supreme Court during this period challenging the new regime ushered in by the 1890 Constitution. Whether because of lack of means, motive, opportunity, or courage, no other



Monmouth Beach
Supreme Court of the United States
July 5th 1895

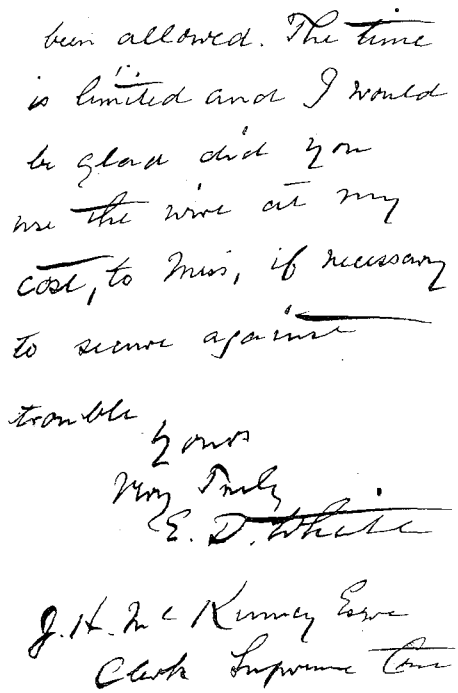
Dear Mr McKenney. The
records in the two
cases from Miss have
not reached me - In
one the execution is
fixed for the 10th
day after tomorrow.
In view of this fact
as the petitions set
out adequate grounds
and is reasonable

(a)



have granted the writ
to operate as a
supersedeas. I enclose
herein the petition
with the order thereon
along with the bond
signed by me, from
see that they are
properly filled out
I have wired C.J.
Jones, at Greenville
that the writ has

(b)



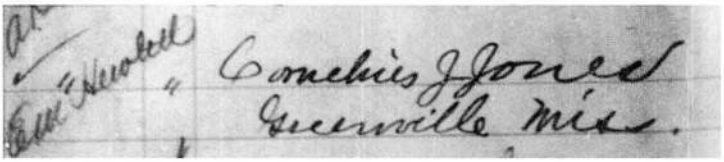
been allowed. The time
is limited and I would
be glad did you
use the wire at my
cost, to Miss, if necessary
to secure against
trouble

Yours
Very Truly
E. D. White

J. H. McKenney Esqr
Clerk Supreme Court

(c)

While he was on summer recess, Justice Edward D. White, the Circuit Justice for Mississippi, wrote to Clerk of the Court James McKenney about granting a stay of execution for Charley Smith, a Black man convicted of murder who was represented by Jones. As time was running out and the case records had not yet arrived, White instructed McKenney to issue the stay anyway and "use the wire at my cost, to Miss[issippi], if necessary to secure against trouble."



Jones, who needed a member of the Court's Bar to docket *Gibson* and *Smith* in the Supreme Court, enlisted prominent Washington, D.C., attorney Emanuel M. Hewlett to do so. Hewlett served as co-counsel in the two cases. Pictured above is Jones' signature on becoming a member of the Supreme Court Bar on October 21, 1895.

attorney brought constitutional challenges to Mississippi's disfranchisement of its Black population. As one recent study concluded, "Cornelius Jones was the only man in Mississippi who was actually doing something concrete to reverse, or just slow, blacks' disfranchisement" during this period.[77]

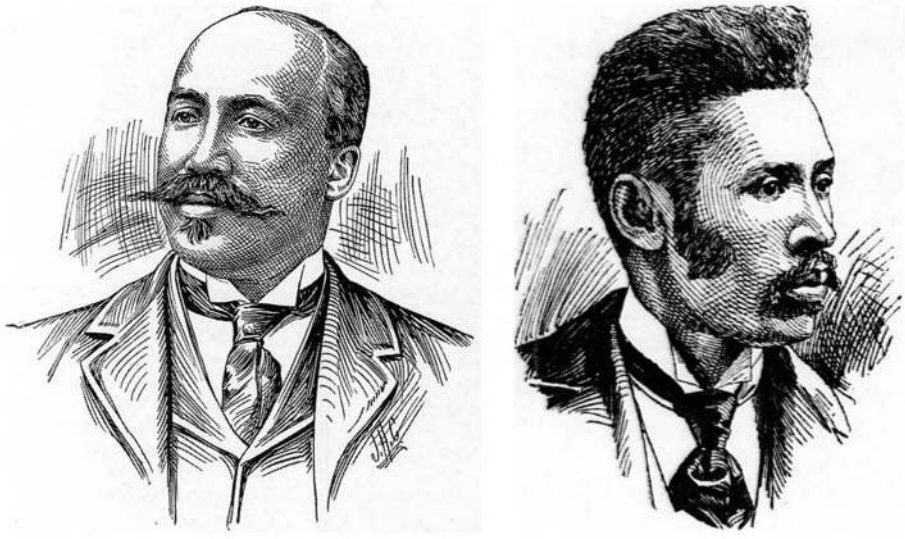
There were risks to Jones's clients and, perhaps, to Jones himself. Mississippi led the nation in the 1890s (and later) in lynching activity, which reached its peak between 1889 and 1908.[78] Bolivar and Washington Counties, where Jones was active and where his 1890s Supreme Court cases originated, were among those leading the state in lynchings.[79] The majority of lynching victims were accused of murder or attempted murder of a White victim, just like the defendant in one of Jones's 1890s Supreme Court cases, *Gibson v. Mississippi*.[80]

In the 1890s, the Court had not yet clearly decided how to analyze a facially race-neutral law that was alleged to discriminate against Blacks in violation of the Civil War Amendments. Was the intent to discriminate sufficient to show a violation, even if the law itself did not expressly mention race? If so, whose intent was relevant—the legislators who adopted the law or those who administered or enforced it? Together with or instead of intent, did an actual harmful effect on Blacks have to be proven? If so, given that many laws have a disproportionate effect on different races, what kind of effect would be necessary to show a violation? All of these questions were open in the mid-1890s, when Jones brought *Gibson*, *Smith*, and *Williams* to the Court.

Gibson v. Mississippi *(1896) and* Smith v. Mississippi *(1896)*

Jones's first case was *Gibson v. Mississippi*,[81] in which the defendant was tried an astounding four separate times. On January 9, 1892, John Gibson, a Black plantation laborer, accused Bob Stinson, his White boss, of shorting his weekly pay by 25 cents.[82] When the two met outside the plantation owner's home, Stinson, who was armed, knocked Gibson to his knees and fired at him. There was a struggle, another shot was fired, and Stinson crumpled to the ground.[83] The facts suggested an obvious self-defense claim, but a Washington County jury found Gibson guilty of murder. In a surprising twist, although Gibson had no counsel on appeal, the Mississippi Supreme Court reversed the conviction, on the ground that the trial court had erred in improperly limiting Gibson's peremptory challenges.[84]

Gibson's second trial resulted in a hung jury, likely because of what must have been Gibson's strong self-defense claim. But after a third trial, he was again convicted and sentenced to death.[85] Jones was not involved in any of the trials, but he successfully appealed the conviction at Gibson's third trial.[86] The Mississippi Supreme Court this time reversed on the grounds that the trial court had erred in (a) erroneously sustaining an objection when a witness was asked whether he "was prepared to mob the defendant in case of his acquittal," i.e., whether he would participate in lynching the defendant, (b) refusing the defendant's proper instruction on the elements of murder, and (c) not permitting a witness to



Hewlett (left) and Jones (right) argued separate cases from Mississippi challenging the disfranchisement of Black voters on December 13, 1895, but both signed the briefs in both cases. As Hewlett's case was scheduled first, he became the second Black attorney to present a case in the Supreme Court; Jones, who was the driving force behind the companion cases, became the third. (Everett J. Waring was the first, in 1890.)

testify that he heard the victim threaten to kill Gibson.[87]

Given the multiple trials and reversals, the case had by this time become a local cause celebre.[88] Gibson was again convicted after a fourth trial in January 1895, and this time, despite Jones's efforts on appeal, the Mississippi Supreme Court affirmed, on May 27, 1895.[89]

Meanwhile, Jones was litigating another case, *Smith v. Mississippi*,[90] with a simpler procedural history. Charley Smith had quarreled with another man at a country dance at a house in Bolivar County, and the fight spilled outside. Shots were fired, though no one was hurt. Later, two shots were fired into the house, one of them killing a man named Wiley Nesby. Unlike in *Gibson*, all involved were Black. Smith was convicted of the murder, and the Mississippi Supreme Court affirmed the conviction on June 3, 1895, with Jones as counsel throughout the proceedings.[91]

Smith's execution was set for July 10 and Gibson's for July 17, 1895.[92] At the time, the Court had mandatory jurisdiction via writ of error—not discretionary certiorari jurisdiction—over cases like *Smith* and *Gibson*, in which a state court denied an asserted claim of federal constitutional right.[93] Still, Jones had to act quickly to get the cases before the Court and obtain stays of execution. In *Smith*, Jones petitioned for a writ of error to the U.S. Supreme Court on June 7.[94] In accordance with contemporary practice, he also asked the Mississippi Supreme Court to allow the writ on June 14, and his motion was granted on June 27.[95] In the Supreme Court, the case was referred to Justice Edward D. White, the Circuit Justice for Mississippi. On July 5, White, who was on vacation in Monmouth Beach, New Jersey, scribbled a note to the Clerk of the Court, James McKenney, that Jones had reached him, that the record in *Smith* had not yet arrived, but that "[i]f the records bear out the allegations of the petition, I will grant the writ" and stay the execution. By July 8, two days before Smith's scheduled execution, the record had still not arrived, but White granted the writ and stay anyway. Given the shortness of time, he instructed the Clerk to "use the wire

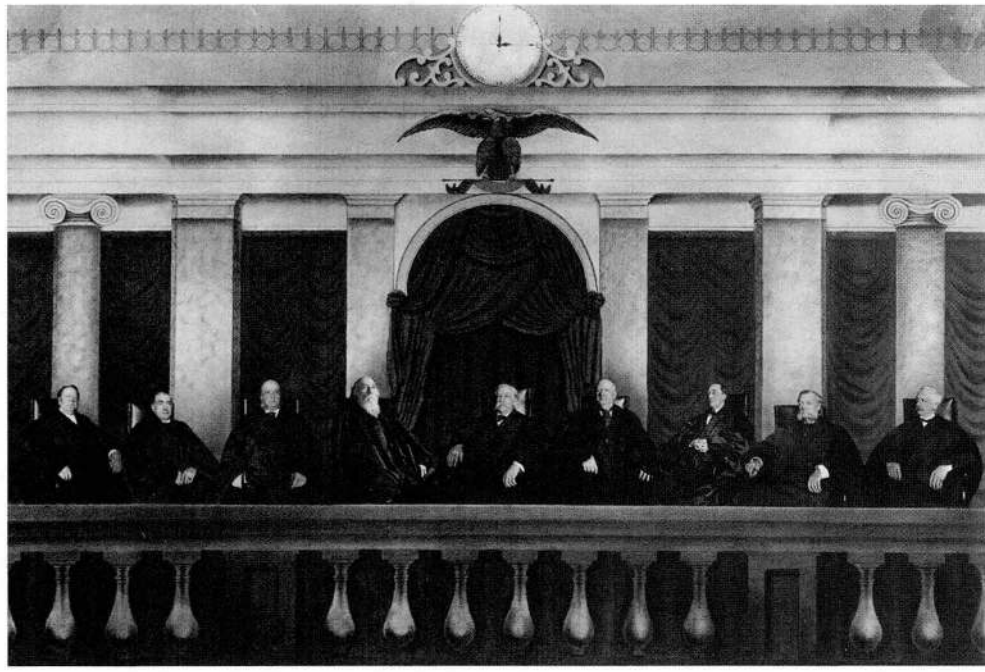
at my cost, to Miss[issippi], if necessary to secure against trouble."[96] Jones filed the papers in *Gibson* along an almost identical timeline. White received them by July 15, two days before Gibson's scheduled execution.[97] He granted the writ and the stay that day.[98]

Because Jones was not yet a member of the Supreme Court Bar, he needed a member of the Court's bar to docket the case. He enlisted prominent Black Washington, D.C., attorney Emmanuel M. Hewlett, who appeared as co-counsel in both cases when they were docketed on August 22.[99] Hewlett argued *Gibson*, while Jones argued *Smith*, and both attorneys signed the briefs in both cases.[100]

Jones and Hewlett advanced two primary claims in *Gibson*. The first accepted as a premise the validity of the Constitution of 1890, Section 264 of which had adopted the requirement that only those registered to vote could sit as jurors.[101] The brief stated that "[t]he laws of the State of Mississippi regarding the selecting, listing and forming the grand jury ... cannot and are not complained of as the law."[102] But the defendant in *Gibson* had presented an affidavit stating that, even in 1892, after the disfranchising provisions of the 1890 Constitution were put into effect, 7,000 Blacks (as opposed to 1,500 Whites) in Washington County remained eligible voters, and therefore eligible jurors.[103] Yet "for a number of years" and in *Gibson* itself, no Black person had been called to serve on the grand or petit jury.[104] Jones and Hewlett argued that such exclusion could only have been intentional and that it violated the Equal Protection Clause. They argued that the trial court therefore should have permitted *Gibson* to be removed to federal court under Revised Statutes § 641, which authorized removal when a defendant "is denied or cannot enforce in the judicial tribunals of the State ... any right secured to him by any law providing for the equal civil rights of citizens of the United States."[105]

The second claim in *Gibson* was based on the prohibition against retroactive application of criminal laws in the Ex Post Facto Clause of Article I, Section 10, of the Constitution. In the nineteenth century, before most of the Bill of Rights was held applicable to the states, the Ex Post Facto Clause was one of the very few federal constitutional protections applicable to state criminal defendants, and therefore one of the only bases for a state criminal defendant to obtain U.S. Supreme Court review of his case. Section 283 of Mississippi's 1890 Constitution had provided that all crimes "shall be tried, prosecuted and punished as though no change had taken place, until otherwise provided by law"—i.e., until legislation to implement the new constitutional provisions was enacted. The murder in *Gibson* took place in 1892, after the 1890 Constitution was adopted but before implementing legislation had been enacted, and Section 283 therefore seemed applicable. If so, the law prior to the 1890 Constitution would remain applicable and govern Gibson's trial. The pre-1890 law provided for much broader eligibility of jurors, who did not have to be eligible to vote or literate, but instead merely had to be males between 21 and 60 who had never been convicted of an "infamous" crime.[106] Jones and Hewlett accordingly argued that the Ex Post Facto Clause entitled Gibson to demand a jury under the broad pre-1890 juror eligibility law—which would certainly have included Black men in the jury pool—rather than the implementing legislation adopted after the murder in *Gibson* took place.

Gibson was argued on Friday, December 13, 1895, and the argument in *Smith* began that day and continued on the following Monday, December 16.[107] Before *Gibson* and *Smith*, only one Black attorney had ever argued a case before the Court—in 1890 Everett J. Waring of Maryland argued *Jones v. United States*.[108] Because some of Waring's co-counsel in *Jones* were White, *Gibson* and *Smith* were the first cases in the Court in



The Court handed down its decisions in *Gibson v. Mississippi* and *Smith v. Mississippi* on April 25, 1898, the same day it heard argument in *Plessy v. Ferguson*. Justice John Marshall Harlan (who would famously dissent in *Plessy*) wrote the unanimous opinion rejecting the defendants' claims. Harlan (third from right) noted in his opinion in *Gibson* that Jones and Hewlett, who were representing the Black defendant, were themselves Black.

which a party was solely represented by African-American counsel and the first time two cases on the same day were argued by African-American attorneys.[109]

On April 13, 1896—as noted, the same day that *Plessy v. Ferguson* was argued—the Court, in opinions written by Justice John Marshall Harlan, unanimously rejected the challenges in *Gibson* and *Smith*. The Court ruled in *Gibson* that removal from state to federal court under the civil rights removal statute was limited to cases in which the denial or inability to enforce a federal civil right "result[ed] from the constitution or laws of the State, rather than a denial first made manifest at or during the trial of the case," such as in selection of a jury.[110] Thus, although "[t]he equal protection of the laws is a right now secured to every person without regard to race … neither the constitution of Mississippi nor the statutes of that State prescribe any rule for, or mode of procedure in, the trial of criminal cases which is not equally applicable … to all persons within the jurisdiction of the State without regard to race."[111] In short, because the 1890 Constitution and resulting laws did not expressly treat Blacks worse than Whites, the *implementation* of those laws during legal proceedings, even if discriminatory, could not justify removal to federal court.

Having disposed of the removal issue, the Court simply declined to rule on the key substantive question: Whether, removal or not, the exclusion of Black men from the jury violated the Equal Protection Clause. The Court ruled that trial counsel had forfeited the claim of bias in selection of the grand jury by not moving to quash the indictment.[112] The Court simply ignored the claim of bias in selecting the petit jury.

The Court also rejected the Ex Post Facto claim in *Gibson*. In the Court's view,

notwithstanding the 1890 Constitution's directive that former law be applied until implementing legislation could be passed, the new Understanding Clause and the requirement that jurors be eligible to vote were self-executing, i.e., they "became the law of the State immediately upon the adoption of the constitution."[113] They were therefore in place *before* the murder in *Gibson* occurred in 1892 and could be applied at the *Gibson* trial. The Court also held that in any event applying the implementing legislation would not be unconstitutional, because under the long-established test derived from *Calder v. Bull*,[114] new legislation affecting jury qualification "related simply to procedure" and therefore did not implicate the Ex Post Facto Clause.[115]

Smith had no Ex Post Facto claim, because the crime there took place long after all relevant enactments. But the Equal Protection claims in the two cases were essentially the same. As in *Gibson*, the defendant had filed an affidavit stating that, despite the fact that eligible Black jurors in Bolivar County outnumbered Whites by 1,500 to 500, no Black person was among the pool from which the grand or petit juries were selected.[116] As in *Gibson*, the affidavit more broadly stated that "no black person has been summoned to serve as ... juror ... in [Bolivar County] since the adoption of the new constitution, on account of the great prejudice against the black race by those in authority."[117] As in *Gibson*, the trial court rejected the defendant's removal petition and related motions.[118]

Unlike in *Gibson*, Jones himself was trial counsel in *Smith* and had made the necessary motion to quash, so there was no question of procedural default on his claim of bias in the selection of the grand or petit jury.[119] In their brief in *Smith*, Jones and Hewlett attempted to allay any concerns about relying on the key facts in the defendant's affidavit. They pointed out that the state had offered "no proof in rebuttal" to the facts of discrimination in the selection of the grand and petit juries set forth in the affidavit.[120] Moreover, they asserted that the defendant's affidavit was based on his personal knowledge and that, because the state had not challenged the defendant's competency on that (or any) ground, it was too late to do so now.[121]

Despite the efforts of Jones and Hewlett, the Supreme Court rejected the discrimination claim in *Smith* for lack of evidence, holding that the defendant "could not, of right, insist that the facts stated in the motion to quash the indictment"—i.e., the exclusion of Blacks from the jury—"should be taken as true simply because his motion was verified by his affidavit."[122] Instead, the Court required the motion to quash to "have been sustained by distinct evidence introduced or offered to be introduced by the accused."[123] Presumably, the Court was requiring evidence of specific officials committing particular acts of discrimination in jury selection to sustain the claim.

Ironically, in his petition for removal and in his motion to quash the venire, Jones, as trial counsel, had sought to subpoena local officials to obtain just such "distinct evidence" of racial discrimination, but the trial court had denied the subpoenas.[124] The Court did not discuss the trial court's refusal to permit Jones to subpoena witnesses to gather evidence or whether any evidentiary weakness in the case should be at least in part excused because Jones had been denied the ability to subpoena witnesses.

Jones and Hewlett filed a petition for rehearing that was received by the Court on May 6, 1896. They repeated that the defendant's affidavit had never been controverted and added that Mississippi practice therefore required the "allegations that [Smith] was discriminated against in the selection of the grand and petit jury on account [of his] color" to be accepted as true.[125] The Court denied the petition on May 11, with no comment.[126]

Williams v. Mississippi *(1898)*

Jones's third and most significant case, *Williams v. Mississippi*,[127] arose while *Gibson* and *Smith* were under advisement in the Supreme Court. Henry Williams was charged with murdering his lover, Eliza Brown, in a crime of passion committed a day or two after Christmas 1895. Both Williams and Brown were Black.[128] Williams admitted that he had gone to Brown's house and tried to kill her, though he also said she had threatened him with a pistol. He tried to place suspicion on another man whom he said he had heard leaving the house and who may have returned later.[129] With Jones representing him, Williams was found guilty by an all-White jury and sentenced to death on June 19, 1896.[130] On November 9, 1896, the conviction was affirmed by the state supreme court in a brief opinion relying on *Dixon v. State*,[131] a companion case that Jones had also argued.[132]

In *Gibson* and *Smith*, Jones had attacked only the discriminatory administration of the law and expressly disclaimed an attack on the legality of the Constitution of 1890 itself. In *Williams*, Jones turned to that much more direct attack. He now had the benefit of the Mississippi Supreme Court's remarkably frank 1896 opinion in *Ratliff v. Beale*,[133] which addressed the question whether the 1890 Constitution's poll tax could support a lien on the property of nonpayers. *Ratliff* found that the various disfranchising provisions of the 1890 Constitution, including the poll tax, were the result of its framers having "swept the circle of expedients to obstruct the exercise of the franchise by the negro race."[134] Accordingly, the court held that no liens were permitted for nonpayment of the poll tax, because such liens would result in more Black citizens paying the tax and therefore eligible to vote—directly contrary to the framers' purpose.[135]

Jones submitted his motion to docket *Williams* on December 9, 1897. The case was argued on March 18, 1898, and decided on April 25, 1898.[136] Jones's primary argument was based on discriminatory intent. He argued that the electoral franchise—and therefore the juror qualification—provisions of the 1890 Constitution and implementing legislation were unconstitutional because they "were enacted by the framers thereof, with the purpose and intent to discriminate against the negro voters of the State because of their race, color, and previous condition of servitude."[137] That intent had an impact as well; he argued that the limitations on the franchise had resulted in "the denial of suffrage to 190,000 [Black] citizens of the United States."[138] He liberally employed *Ratliff*, noting that the Mississippi Supreme Court itself had "judicially declared that the present Constitution and statutes" had changed the prior franchise provisions "for the purpose of 'obstructing the exercise of suffrage by the negro race.'"[139] That, he argued, "clearly puts at rest for all time to come any question as to the purpose of the framers of the present Constitution of Mississippi."[140] Although the Mississippi Supreme Court stated that it "ha[d] no power to investigate or decide upon the private individual purposes of those who framed the Constitution," Jones argued that it was precisely the framers' invidious purpose that violated the Fourteenth Amendment's guarantee of equality.[141]

The U.S. Supreme Court rejected Jones's argument and unanimously affirmed, in an opinion written by the newly appointed Justice Joseph McKenna. After a perfunctory statement that the U.S. Constitution "forbids ... discriminations by the general government or by the states against any citizen because of his race," the opinion noted that Mississippi's constitution and laws were facially race-neutral and that any discrimination against Black citizens must, in the Court's view, be the result of "the powers vested in certain administrative officers."[142] Remarkably, the Court quoted in full the *Ratliff* statement

that the framers of the 1890 Constitution had "swept the field of expedients, to obstruct the exercise of suffrage by the negro race" and *Ratliff*'s accompanying, thoroughly racist justification for doing so.[143] The Court went on:

> [N]othing tangible can be deduced from this. If weakness were to be taken advantage of, it was to be done 'within the field of permissible action under the limitations imposed by the Federal Constitution,' and the means of it were the alleged characteristics of the negro race, not the administration of the law by officers of the State. Besides, the operation of the constitution and laws is not limited by their language or effects to one race. They reach weak and vicious white men as well as weak and vicious black men, and whatever is sinister in their intention, if anything, can be prevented by both races by the exertion of that duty which voluntarily pays taxes and refrains from crime.[144]

In *Williams*, the Court seems thus to have adopted the rule that, if a law is facially race-neutral, even an indisputable racially discriminatory purpose and grossly (if not very detailed) disproportionate effect would not invalidate it; so long as the law had *some* effect on Whites as well as Blacks, it was valid. In such a case, the challenger needed proof that the officials who *administered* the law had discriminated. As Justice McKenna stated, "[t]here is an allegation of the purpose of the [1890 constitutional] convention to disfranchise citizens of the colored race, but with this we have no concern, unless the purpose is executed by the constitution or laws or by those who administer them."[145] And, as in *Gibson* and *Smith*, the statements in affidavits that Black citizens had been denied the right to sit on juries (and that 190,000 had been disfranchised) did not themselves establish that any particular administrative official had committed any particular act of intentional discrimination.[146] Perhaps realizing the significance of the loss, Jones filed two successive long-shot rehearing petitions in *Williams*, but neither was granted.

Some modern commentators have criticized the quality of Jones's representation in *Gibson*, *Smith*, and *Williams*, primarily on the ground that the affidavits he used to establish discriminatory effect were undetailed and conclusory.[147] The criticisms have force, but a look at the whole context may temper the critique. In *Gibson*, any lack of factual development by trial counsel (not Jones) turned out to be of no consequence, because the Court never analyzed the facts. Instead, Justice Harlan's opinion decided the case on legal and procedural grounds: the legal insufficiency of the Ex Post Facto claim; the unavailability of removal even if there were discrimination in jury selection; and trial counsel's failure to make a motion to quash the indictment. Moreover, in both *Gibson* and *Smith*, the Court demanded additional evidence of discrimination by local officials, but disregarded the trial court's refusal to permit Jones the ordinary means to develop such evidence—by subpoenaing witnesses.

In any event, no one disputed Jones's affidavits stating that Blacks constituted a huge majority of eligible jurors in Washington County (7,000 Blacks and 1,500 Whites) and Bolivar County (1,500 Blacks and 500 Whites), but *none* had served on juries since the 1890 Constitution took effect. Referring to those numbers, Jones and Hewlett asked in their *Gibson* brief: "[C]ould it be probable or reasonable to suppose that all the names so drawn to the number of two hundred [in the venire] would have by chance been all names of white men?"[148] At a later time, that evidence would have surely been viewed as near-conclusive, yet the Court found it inadequate.

Indeed, Jones had strong arguments that his affidavits were sufficient to make out his claim. There had been no challenge to Jones's affidavits about the discriminatory effects of the 1890 Constitution. The Mississippi Supreme Court itself in the *Dixon* case—on which its decision in *Williams* had rested—had stated that "[w]e have dealt with the case upon the assumption that the facts set out in the motion are true," and that it is "common practice in our courts, in the absence of objection, to hear affidavits on motions."[149] As in *Dixon*, the state in *Gibson*, *Smith*, and *Williams* had made no objection to Jones's affidavits, yet the U.S. Supreme Court refused to accept the facts they recited as true.

More importantly, however, what Jones intended to do in *Williams* seems to have been to offer the Court an intent-based criterion for determining an equal protection violation—not dissimilar from what the Court decades later adopted in *Washington v. Davis* (1976).[150] Indeed, in *Hunter v. Underwood* (1985),[151] the Court finally accepted Jones's position. *Hunter* involved an attack on Alabama's constitutional provision disfranchising those convicted of certain crimes, which Alabama adopted in 1901 (following Mississippi's example) with the express purpose to disfranchise Black citizens. As in *Williams*, the Alabama provision was facially race-neutral and was adopted "to disenfranchise poor whites as well as blacks." As in *Williams*, the state's purpose in *Hunter* was "within the limits imposed by the Federal Constitution, to establish white supremacy in this State."[152] But while the Court in *Williams* held that those points, if anything, cut in favor of the challenged provisions, a unanimous Court in *Hunter* relied on them to strike down the challenged law, in an opinion by then-Justice William Rehnquist.

Lawyers are responsible for finding the key to winning their case, not a case that might be brought 90 years later, in a different era. But perhaps the real point of *Gibson*, *Smith*, and *Williams* is that no strategy could have been successful in convincing the Court to make a serious attempt to roll back the Jim Crow regime in the 1890s. Citing Jones's three cases among others, Michael Klarman has detailed how the Court in the *Plessy* era rejected almost all challenges to Black disfranchisement and "largely nullified" the rule against racial discrimination in jury selection "by making such discrimination virtually impossible to prove."[153] "[G]iven the background state of race relations at the turn of the century and the limited capacity of the Supreme Court generally to frustrate dominant public opinion, it may be implausible to think that the Justices realistically could have reached different results in these cases."[154] In a moment of discouragement, Jones expressed much the same sentiment in a letter to a newspaper in 1901: if the Supreme Court faces a case in which "the decision will in any manner cloud the prospect for perpetual white supremacy in the South, the result thereof is too well known to us."[155]

Bell v. Mississippi *(1900)*

Jones returned to the Supreme Court in 1900, when he sought leave to file *Bell v. Mississippi* under the Court's original jurisdiction. His motion tells the story of Fred Bell, who was convicted of grand larceny in Sharkey County, Mississippi, on May 31, 1879, and sentenced to five years' imprisonment. While Bell was supposed to have been released on May 31, 1884, he was in fact held in custody for an additional 13 years, until July 27, 1897. In light of the well-known cruelty of the Mississippi system of convict labor at that time, it is no surprise that by the time he was released he was "a physical wreck, blind and wholly incapacitated for making a living, and ... no more than a charge upon the charity of his neighbors and friends." Jones argued that his "imprisonment aforesaid and consequent punishment was cruel and unusual, wantonly inflicted by the authorized agents of the State

of Mississippi and contrary to the inhibition of the federal constitution." He sought "such relief as he is entitled to for said false imprisonment," presumably referring to money damages.[156]

Ten years earlier, the Court had decided *Hans v. Louisiana*,[157] which held that, under the Eleventh Amendment, a state cannot generally be sued without its consent. Because *Hans* arose in federal district court, it did not directly address the question of whether a suit against a state could be brought under the original jurisdiction of the Supreme Court, which the Constitution provides for "[i]n all cases ... in which a State shall be party."[158] Jones did not cite *Hans* in his brief two-page motion, but it is possible that the motion was an effort to exploit this possible loophole in *Hans*. Any such effort, however, was doomed. On April 16, 1900, the Court denied Jones's motion for leave to file suit in a one-sentence order "on the authority of *Hans v. Louisiana*."[159] Jones was not to return to the Supreme Court for another 17 years.

The Election Contests in 1896 and 1898

Attacking the 1890 Constitution in the 1896 Election Contest

While Jones was litigating *Williams* in the Supreme Court, he also was attacking Black disfranchisement in another forum entirely. In 1894, Republicans had not run a candidate for Congress in Mississippi's heavily Black Third District, out of concern that, as their resolution put it, a nomination by their party "would logically result in the choice of one of our race as a candidate, and the effect of such action will be to revive the bitterness of a race line in our politics, which we deem would be a most hurtful consequence to our body politic."[160] But on March 3, 1896—less than three months after the Court heard arguments in *Gibson* and *Smith*—Jones was selected by a Republican convention as candidate for Congress in the district.[161] In a letter to an African-American newspaper published in Washington, D.C., condemning the discriminatory treatment of African Americans he had observed in the local Washington police court, Jones added that he had "just been tendered the nomination for Congress from my district, and if I accept I am reasonabl[y] sure of election."[162]

Jones's Democratic opponent was incumbent "General" Thomas C. Catchings. He had been elected to Congress in 1884 and repeatedly reelected since then. When in 1888, his opponent, Black attorney James Hill, contested his loss to Catchings and sought to take the testimony of witnesses, Catchings wrote a local Democratic official that "I do not think it would hurt at all if one or two of them should disappear. It might have a very happy effect on Hill, his witnesses and lawyers."[163] The threat seems not to have been carried out, and the House Committee on Elections rejected the challenge. This was the man against whom Jones was now running in 1896.

If Jones's optimism about a victory was genuine, it was based on the 85% Black racial composition of the Third District.[164] Jones ran an unusually vigorous campaign for a Republican in 1890s Mississippi, holding large rallies throughout the district.[165] A handbill for Jones's August 1 opening rally in Greenville, fortunately, survives in the collection of the Schomburg Library in New York. It promises "[t]he greatest demonstration since 1876" and adds: "Let every old soldier who fought for the country and every Republican who voted before he was disfranchised by the New Constitution RALLY AROUND the FLAG."[166] The Greenville newspaper reported on the "large" rally, in which "[m]ore enthusiasm was manifested than has been usual on such occasions."[167]

Nonetheless, Jones certainly knew the history of Black disfranchisement in Mississippi, and he likely planned all along for an alternative means to attain the House seat and at the same time mount another challenge to

Ten Thousand Republi-

cans Rally as Never

BEFORE!!

Let every old soldier who fought for the country and every Republican who voted before he was disfranchised by the New Constitution

RALLY AROUND the FLAG

AT

GREENVILLE, MISS.,

ON THE

1st Day of Aug. 1896

The Grandest Ratification Rally ever witnessed. Hon. C. J JONES, the Republican nominee for Congress will open his campaign in this county on that day.

Leading Republicans from other counties will be present and speak on that day. S. P Hurst Chairman of the 1st. Executive Committee. J. E. Ousley, Wesley Creyton, I. T. Montgomery. G. W. Gilliam, G W Chatters and S. B. Blackwell and many other leading Republicans will be present, The greatest demonstration since 1876 Every Republican is called to duty.

E. W. LAMPTON,
N. COWAN,

Chairman and Secretary of the County Central Committee.

Jones ran a vigorous campaign for Congress in theThird District, holding large rallies. A handbill for Jones's August 1 opening rally in Greenville says: "Let every old soldier who fought for the country and every Republican who voted before he was disfranchised by the New Constitution RALLY AROUND the FLAG."

the Constitution of 1890. The certified vote on November 3 showed 3,069 votes for T.C. Catchings, the incumbent Democrat, against 369 votes for Jones.[168] A White free-silver proponent named J.R. Chalmers polled 532 votes and a Black candidate of a feuding Republican faction, Thomas Easterling, polled 80 votes.[169] On November 18, 1896, Jones filed a notice with Clerk of the House that he was contesting the election.[170]

Article I, Section 5 of the Constitution makes each House of Congress "the Judge of the Elections, Returns and Qualifications of its own Members." Accordingly, contests over who should be declared the winner of an election have been decided by the House since the very early days of the Republic.[171] The late 1880s and 1890s were a peak era for such election contests, many of which were based on the disfranchisement of Black voters in the South. Jones's case was one of twenty-one contested election cases that followed the 1896 election, three of which were successful.[172] Election contests were governed by a statute originally enacted in 1851 and amended several times thereafter, which provided for a litigation-like process including notice of challenge, successive depositions by contestant and contestee to develop the facts, and printing and filing of reports and briefs with the House Committee on Elections.[173] It also provided for a payment of up to $2,000 each to the contestant and contestee to cover the costs.[174]

Jones's November 18 Notice of Contest charged that Mississippi's election laws were unenforceable, emphasizing especially the Understanding Clause. It charged that an applicant's "right to register as a voter depends upon the judgment of the county registrar" with respect to whether the applicant could "give a reasonable interpretation of or read any section of the constitution," a process that "practically leaves the applicant ... at the will of the registrar" and has "resulted in a wholesale denial of the elective franchise to ... the colored Republicans of this district, while those of the white race and the Democratic party" were permitted to vote.[175] The notice also charged various means by which Black citizens had been denied the right to vote, such as "asking all manner of unreasonable questions which would be foreign to any phase of the subjects named in the law"; sending registration books "to private parties, who invariably registered such white citizens as applied therefor and denied that privilege to the colored Republicans who applied for such registration"; "willfully declin[ing] to receive" appeals from applicants refused registration, though state law provided for such appeals; "wrongfully canceling and causing" the names of "duly registered Republicans to be left off the poll books" sent to the precincts; and so on. The notice included the precise numbers of voters in many of the district's counties whom it alleged had been unlawfully denied the franchise.[176]

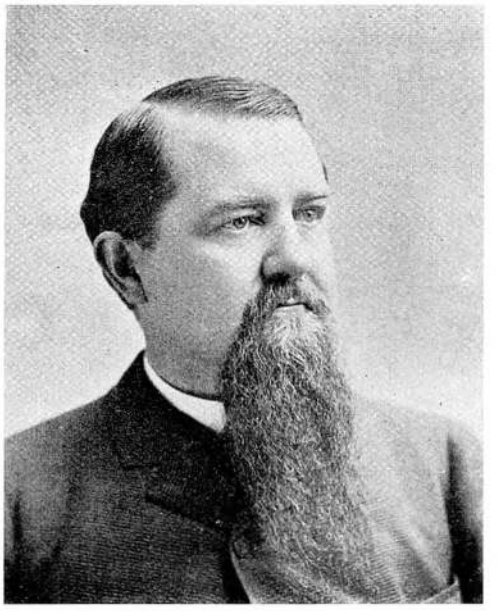
The local White press was scornful of the election contest. The Greenville paper commented that Jones's losses in the Supreme Court "should have taught any head less thick than that of an African that he has been wasting his time" and charged that Jones's only motivation was the "$2,000 premium offered by a generous congress." The paper concluded that "[t]he presence of an agitator and chronic malcontent like Jones is a standing menace to the harmony and welfare of the races."[177] It should be noted that Jones submitted a statement and receipts for his out-of-pocket expenses for the contest. The statement included expenses for stenography, travel, printing, attorney's fees (none of which were for Jones himself), and witness fees of 75 cents per day, amounting to a total of $2,287.61. After review, the committee apparently awarded him exactly $1,998.80.[178]

Having just completed work in mid-December 1896 on the petition for review in *Williams* that would bring the case to the Supreme Court, Jones spent the first

three months of 1897 laboriously taking and defending depositions in his contested election case.[179] On eight days in January and early February 1897, Jones gave his own deposition and took the depositions of thirty-nine witnesses; five more of his witnesses were separately deposed by a notary on his behalf.[180] On ten days in February and March, Catchings' attorney deposed 74 witnesses; two additional witnesses for Catchings testified via written interrogatories.[181] Finally, on March 26 and 27, 1897, Jones deposed eleven rebuttal witnesses.[182] Each of the deposed witnesses was subject to cross-examination by the opposing party.

In his own deposition, Jones advanced the same basic point that he presented in *Williams*: that the 1890 Constitution "was enacted for but one purpose, and that was a scheme or plan to throttle the suffrage of a majority of the voters of the State," and that the discretion granted by the Understanding Clause to "the county registrar … has been used to the means desired, resulting in the extensive disfranchisement of about 180,000 male citizens of the United States."[183] Many of Jones's witnesses were literate and had paid their poll taxes, but testified they were denied the right to vote because their names (and the names of other Black would-be voters) were not present or had been erased from the poll books.[184] Others were not able to read but testified that registrars had unfairly applied the Understanding Clause, either by simply refusing to apply an understanding test, by refusing to accept an applicant's reasonable interpretation of a constitutional provision, or by posing irrelevant questions having nothing to do with the state constitution.[185]

In addition, Jones introduced petitions from eight of the counties in the Third District, containing a total of 5,043 names of African Americans who asserted they would have voted for Jones but, as one petition put it, "by virtue of the enforcement of the present constitution and statute of the State" had "been denied the right of elective franchise."[186] It must have taken enormous effort and courage to gather and sign these petitions in 1890s Mississippi.



Running in an 85% Black district, Jones lost badly to T.C. Catchings (above), the incumbent Democrat, in both the 1896 and 1898 Congressional elections. He contested the loss in the House of Representatives on the basis of the disfranchisement of Black citizens.

Catchings called witnesses to rebut each of Jones's claims. Some testified that Jones's witnesses who claimed to be qualified had not in fact paid their poll taxes. Several witnesses involved in registering voters advanced reasons (usually, nonpayment of poll taxes) for eliminating names of voters from registration and poll books. Catchings' witnesses also testified that very few applicants were excluded by the Understanding Clause, and that members of both races were among the excluded. Somewhat surprisingly, Catchings' attorneys consistently elicited testimony that many or most potential Black voters were either literate or could satisfy the Understanding Clause. That claim lay the groundwork for Catchings' assertion that Black citizens were simply not interested in politics and therefore had no reason to pay the poll tax,

which was alleged to be the overwhelming reason for the huge drop in Black voters after 1890. Catchings "defended" the Understanding Clause as a way to permit "illiterate whites whom experience had shown were capable of an intelligent exercise of the right of franchise" to escape the general literacy requirement.[187] Finally, Catchings' witnesses consistently emphasized that the non-Catchings vote (and the Black vote generally) was split between three candidates, perhaps in an effort to suggest that, even if there was a problem with Catchings' election, Jones should not be declared the victor.

The House Committee on Elections to which the case was assigned held hearings, but there is no record of any report to the House itself.[188] With respect to the claims of bad-faith enforcement of the Understanding Clause and other fraudulent tactics, the factual disputes in the testimony would have been difficult for a congressional committee to resolve. And no one was challenging the poll tax, nor was there apparently a basis to do so under then-existing law and precedent. Under those circumstances, Catchings' evidence that it was the poll tax that had overwhelmingly produced the disfranchisement of potential Black voters may have made Jones's case unappealing even to sympathetic congressmen. More generally, Republicans by this time had a safe majority in the House and had likely concluded that they had no need, and not much desire, for a predominantly Black southern branch of the party.[189]

Juxtaposing the timelines of the *Williams* case and the 1896 election contest is striking. In June 1896, the *Williams* trial took place. In December, the Mississippi Supreme Court ruled against the appeal on the basis of a companion case in which it held that the facts were insufficient to prove discrimination by state officials.[190] Almost immediately thereafter came Jones's very extensive development of precisely those facts in his election contest in the early months of 1897. When Jones presented his argument in *Williams* to the Supreme Court later that year and in early 1898 in briefs and oral argument, he was necessarily limited to the thin factual record developed in the trial court; then as now, appeals had to be decided based on the facts in the trial record. One can only wonder what Jones thought about the Court's holding in *Williams* that "it has not been shown that the[] actual administration" of the 1890 Constitution and related statutes "was evil," when he was sitting on a mound of (admittedly, contested) evidence of such invidious discrimination he had just gathered in his 1896 election contest.[191]

The 1898 Election Contest

By July 1898, Jones had announced his candidacy for Congress again, and in a "large and orderly" Third District Republican convention held on September 15, 1898, he was nominated "with a whirl" as Republican candidate. The convention marked a reconciliation of the two Republican factions in the state. A resolution offered Jones "our grateful appreciation for the masterly struggle he has made in behalf of human liberty and justice in contending before the United States [S]upreme [C]ourt for the supreme liberties guaranteed by the federal constitution, and before Congress."[192]

A yellow fever epidemic that year resulted in a quarantine, which limited Jones's ability to campaign.[193] Nonetheless, he apparently held rallies in at least seven towns in the district.[194] Some Democrats worried that, as the Greenville paper noted in a preelection editorial, "[t]here is nothing more dangerous than the apathy which follows a feeling of absolute security in politics; and that is the danger which is now threatening us."[195] An Issaquena County paper commented that "[w]e can not afford to allow a negro to be elected in this district, and if we do not turn out and vote there is danger of such a thing."[196]

Election day was November 8. Catchings polled 2,068 votes, while Jones polled 363 and a third-party candidate got 45 votes.[197] By this time, Jones had lost *Williams* and its challenge to the 1890 Constitution, and he had failed to convince Congress in his 1896 Election Contest case that the 1890 Constitution unconstitutionally disfranchised Black citizens. Accordingly, he mounted a much narrower, technical challenge, based on the claim that the ballots used in the election were defective under state law and therefore should not have been counted.

In September, Jones had seen a letter from the Mississippi Secretary of State to local election officials apparently instructing them to use two ballots at the upcoming election—one for the congressional race and another for a constitutional amendment regarding levees that was also before the voters.[198] Before 1890, state law provided for candidates or voters to vote their own "tickets" that were subject only to certain formatting requirements. Even illiterate voters could vote tickets provided by candidates or others merely by inserting them in the ballot box. As part of its suppression of illiterate (and disproportionately Black) voters, the 1890 Constitution replaced that method of voting with official ballots prepared by election officials, on which voters would have to read the ballots to identify their candidates and then mark their votes. The implementing legislation provided that when a constitutional amendment is submitted to a vote, "the amendment ... shall be printed on the official ballot, *together with the names of the candidates, if any*," thus requiring a single ballot for both electoral office and constitutional amendment.[199] Under state law, "[a] ballot not provided in accordance with law *shall not be deposited or counted.*"[200]

Jones thus had a respectable plain-language argument: The separate congressional and constitutional ballots were defective under state law, which provided that such improper ballots "shall not be ... counted." Jones drafted a form of declaration attesting that the declarant was qualified to vote under prior law and desired to vote for Jones but was not provided a legal ballot that could be counted. Jones and his fellow Republicans arranged on election day for would-be voters to gather near several polling places to sign and submit such declarations to a designated person, who sealed them in boxes for later review. In his election contest, Jones submitted 1,172 such declarations of voters. Most or all of them were surely Black, so the effect of his contest, if successful, would have been to disqualify the official ballots and thereby give Black citizens once again an effective vote for Congress.[201]

A brief filed by Jones's attorneys stated that Jones and his colleagues knew that "the plan of having this separate voting process was indeed quite a risk." They "recognized that there was cause of the greatest apprehension of violence, if this plan was generally known" and "therefore only a few precincts were regarded safe for such a method of declaring the voter's choice."[202] Though in the subsequent election contest Catchings' witnesses swore "that there exists the most friendly feeling between the races," Jones argued that "it is a matter of current history that this pretended friendliness between the races on political occasions ... could be broken at an[y] moment, when the Democrats thought that such was necessary to make absolutely certain their success."[203]

Jones filed his Notice of Contest on November 30, 1898. The litigation was much less extensive than in 1896. Jones deposed seven witnesses (including himself) over two days in March 1899, mainly attempting to establish how the declarations of his voters were collected.[204] But some of his witnesses also testified to the refusal of election officials to let Blacks vote at the regular polling places.[205] Catchings deposed 22 witnesses over six days in May, and an additional 17 of Catchings' witnesses answered interrogatories posed by the parties. Catchings attempted

to establish how and why the double ballots came about and also to rebut Jones's evidence that Blacks were denied the vote on account of race.[206] But Catchings had little substantive defense of the validity of the double-ballot voting procedure itself under state law. Jones then re-deposed himself in rebuttal and was cross-examined on May 27, 1898.[207]

Jones's 1898 challenge once again died in the Elections Committee.[208] Simply counting Jones's declarations as votes sufficient to declare him the victor, without any opportunity for Catchings' voters to be counted, may have been difficult. But accepting Catchings' victory did depend on disregarding the apparently mandatory provision of state law that improper ballots "shall not be ... counted." The ordinarily hostile *Vicksburg Commercial Herald*, after smugly noting that the Supreme Court had rejected Jones's previous challenges to the 1890 Constitution and charging Jones with now "having no more motive than contest fees," conceded "that in drawing up his notice of contest, Jones discovered, and has disclosed, a grave error in the manner of the submission of the levee amendment."[209]

In 1900, Republicans again nominated a candidate to run in the Third District congressional race, before giving up entirely in 1902. Jones, however, had had enough and declined to allow his name to go before the nominating convention.[210]

Oklahoma Statehood, Black Voting Rights, and Jim Crow

By 1900, Mississippi had become a one-party state. The era when Republicans, Greenbackers, Populists, or "Fusion" candidates could mount a challenge to Democratic control was over. As Stephen Creswell has observed, "[g]eneral elections were still necessary, but in the vast majority of cases in the first half of the twentieth century, the voter's ballot would have only one name listed for each office."[211] Indeed, Democrats won 100 percent of the vote in all eight congressional districts in the 1902 election.[212] In the meantime, James Vardaman had become Speaker of the Mississippi House in 1894 and was a dominant figure by the time he became governor in 1904. As one commentator noted, "[a]s a 'closed society,' Mississippi ... developed a number of special Jim Crow politicians, who made it their life's work to degrade and oppress Black Mississippians," and Vardaman was a "leader[]" of this group.[213] The space for Jones to challenge the state's racial caste system became vanishingly small.

Meanwhile, Jones had become a national figure in the Black community. In the years around 1900, he was active in national Black organizations that met in Washington, D.C., and appears to have spent considerable time there.[214] In 1898, he was elected chair of a conference of Southern Black leaders petitioning Congress to investigate disfranchisement of Black citizens.[215] In the 1900 census, he was counted twice: once as a resident of his mother's house in Greenville, Mississippi, with his two daughters (then 18 and 16 years old), and also as a lodger in a Washington, D.C., rooming house.[216] Several articles in the Black press stated that he was being pushed for a judicial post in one of the territories newly won in the Spanish–American War.[217] In Mississippi, he continued to practice law and even substituted briefly as temporary district attorney in Greenville.[218] He organized a Black-owned company to invest in the Mississippi Delta region.[219] He was named Chief Legal Advisor to a prominent Black social organization in Mississippi, and in early 1903, he was chairman of a relief committee seeking donations for Black victims of that year's ruinous flood.[220]

In September 1900, Jones was also the victim in a case that aroused great interest in the Black community of Greenville. A prominent Black preacher claimed that while he was out of town, Jones had called and insulted his wife. (The precise wording of the alleged insult is not in the newspaper report.) Jones denied that he made the phone call. The

preacher and another man came to Jones's office, and while the other man held a gun on Jones, the preacher beat him with a stick until Jones managed to flee to a neighboring barber shop. Jones pressed charges, but there was ultimately no conviction.[221]

The ever-deteriorating political, social, and economic prospects in Mississippi and the South around the turn of the century led some Black southerners to leave for places thought to offer better opportunities. While not on the scale of the later Great Migration to the North, many moved to the Oklahoma and Indian Territories, which the federal government opened to settlement beginning in 1889; the two territories would be combined into the State of Oklahoma in 1907.[222] The Indian Territory was a homeland for what were known as the Five Civilized Tribes. Most had been forced there from the South earlier in the nineteenth century, and slaveholding had been common among them, both in the South and in Oklahoma.[223]

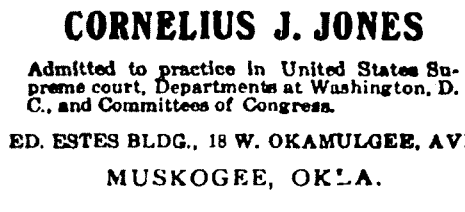
Jones moved to Muskogee, in the Indian Territory, in 1903.[224] His precise reasons are unknown. It could have been frustration at the now-closed channels for change in Mississippi, hope that Oklahoma would offer a new and more just environment, bad feeling that might have remained from the 1900 beating incident and its aftermath, or some other reason. A brief Vicksburg newspaper squib in May 1903 suggests that some Oklahoma Indians had retained him in connection with a Supreme Court case involving land and money claims.[225] But there is no indication whether any such representation preceded or followed his decision to move.

Perhaps in the light of his move to Oklahoma (or his representation of some Indians on their land claims), Jones applied to the Dawes Commission for "identification as a Mississippi Choctaw."[226] The commission was attempting to determine membership in the Choctaw and other Indian Territory tribes in connection with the federal plan to allot tribal land to individual Indians so that, ultimately, tribal government could be eliminated.[227] If Jones's application were successful, he would be entitled to an allotment of land and other benefits.

On March 5, 1903, Jones sat for a deposition in Muskogee in support of his application. He stated that his great-grandfather, John (or Jack) Jones had been a "whole-blood" member of the Choctaw Tribe, which had originally lived in the area of Mississippi and Alabama and some of whose members had remained there when others were forced to move to Oklahoma in 1830.[228] The commission rejected his claim in October 1903, on the ground that the evidence was insufficient to show his descent from a Choctaw Indian.[229] An appeal to the Secretary of the Interior was finally rejected in November 1906.[230]

In Jones's Choctaw membership deposition, he said that he had been married twice and identified his second wife as "Rosa A. Jones," with no mention of his actual second wife, Sarah Elizabeth Disney.[231] There is a surviving 1904 letter from Jones beginning "Dear Rosa" that discusses plans for her to sell their furniture in Mississippi and move to Muskogee to join him.[232] She apparently did so, and "Rosa A. Jones" is identified as his wife in the 1905–1908 Muskogee City Directories. It is unclear, however, how and when the marriage to Rosa terminated; her name is absent from the 1909 or later Muskogee City Directories, and neither Cornelius nor Rosa Jones was listed in the 1910 census in Muskogee.

Shortly after he arrived in Oklahoma, Jones threw himself into the fight for statehood, which was at that time brewing in Congress. Among the issues were whether the new state would protect Black voting rights and whether it would adopt the Jim Crow segregation laws that were by this time prevalent throughout the South.[233] Although Black migration had been significant, Black people never constituted more than a small proportion of the total population of either



CORNELIUS J. JONES

Admitted to practice in United States Supreme court, Departments at Washington, D. C., and Committees of Congress.

ED. ESTES BLDG., 18 W. OKAMULGEE, AVE

MUSKOGEE, OKLA.

In 1903, Jones moved to Muskogee, in the Indian Territory, and threw himself into the fight for Black voting and civil rights as Oklahoma attained statehood. Above is an ad he placed in an Oklahoma newspaper touting his legal services and noting his membership in the Supreme Court bar.

the Oklahoma or Indian Territories.[234] Beginning in the 1890s, serious racial violence, segregated schools, and the other characteristics of Jim Crow in the South emerged in the territories.[235]

On August 17, 1904, Cornelius Jones presided over the organizing convention of the Suffrage League of Indian Territory in Muskogee.[236] The League was formed to support a statehood bill that would guarantee equal voting rights for Black citizens.[237] Jones made two speeches to the convention, including an opening speech that even a hostile newspaper noted was "well received" and "was a very good effort."[238] The convention elected Jones as Vice-Chairman for the Creek Nation (the area including Muskogee) and designated him "to go to Washington this winter in the interest of the Colored citizens."[239] Another newspaper commented that the convention "showed its good sense in its appointment of Mr. Cornelius J. Jones, to urge the matter" in Washington, and stated that "we feel sure, that from our knowledge of his sterling ability, keen foresight, and forensic acquirements, the Negroes[']' cause will be safely and carefully handled."[240]

The convention adopted a resolution that pointedly referred to "the experience of past legislation in a number of states restricting the suffrage rights of the voters" that was "directly aimed at the Colored citizens of the voting population."[241] It commended the pending statehood bill (the "Hamilton bill") that required the new state's constitution to "preserv[e] the right of suffrage" regardless of race. To protect Black suffrage from the kind of facially race-neutral disfranchising provisions embodied in the Mississippi Constitution of 1890, the convention also urged a requirement that the new state "shall never enact any law, organic or statute, which will by its terms, in any manner whatever, prescribe any qualification for ... persons entitled to the right of elective franchise" other than those then prescribed by pre-statehood law (which provided for virtually universal adult male suffrage).[242]

Jones concluded that "indiscreet agitation of the matter would endanger the measure as a whole" and therefore did not himself travel to Washington.[243] Instead, he wired Senator Albert Beveridge of Indiana, the Chairman of the Committee on Territories, with the convention's proposals. On December 21, 1904, Beveridge wrote to Jones that the committee had, as Jones had urged, omitted from the statehood bill a provision authorizing literacy tests for voting.[244]

Ultimately, the statehood bill enacted on June 16, 1906, was a mixed bag. It provided for universal male suffrage in the election of a state constitutional convention, and it also provided "that said State shall never enact any law restricting or abridging the right of suffrage on account of race, color, or previous condition of servitude."[245] It did not, however, prohibit facially race-neutral voting restrictions, such as those Mississippi had adopted in 1890. It required the original state constitution to "make no distinction in civil or political rights on account of race or color" and required the state to provide public schools for all, but with the qualification "[t]hat this shall not be construed to prevent the establishment and maintenance of separate schools for white and colored children."[246]

The next step in statehood was the election of a constitutional convention in 1906. Jones sought the Republican nomination for

delegate from his district, but George Bucher, a White Republican, ran against him. That led to the convening of rival Republican conventions, each of which nominated one of the candidates. Ultimately, the canvassing board named Bucher as the "regular" Republican candidate and permitted Jones on the ballot as an independent.[247] A few days before the election, Bucher withdrew, which may have had the effect of ensuring the election of White Democrat Charles N. Haskell.[248] Jones contested the result to the local elections board, charging that between 100 and 300 would-be Black voters had been denied the right to vote in each of five specific precincts.[249] The contest was referred to the overwhelmingly Democratic convention itself, which seated Haskell.[250]

It was a fateful decision, because Haskell became a political leader at the convention and later. He helped convince the convention to omit a Jim Crow provision from the state constitution, on the ground that including it would deter President Roosevelt from proclaiming statehood.[251] But as the first governor of the state, Haskell led the way in instituting a thoroughgoing Jim Crow and Black disfranchisement regime, along the lines pioneered in Mississippi fifteen years earlier.[252]

During the next years, Jones continued his legal practice, which seems to have become primarily civil and not criminal.[253] He spoke at local banquets, including ones honoring visits of Booker T. Washington and Vice-President Charles Fairbanks to Muskogee.[254] After a split into Black and primarily White Republican factions, the Black faction elected him as a delegate to the state Republican convention in 1908.[255] He ran unsuccessfully for the Republican nomination for the local post of police judge in Muskogee in 1909.[256]

In these years, he also got into some legal tangles. The first, in 1906, involved the charge that he fraudulently secured signatures to a document. The second was a contempt-like charge that arose in 1908 from Jones having taken possession of some property in possible violation of a court order. He was acquitted on the fraud charge, but the disposition of the contempt charge is unclear.[257] Later, he was apparently intoxicated and fell asleep in a taxi; he was charged with being drunk and disturbing the peace, but the disposition of this charge too is unknown.[258]

Jones did undertake one other significant effort during this period. Nearly thirty all-Black towns were established in Oklahoma in the period up to around 1920.[259] As one scholar explained, these towns were "a consequence of the legalization of white racism throughout the United States" and "blacks felt that this kind of racial isolation from whites formed the only positive and workable solution of their racial difficulties."[260] In February 1906, Jones joined this movement and bought most of a townsite named Chase, eight miles east of Muskogee, for $4,000, apparently with the intention to develop it as an all-Black industrial and educational center modeled on Booker T. Washington's Tuskegee, Alabama.[261] Around the time of the purchase, the town had three stores, a post office, two churches, and two schoolhouses.[262]

Jones's investment in Chase triggered one significant regulatory matter. On September 26, 1906, amid his campaign for delegate to the state constitutional convention, Jones filed a complaint with the Interstate Commerce Commission, claiming that the St. Louis and San Francisco Railroad's decision to move its station in Chase to a spot four miles from the town was discriminatory and based on prejudice.[263] In an opinion issued in May 1907, the ICC noted that the claim raised the unresolved issue of whether the commission could require a carrier to maintain a station at a given point. The commission, however, did not reach that question, instead finding that the carrier had acted lawfully, because there was

little business at the old location and both old and new station locations were equally convenient for local farmers.[264] The commission did not address any racial issue in the case.

The town never achieved the success Jones sought. Its name was changed to Beland in 1908.[265] Its post office closed in 1926, and by 1962 the population of the site had declined to only fifty inhabitants.[266]

The Cotton Tax Case: Reparations for Ex-Slaves

Cornelius Jones had one more significant cause to champion—the first, and still most significant, case claiming reparations for ex-slaves. The reparations case grew out of a movement to obtain a government pension for ex-slaves. In 1890, a White congressman introduced a bill to provide a pension for the now-aging ex-slaves, and similar bills were introduced in succeeding years. In 1898, ex-slave Callie House and associates chartered the National Ex-Slave Mutual Relief, Bounty and Pension Association, consisting of a national organization with state and local lodges and councils.[267] Members were asked to pay a fee to join the organization, whose purpose was to support the pension bill and provide its members benefits, such as medical and burial insurance. By the early twentieth century, its membership reached an estimated 300,000.[268]

The federal government and some states, as well as some elements of the Black community itself, responded with hostility. There were indeed some fraudsters who preyed on poor members of the Black community by collecting a fee to obtain illusory pensions, but there appears to be little evidence that the Ex-Slave Association's leaders did anything to enrich themselves or otherwise permit such fraudulent conduct.[269] Nonetheless, in 1899, the Post Office Department issued a fraud order that prohibited the payment of money orders made out to the Association and excluded from the mails any literature of the Association or letters addressed to it or its officers.[270] Though the fraud order crippled the Association, it continued to operate for another 16 years. In 1917, House herself was federally prosecuted and convicted of mail fraud for promoting the Ex-Slave Association and its goals.[271]

Meanwhile, by 1915, the pension bill had still not succeeded in Congress, and Callie House apparently enlisted Jones to attack the problem through the courts instead.[272] As chief counsel, Jones must have had the major role in developing the legal theory used in the subsequent litigation. It was not based on a broad claim to reparations for all Black Americans. Instead, it was based on the principle that formerly enslaved Black people were entitled to an equitable lien, analogous to a mechanics' lien, on cotton they had been compelled to produce. To make his claim, Jones needed a fund to which to attach the lien.

Jones found the fund in an obscure tax on cotton Congress had enacted as part of a much broader wartime tax on commodities in 1862. Congress had amended the cotton tax in 1864 and 1866 and then repealed it in 1868.[273] While the cotton tax could not be collected in the South during the Civil War, it had produced $68 million dollars in revenue for the federal government between 1866 and 1868, a part of which was apparently based on cotton produced during the war.[274]

The validity of the tax was uncertain in light of Article I, Section 9 of the Constitution, which permits Congress to levy a "direct" tax only if it is "in proportion to the census or enumeration." There was never a reported or precedential decision on the validity of the cotton tax under that provision. A federal circuit court in Tennessee in an unpublished 1867 order in *Farrington v. Saunders* had upheld it. In 1871, that ruling had been affirmed by an equally divided Supreme Court, again in an unreported and unpublished order.[275] Twenty-four years

later, in 1895, the Court in the famous case of *Pollock v. Farmers Loan and Trust* struck down the original federal income tax because it violated the constitutional prohibition on nonproportional direct taxes.[276] *Pollock* significantly bolstered the argument that the cotton tax too had been a nonproportional direct tax and hence unconstitutional.

In May 1915, Jones wrote to William McAdoo, the Secretary of the Treasury, inquiring about the status of the funds collected under the cotton tax. On June 1, Assistant Secretary William Malburn wrote back to Jones, informing him about *Farrington v. Saunders*. The letter also disclosed that the cotton-tax proceeds had totaled $68 million.[277]

Jones proceeded to file suit on the equitable lien theory. On July 13, 1915, Jones filed a complaint on behalf of four ex-slaves and "a multiplicity of persons similarly situated" against Secretary of the Treasury William McAdoo in the Supreme Court of the District of Columbia, which was then the local trial court. The complaint sought an equitable lien on the $68 million.[278] Jones's co-counsel twenty years earlier in *Gibson* and *Smith*, Emanuel M. Hewlett, initially signed as local counsel for service of process, but Hewlett later withdrew. The case was ultimately litigated based on an October 26 amended complaint signed only by Jones.

As the amended complaint put it, plaintiffs were "forced to labor in the cultivation of ... many millions of bales of cotton" through the South in the years 1859–1868. The cotton "was conveyed away from the places of production without notice or consideration of any rights these plaintiffs might have had in said fruit of their labor" and thus "placed beyond the reach of any equitable proceeding for enforcement of any lien which these plaintiffs might have in consequence of said labor." The complaint alleged that the $68 million held in the Treasury is the "fruit of the cotton produced by these plaintiffs" to which the United States has no "ownership or legal interest." It further alleged that the fund can be "distinctly identified in the possession of the defendant, and ... is subject to an equitable lien of these plaintiffs." The complaint asked the court to require McAdoo to provide discovery of all records regarding the receipt of the funds and assert any right the government may have in them and to hold that plaintiffs are entitled to an equitable lien on the $68 million.[279]

Both general-interest and Black newspapers reported on the suit.[280] On October 15, 1915, Secretary McAdoo launched a public relations counter-offensive in response. He issued a statement denying that any separate fund remained in the Treasury from the $68 million collected for the cotton tax and stating that "the right of the Government to collect this tax was ... determined many years ago by the courts of the United States." The statement added that the suit was likely to be dismissed on sovereign immunity grounds.[281] The statement did not mention that *Farrington v Saunders* had been decided by an equally divided Court and therefore had no precedential effect.

McAdoo's statement also attacked the solicitation of funds to support the litigation. Jones had sought claimants through a newspaper notice and letter and asked that they pay $1.75 each to defray the costs of the suit.[282] The McAdoo statement charged that any funds contributed by potential claimants "would be money thrown away."[283] Jones issued a rebuttal, defending the merits of the suit. In response to McAdoo's allegations of fraud, he noted that the claimants "believed they have a right to relief in court" and to "pay[] the necessary expenses for [the case's] orderly prosecution."[284]

On December 10, 1915, the district court issued an order dismissing the suit.[285] On appeal, the D.C. Circuit affirmed in a brief opinion on November 16, 1916. The court held that, because McAdoo "is merely [the] custodian" of the $68 million, the "real defendant ... is the United States." The

court noted what it termed "other apparent weaknesses," but grounded its affirmance on sovereign immunity, i.e., "upon the fact that the United States cannot be made a party to this suit without its consent."[286]

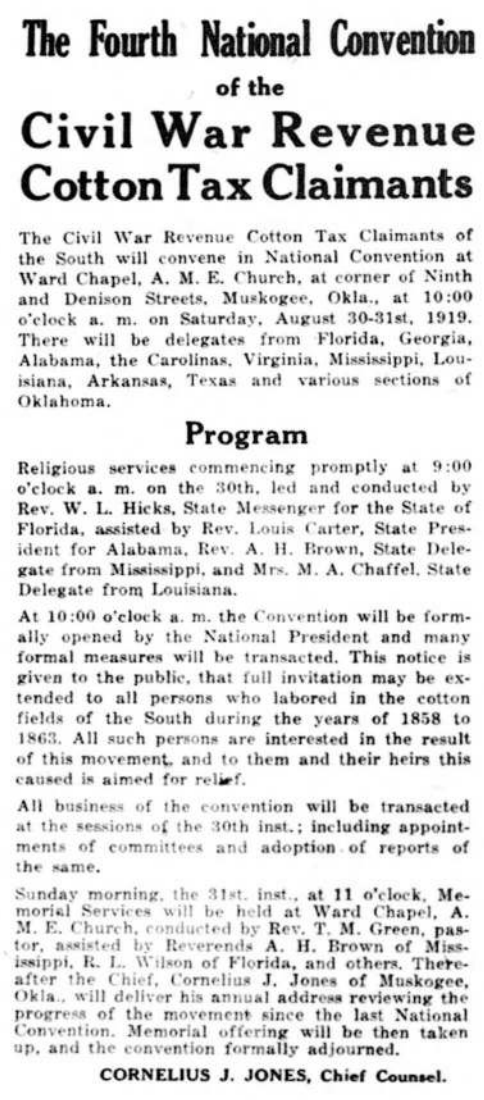
Jones appealed to the U.S. Supreme Court. The government's brief in support of affirmance provided no further argument but simply quoted the court of appeals' opinion. Jones's brief argued that, although McAdoo was in possession of the $68 million, "he has no legitimate claim nor personal interest in the money, but is a mere custodian thereof in the nature of bailee." It argued that "if it is shown that the constitution of the United States has been violated in the enforcement of a void law, resulting in the accumulation of this fund, then the money is illegitimately acquired." The brief concluded that "the government can not acquire any interest in property illegally acquired" and that, therefore, "as bailee, the secretary holds legal (but not official), custody thereof, subject to judicial determination regarding its status."[287] On May 17, 1917, the Court summarily rejected Jones's claims, without opinion.[288]

While the reparations case was working its way through the courts, Jones was promoting the cause. He apparently moved from Muskogee to Memphis for a two-year period in 1915–1916, where he established the headquarters of the cotton-tax claimants organization, though he was once again living in Muskogee by May 1917.[289] He also traveled widely to promote the litigation.[290] He called a convention of cotton-tax claimants in Canton, Mississippi, at which he spoke and for which he even composed a song.[291] As one newspaper reported, "[f]rom all reports, no gathering of white or colored citizens of this republic ever contained such pent-up enthusiasm."[292] Jones also addressed at least two more annual conventions of the claimants.[293] The White press, especially in the South, condemned the suit, usually in the most racist terms.[294] The Black press was divided, with some hostile and others strongly supporting the suit.[295]

As the suit was progressing, the federal government opened another front against Jones. On November 20, 1915, the day after the district court in Washington dismissed the complaint in *Johnson v. McAdoo*, Jones was arrested in Memphis on a federal charge of mail fraud, based on his having raised money from the cotton-tax claimants.[296] The prosecution proceeded in fits and starts as *Johnson v. McAdoo* wound its way through the courts. It suffered from two weaknesses. First, while fraud requires proof of the defendant's false statement or misrepresentation, there was little or no evidence that Jones had lied to anyone. Jones had promised them nothing more than the ability to participate in the results *if the suit were successful*. Second, it was difficult to argue that Jones had committed fraud while *Johnson v. McAdoo* was still working its way through the courts; an ultimately favorable outcome would surely have refuted any fraud claim against Jones.

On May 26, 1916, six months after his initial arrest, Jones was indicted by a grand jury, and on September 28, 1916, he was again arrested in Memphis on that indictment.[297] On January 15, 1917, after the D.C. Circuit affirmed the dismissal of *Johnson v. McAdoo*, but while it was pending before the Supreme Court, Jones's criminal trial began in Memphis.[298] The government, however, abruptly dropped the case mid-trial, with one newspaper attributing the government's action to the judge's unease with the case going forward before *Johnson* was finally decided.[299]

After the Supreme Court decided *Johnson* against Jones on May 17, 1917, and after the conviction of Callie House on mail fraud charges in September 1917, the government tried again. On December 10, 1917, Jones was again indicted for mail fraud. The trial



The Fourth National Convention
of the
Civil War Revenue Cotton Tax Claimants

The Civil War Revenue Cotton Tax Claimants of the South will convene in National Convention at Ward Chapel, A. M. E. Church, at corner of Ninth and Denison Streets, Muskogee, Okla., at 10:00 o'clock a. m. on Saturday, August 30-31st, 1919. There will be delegates from Florida, Georgia, Alabama, the Carolinas, Virginia, Mississippi, Louisiana, Arkansas, Texas and various sections of Oklahoma.

Program

Religious services commencing promptly at 9:00 o'clock a. m. on the 30th, led and conducted by Rev. W. L. Hicks, State Messenger for the State of Florida, assisted by Rev. Louis Carter, State President for Alabama, Rev. A. H. Brown, State Delegate from Mississippi, and Mrs. M. A. Chaffel, State Delegate from Louisiana.

At 10:00 o'clock a. m. the Convention will be formally opened by the National President and many formal measures will be transacted. This notice is given to the public, that full invitation may be extended to all persons who labored in the cotton fields of the South during the years of 1858 to 1863. All such persons are interested in the result of this movement, and to them and their heirs this caused is aimed for relief.

All business of the convention will be transacted at the sessions of the 30th inst.; including appointments of committees and adoption of reports of the same.

Sunday morning, the 31st. inst., at 11 o'clock, Memorial Services will be held at Ward Chapel, A. M. E. Church, conducted by Rev. T. M. Green, pastor, assisted by Reverends A. H. Brown of Mississippi, R. L. Wilson of Florida, and others. Thereafter the Chief, Cornelius J. Jones of Muskogee, Okla., will deliver his annual address reviewing the progress of the movement since the last National Convention. Memorial offering will be then taken up, and the convention formally adjourned.

CORNELIUS J. JONES, Chief Counsel.

In 1915, Jones initiated a suit to get formerly enslaved people an equitable lien on cotton they had been forced to produce. He argued that his clients were each entitled to a share of funds collected under an unconstitutional cotton tax Congress had enacted in 1862. Above is a newspaper advertisement inviting cotton-tax claimants to a convention in 1919.

on this indictment finally commenced on December 2, 1918. Although the jury found him guilty, the judge set the verdict aside on the ground that the evidence—presumably, the evidence that Jones had made a false or misleading false statement—was insufficient to support the verdict.[300]

Final Years

Meanwhile, Jones had remained active as an attorney. Three of his cases—all civil cases—reached the Oklahoma Supreme Court in 1915 and 1916.[301] But even after the loss in *Johnson v. McAdoo*, Jones continued to work on reparations, now through legislation. He called and addressed a fourth annual convention of cotton-tax claimants in Muskogee on August 30–31, 1919.[302] Also in 1919, he filed a memorial with the House of Representatives on behalf of the cotton-tax claimants seeking "authority to try their claim in [the] Court of Claims."[303] In 1920, he traveled to Washington at least three times to support a pending bill that would permit suit by the cotton-tax claimants. He purchased a building to house the cotton-tax claimants' organization and a house for himself, though it is unclear how much time he spent in Washington in the succeeding years.[304]

Jones, now 61 years old, had married for the third time in 1919. His bride was Maggie Davis, a woman 23 years his junior.[305] The 1920 census records him as living in Muskogee with Davis and her 14-year-old son from a prior marriage.[306] But the marriage did not last long. She filed for divorce in February 1921, which seems to have been granted.[307] Jones is listed in Muskogee City Directories after 1921 with no mention of a wife, and the 1930 census lists him as widowed and living only with a housekeeper.[308]

Jones wrote four surviving letters from Muskogee and Washington to his sister Sarah in Mississippi in 1927–1929. One of them, dated May 9, 1927, expresses his distress at the destruction caused by the devastating Mississippi River floods of that year and inquires of Sarah "what you may know from time to time of the old friends and neighbors white and colored alike, for I sent Red Cross money … and expect to keep contributing as long as there is suffering among the people there."[309] In a letter dated September 28,

1928, he told Sarah that he had given up politics and added what must have been the astounding news that he, a lifelong Republican who had fought the racist Democratic Party in Mississippi and Oklahoma for decades, was going to vote for a Democrat:

> Well politics are active and most every person is seeking to do the best he or she thinks to vote right. I do not take any part in politics now, except to vote and express my own choice for president. I am for Alfred E. Smith. Hoover does not come up to my choice of a man for the greatest office in the world.[310]

One final appearance on behalf of the cotton-tax claimants remained. A number of states in the 1920s had passed legislation authorizing their own pursuit of suits against the federal government to obtain a refund of the taxes on commodities collected by the federal government in the 1860s, including the $68 million in cotton-tax proceeds. Resolutions were introduced in Congress to authorize such suits. If successful, the states would theoretically return any proceeds to the original taxpayer, but if the original taxpayer could not be found (as was no doubt likely in most cases), the proceeds would escheat to the states.[311] On January 4, 1929, the House Ways and Means Committee held a hearing on one of those resolutions, which would have authorized the Supreme Court to hear the suits.

The committee hearing record includes an extensive discussion of the tax, the arguments about its unconstitutionality, and the practicalities of this kind of suit, but no discussion at all of the claims of the Blacks who had labored to produce the cotton and had a decade earlier made their own claim to the tax proceeds. Jones filed a brief on behalf of the cotton-tax claimants. It was published as an addendum to the hearing record and argued that the ex-slaves and their heirs, rather than the states, should be permitted a cause of action in the Court of Claims to adjudicate their right to the cotton-tax funds. The brief recounted the long history of the cotton-tax claims.[312] The brief argued that it "will be outrageous to authorize the States to sue for money which they had nothing in the world to do with as a State in face of persistent claims being made" by the claimants.[313] It also noted that, if the states did recover the money, they would be immune to suit by the claimants seeking their fair share.[314]

The House ultimately took no action on the resolution, and neither the states nor anyone else was ever authorized to sue to get return of the cotton-tax proceeds. Apparently referring to his submission, Jones wrote in a letter to his sister on January 21, 1929, that "the white claimants made another break for that money last week or so ago, and your old brother was Charlie on the Dot, and I met them on the swing on fourth of this month, and nothing is to be done until they count us in it."[315]

Cornelius Jones died on March 23, 1931, in Muskogee. By the time of his death, his challenge to the 1890 Mississippi legislature's plan to disfranchise Blacks, his fight against that plan and against racial injustice through five Supreme Court cases and two election contests, his struggle against Jim Crow and Black disfranchisement in Oklahoma, and his championing of reparations for the ex-slave cotton-tax claimants were all largely forgotten. The *Chicago Defender* published a two-sentence death notice in its "Oklahoma News" column, commenting only that Jones "was a prominent figure among the citizens of Muskogee, and the state at large."[316] There were no published obituaries or memorials. Only a few scholarly writings mentioned him until the 2000s, when some scholars began to give brief descriptions of his life in the course of discussing his Supreme Court cases or reparations effort. Jones lost all of his major struggles. The country, and the legal system,

Jones died in 1931 in Muskogee. There were no published obituaries or memorials for the valiant attorney who had waged so many legal battles for justice and equality—including five before the Supreme Court.

were not ready to enforce the rights for which he fought.

James A. Feldman is an attorney in private practice specializing in Supreme Court litigation. Mr. Feldman was Assistant to the Solicitor General at the U.S. Department of Justice from 1989 to 2006, where he first came across Cornelius Jones's name

in *Gibson v. Mississippi* while preparing a brief.

Author's Note: I wish to thank the Supreme Court Institute at Georgetown U. Law Center, which early in my research generously gave me access to their library and digital legal research resources.

ENDNOTES

[1] *Gibson v. Mississippi*, 162 U.S. 565 (1896), and *Smith v. Mississippi*, 162 U.S. 592 (1896).

[2] 162 U.S. at 591.

[3] 162 U.S. at 592 (emphasis added).

[4] "Obituary" 1, Jones–Sadler Family Papers, Schomburg Center for Research in Black Culture, New York Public Library (hereinafter *Obituary*). A copy can be found at http://msstate-exhibits.libraryhost.com/items/show/1271. The most extensive and accurate discussion of Jones's legal career in Mississippi is in R. Volney Riser, **Defying Disfranchisement: Black Voting Rights Activism in the Jim Crow South, 1890–1915**, 36–45, 60–73 (2010) (hereinafter **Defying Disfranchisement**). For other significant discussions of aspects of Jones' career, see Mary Frances Berry, **My Face Is Black Is True** 173–187 (2005) (hereinafter **My Face Is Black Is True**); Dorothy Overstreet Pratt, **Sowing the Wind: The Mississippi Constitutional Convention of 1890**, 180–188 (2018) (hereinafter **Sowing the Wind**); Lawrence Goldstone, **On Account of Race: The Supreme Court, White Supremacy, and the Ravaging of African American Voting Rights** 175–190 (2020); J. Clay Smith, Jr., **Emancipation: The Making of the Black Lawyer 1844–1944**, 294–295 (1993).

[5] *See* **Defying Disfranchisement,** 36–37 & n.43; A.E. Patterson, **The Possibilities of the American Negro** 153 (1903) (hereinafter **Possibilities**).

[6] *See Obituary* 1; **Defying Disfranchisement,** 36; **Possibilities,** 153. Alcorn, established in 1871, was named after the reconstruction-era governor James L. Alcorn. *See* https://www.alcorn.edu/discover-alcorn/history; Julius E. Thompson, **Black Life in Mississippi,** 75–89 (2001) (discussing study of Alcorn alumni 1871–1930); Neil McMillen, **Dark Journey: Black Mississippians in the Age of Jim Crow,** 103–106 (1989).

[7] *See Obituary* 1; **Possibilities,** 153.

[8] **Possibilities,** 153–157; *see* H.C. Nixon, "The Rise of the American Cottonseed Oil Industry," 38 *Journal of Political Economy* 73, 78, 80–81 (1930) (discussing New Orleans cottonseed milling).

[9] *Vicksburg Herald*, Jan. 6, 1881, 3; *see Obituary* 1.

[10] *Obituary* 1.

[11] *See The Christian Recorder*, Oct. 26, 1893 (marriage). According to the official record of their marriage, Sarah was 14 years older than Jones. See Chatham, Kent, Ontario Canada, Archives of Ontario, Toronto: FHL Microfilm 1,870,475. Sarah is not reported as a member of Jones's household in Greenville in the 1900 census. She died and was buried next to her first husband in Canada in 1907. *See* http://www.biographi.ca/en/bio/disney_richard_randolph_12E.html.

[12] *Obituary* 1.

[13] "School Entertainment," *Vicksburg Herald*, June 3, 1885, 4.

[14] *Vicksburg Evening Post*, April 22, 1886, 1.

[15] *See* Irvin C. Mollison, "Negro Lawyers in Mississippi," 15 *The Journal of Negro History*, No. 1, at 40–41 (1930) (naming 16 Black Mississippi lawyers in the nineteenth century); J. Clay Smith, Jr., **Emancipation: The Making of the Black Lawyer 1844–1944**, 288-300 (1993) (naming 19 Black Mississippi lawyers in the nineteenth century).

[16] Mollison, "*Negro Lawyers*," 15 *The Journal of Negro History* 49.

[17] *Ibid.*, 44.

[18] *Id.*, 43–44, 50–51; McMillen, **Dark Journey,** 166–169. By 1935, there were only six Black lawyers in Mississippi. Charles H. Houston, "The Need for Negro Lawyers," 4 *The Journal of Negro Education* 49 (1935).

[19] *Obituary* 1; **Possibilities,** 157. Although these sources report that Judge Burns sat on the Louisiana Supreme Court, I have been unable to find a record of any justice of the Louisiana Supreme Court by the name of "Burns" or "Burnes." I have also been unable to find any lower-court Louisiana judge with either name with whom Jones might have trained during that era. The profile in **Possibilities** at 157 also refers to a period when Jones studied "under the late W. L. Sharkey, grandson of the late ex-governor Sharkey of Mississippi." William L. Sharkey had served as an antebellum Chief Justice of the Mississippi Supreme Court. He opposed secession, and in 1865 he briefly served as Provisional Governor. He had a son by the same name, but I cannot find any record of a grandson of the same name and accordingly cannot confirm this account. *See* Dunbar Rowland, **Encyclopedia of Mississippi History, Vol. 2**, 649–652 (1907) (biography of William L. Sharkey).

[20] *Obituary* 1.

[21] Mollison, "Negro Lawyers," 45–47, 48, 50–51.

[22] *Ibid.*, 44–45. *But cf.* Smith, **Emancipation** 295 (mistakenly stating that Beadle was admitted to the bar only after McLaurin became governor in 1896). The judge is said to have initially stated that "he did not examine 'n—s,'" but was finally prevailed upon by McLaurin and others to allow the examination. *Ibid.* 44. Beadle later became known as a writer and poet. *See* Stephen Creswell, **Rednecks, Redeemers, and Race: Mississippi After Reconstruction 1877–1917**, 84–86 (2006).

[23] *See* **Journal of the Proceedings of the Constitutional Convention, of the State of Mississippi** 637–638 (Jackson 1890). Anselm McLaurin and one of his brothers did ultimately sign the constitution. *Ibid.*, 699. *See also, Jackson Clarion-Ledger*, Nov. 3, 1890, 1.

[24] *See* Rowland, **Encyclopedia of Mississippi History, Vol. 2**, 189–190; New York Times, Dec. 23, 1909, 3 (obituary); Dunbar Rowland, **Courts, Judges, and Lawyers of Mississippi** 182–186 (1935) (biography of McLaurin).

[25] *Vicksburg Evening Post*, Jan. 30, 1888, 4; *see also Obituary* 2; **Possibilities,** 157; Rowland, **Courts, Judges, and Lawyers of Mississippi,** 261 (noting North's service as district judge).

[26] *See* Department of the Interior, Census Office, **Report on Population of the United States at the Eleventh Census: 1890, Part I**, xcv (1895).

[27] McMillen, **Dark Journey,** 36.

[28] McMillen, **Dark Journey,** 37.

[29] *See, e.g.*, Eric Foner, **Reconstruction: America's Unfinished Revolution: 1863–1877**, 426, 428, 429 (2005 ed.); Vernon Wharton, **The Negro in Mississippi 1865–1890**, 219–221 (1965).

[30] *Ratliff v. Beale*, 20 So. 865, 867 (Miss. 1896).

[31] Wharton, **The Negro in Mississippi**, 181–198; Foner, **Reconstruction**, 558–563; Nicholas Lemann, **Redemption: The Last Battle of the Civil War** (paperback ed. 2007) 110–118, 138–185; George Rable, **But There Was No Peace: The Role of Violence in the Politics of Reconstruction** 148–162 (1984). Whites' seizure of power through violence, intimidation, and fraud in 1875 is sometimes referred to as the "Mississippi Plan," though the term is also used to refer to the techniques used to disfranchise Blacks in the Constitution of 1890. In both cases, Mississippi's plan unfortunately served as a model for the rest of the South.

[32] Vernon Wharton lists selected incidents in 1874–1875 involving the murders of 6 Blacks in Austin, 35 in Vicksburg in 1874 and 2 more in 1875, an "unknown number" in Water Mill, 12 or 13 in Macon, 10–30 in Clinton and 10–50 more in the surrounding area, 5 in Coahoma County, and 4 in Columbus. See Wharton, **The Negro in Mississippi**, 190–192. Many more were injured, driven from their homes, or otherwise terrorized during the campaign or on election day itself in 1875. *Ibid.* 195–197.

[33] *See, e.g.*, **Sowing the Wind,** 57–58 (LeFlore County Massacre); Wharton, **The Negro in Mississippi,** 204.

[34] *See* **Report on Population of the United States at the Eleventh Census, Part I**, 417-418.

[35] On April 20, the *Herald* had listed a "C.J. Jones"—likely referring to Cornelius Jones—as among a group of five men who gave speeches at a public-school commencement dinner and exhibition. "Brevities," *Vicksburg Herald*, Apr. 20, 1879, 3.

[36] See Cresswell, **Rednecks, Redeemers, and Race** 72–75; Carter Woodson, **A Century of Negro Migration** 134–143 (1918); William Cohen, **At Freedom's Edge: Black Mobility and the Southern White Quest for Racial Control 1861–1915** at 168–197, 301–311 (1991); John Van Deusen, "The Exodus of 1879," 21 *Journal of Negro History* 111, 119–121 (1936).

[37] "Mississippi Valley Labor Convention," *Vicksburg Herald*, Apr. 30, 1979, 1.

[38] "Minutes of the Mass Meeting Called by Mr. C.J. Jones, at Pryor's Church," *Vicksburg Herald*, May 1, 1879, 1. A "Beat" was a political subdivision of a county.

[39] "The Labor Convention: Resolutions Passed by the Same," *Yazoo Herald*, May 16, 1879, 1.

[40] Van Deusen, "The Exodus of 1879," 128–129; Cohen, **At Freedom's Edge** 182–183; Cresswell, **Rednecks, Redeemers, and Race,** 75.

[41] See Stephen Cresswell, **Multiparty Politics in Mississippi 1877–1902** 58–60, 67–68 (1995).

[42] "Assassination," *Vicksburg Herald*, Nov. 1, 1881, 3; *see also* "A Murderous Affair," *Greenville Weekly Democrat-Times*, Nov. 5, 1881, 2.

[43] *Vicksburg Evening Post*, Oct. 16, 1886, 1.

[44] J. Morgan Kousser, *Voting Rights Act & Two Reconstructions*, in Bernard Grofman and Chandler Davidson, eds., **Controversies in Minority Voting** 144, 146, 148 (1992).

[45] *Vicksburg Commercial Herald*, Sept. 7, 1888, 1 (Third District); *Greenville Weekly Democrat-Times*, Oct. 13, 1888, 1 (Indiana).

[46] Lemann, **Redemption,** 61.

[47] Wharton, **The Negro in Mississippi,** 202.

[48] *Obituary* 2; **Possibilities,** 157; Michael Perman, **Struggle for Mastery: Disfranchisement in the South 1888–1908**, 73 (2001).

[49] *Jackson Clarion-Ledger*, Sept. 9, 1890, 1. The speaker, Judge J. J. Chrisman, added that "we have been stuffing ballot-boxes, committing perjury and here and there in the State carrying the elections by fraud and violence until the whole machinery for elections was about to rot down." *Ibid.*

[50] The bill passed the House and was defeated only when it became the first substantive legislation killed by a Southern filibuster in the Senate. Richard Valelly, **The Two Reconstructions: The Struggle for Black Enfranchisement** 121 (2004). *See generally* Thomas Adams Upchurch, **Legislating Racism: The Billion Dollar Congress and the Birth of Jim Crow** 85–166 (2004); **Sowing the Wind,** 48–53.

[51] *See* Albert D. Kirwan, **Revolt of the Rednecks,** 58–64 (1951).

[52] See *Jackson Clarion-Ledger*, Sept. 16, 1890, 1 (estimate by Black delegate Isaiah Montgomery in speech to 1890 constitutional convention). For an analysis by a prominent contemporary of the proposition that the

Black vote could sway an election and thus result in what was termed "Negro domination," see **The Autobiography of John Roy Lynch,** 131–136 (1970).

[53] *See* Perman, **The Struggle for Mastery** 72–73; **Sowing the Wind,** 61.

[54] *Jackson New Mississippian*, Oct. 23, 1889, 3; *see* **Sowing the Wind,** 61–62.

[55] *See* **Defying Disfranchisement,** 38; **Sowing the Wind,** 181. *See Obituary* 2 ("strong speech against the bill"), **Possibilities,** 159 (speech "rings even yet throughout the state"); *see also Topeka Plaindealer*, June 30, 1916,1 ("Mr. Jones went down on record, with voice ringing loud and clear, hurling a bitter protest.").

[56] *Memphis Daily Commercial*, Jan. 25, 1890, 1.

[57] *Jackson Clarion-Ledger*, Jan. 25, 1890, 2 ("complimented by all who heard it"); Jackson Mississippian, Jan. 29, 1890, 2 ("universally conceded to have been a splendid effort").

[58] *Jackson Clarion-Ledger*, Feb. 6, 1890, 1.

[59] *See Jackson Clarion-Ledger*, Mar. 12, 1890, 4.

[60] *See Vicksburg Evening Post*, July 21, 1890, 1; *Vicksburg Commercial Herald*, July 25, 1890, 4.

[61] Cresswell, **Multiparty Politics in Mississippi,** 100–101. Reporting the murder, the *Jackson Clarion Ledger* snidely said that it "regrets the manner of his killing, as assassinations cannot be condoned at any time. Yet the people of [his county] are to be congratulated that they will not be further annoyed by Marsh Cook." *Jackson Clarion Ledger*, July 25, 1890, 2; *but cf. Jackson Mississippian*, Aug. 13, 1890, 1 (decrying murder and praising Cook). Cook has sometimes mistakenly been identified as an African American. *See* **Defying Disfranchisement,** 39; **Sowing the Wind,** 63; Morton Stavis, "A Century of Struggle for Black Enfranchisement in Mississippi: From the Civil War to the Congressional Challenge of 1965—And Beyond," 57 *Miss. L.J.* 591, 604 n.44 (1987); McMillen, **Dark Journey,** 53.

[62] **Defying Disfranchisement,** 39; *see New Orleans Crusader*, July 19, 1890, 4.

[63] William Mabry, "Disfranchisement of the Negro in Mississippi," 4 *Journal of Southern History* 318, 324 (1938). The sole Black delegate was Isaiah Montgomery, a wealthy landowner and founder of the all-Black town of Mound Bayou in Bolivar County. In a move that historians have pondered ever since, he supported the disfranchising provisions of the new constitution. *See* Wharton, **The Negro in Mississippi,** 211; **Sowing the Wind,** 88–93; **Defying Disfranchisement,** 39–40; Cresswell, **Rednecks, Redeemers, and Race,** 118–119; McMillen, **Dark Journey,** 49–57. *See also Journal of the Proceedings of the Constitutional Convention* 5–7 (Jackson 1890) (listing delegates).

[64] *Jackson Clarion-Ledger*, Sept. 18, 1890, 3. Calhoon went on: "It was a law of Divine ordination that the white race cannot tolerate divided sovereignty. Any Legislature would have the stamp of idiocy upon it that would assemble such a body as this, with the enormous attendant expense, with an object short of this. Let's tell the truth if it bursts the bottom out of the universe." *See also Jackson Clarion-Ledger*, Nov. 3, 1890, (Calhoon's closing speech at convention).

[65] The constitution set the poll tax at $2 per year and gave each county the option to increase it to $3 to support local schools. This was a large sum for a poor Black farmworker; one commentator notes that, as a percentage of annual income, $1 for such a laborer in 1890 was equivalent to $135 in 2001. *See* Valelly, **The Two Reconstructions,** 125; *see also* Cresswell, **Multiparty Politics in Mississippi,** 105 (typical annual income for small farmer was $50).

[66] Section 241 included the criminal disfranchisement provisions. The provisions for a secret, state-printed ballot were included in what was termed an "Election Ordinance" that was adopted by the convention and accompanied the new constitution. *See Journal of the Proceedings of the Constitutional Convention* 685–690.

[67] J. Morgan Kousser, **The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880–1910**, 145 (1974); *see also* Valelly, **The Two Reconstructions,** 52 (Black turnout decreased from 45% in 1880 to 1% in 1892).

[68] McMillen, **Dark Journey,** 36.

[69] Wharton, **The Negro in Mississippi**, 215.

[70] **Defying Disfranchisement,** 40.

[71] *See* Valelly, **The Two Reconstructions,** 123–131. The plan is sometimes referred to as the "Second Mississippi Plan," following the first plan, which consisted in the violence, fraud, and intimidation of the Revolution of 1875. C. Vann Woodward, **Origins of the New South,** 321–322 (1967); Neil McMillen, **Dark Journey,** 38–39. *See* William Cohen, **At Freedom's Edge: Black Mobility and the White Quest for Racial Control,** 207–209, 224 (1991); John Hope Franklin, "'Legal' Disfranchisement of the Negro," 26 *Journal of Negro Education* 241, 243–248 (1957); Stavis, "A Century of Struggle," 57 *Miss. L. J.* 602–603, 606–607.

[72] *Vicksburg Commercial Herald*, July 25, 1890, 4.

[73] *Vicksburg Evening Post*, Oct. 31, 1890, 1.

[74] *Ibid.*, Apr. 28, 1890, 4 (addressing civic group); *Id.*, Sept. 8, 1890, 1; *Vicksburg Commercial Herald*, Oct. 26, 1890, 4 (addressing political rally); see *New Orleans Daily Picayune*, Mar. 12, 1895, 12 (oration at Greenville memorial service for Frederick Douglass).

[75] *Vicksburg Evening Post*, Sept. 8, 1890, 1.

[76] Aside from the *Gibson* case discussed in text, Jones's clients' convictions were reversed in two other reported Mississippi Supreme Court cases. *See James v. State*, 26 So. 929 (Miss. 1900); *Cherry v. State*, 20 So. 837 (Miss. 1896). The Mississippi Supreme Court affirmed

his clients' convictions in another five reported cases. See *Ex Parte Grubbs*, 31 So. 741 (Miss. 1902); *Ex Parte Smith*, 30 So. 710 (Miss. 1901); *Dixon v. State*, 20 So. 839 (Miss. 1896); *Morton v. State*, 12 So. 829 (Miss. 1893); *Ex Parte Collier*, 12 So. 597 (1893).

[77] **Defying Disfranchisement,** 60.

[78] *See* McMillen, **Dark Journey,** 229–230 (Mississippi first in number of lynchings), 232 (1889–1908 period of "peak mob activity"), 233 (lynchings turned "truly sadistic . . . after 1890").

[79] Thompson, **Black Life in Mississippi,** 62–63 (Bolivar and Washington second and fourth among Mississippi counties in the number of lynchings).

[80] *See* Thompson, **Black Life in Mississippi,** 68–69; Stewart E. Tolney & E.M. Beck, **A Festival of Violence: An Analysis of Southern Lynchings, 1882–1930**, 48–50 (1992).

[81] 162 U.S. 565 (1896).

[82] The official report of the case first gives the date of the offense as December 12, 1892, 162 U.S. at 567, though the correct date is later noted, see 162 U.S. at 569. Contemporary newspaper reports make clear that the correct date is January 9. *See, e.g., Jackson Clarion-Ledger*, Jan. 13, 1892, 3.

[83] *See* **Defying Disfranchisement,** 40–41.

[84] *Gibson v. State*, 12 So. 582, 583 (Miss. 1893). Prior commentators have overlooked this first reversal of Gibson's conviction. *See, e.g.*, **Defying Disfranchisement,** 41–42.

[85] *See Greenville Weekly Democrat-Times*, June 23, 1894, 5.

[86] *See* **Defying Disfranchisement,** 41–42.

[87] *Gibson v. State*, 16 So. 298 (Miss. 1894).

[88] *See Greenville Weekly Democrat-Times*, Jan. 19, 1895, 4; *Ibid.*, June 1, 1895, 4; *Pascagoula, Mississippi, Star Ledger*, July 26, 1895, 4 (referring to "famous case of John Gibson"); *New Orleans Daily Picayune*, Nov. 1, 1895, 2. Between the time of argument and decision in *Gibson*, a heavily armed man attempted unsuccessfully to break Gibson out of jail. The local newspaper commented that "[t]he case of Gibson has enlisted the active efforts of the entire negro population, and no means to procure his release has been left untried. This is the first time such a daring attempt has been made for his forcible relief." *Greenville Weekly Democrat-Times*, Mar. 7, 1896, 3.

[89] *Gibson v. State*, 17 So. 892 (Miss. 1895). *See Greenville Weekly Democrat-Times*, Jan. 19, 1895, 4.

[90] 162 U.S. 592 (1896).

[91] *See Smith v. State*, 18 So. 116 (Miss. 1895). For Jones's representation of Smith as trial counsel, see **Defying Disfranchisement,** 42. One past commentator reversed Jones's trial roles in *Gibson* and *Smith*. Benno Schmidt, "Juries, Jurisdiction, and Race Discrimination: The Lost Promise of *Strauder v. West Virginia*," 61 *Tex. L. Rev.* 1401, 1463–64 (1983).

[92] *See Vicksburg Evening Post*, June 4, 1895, 1 (Smith); *Jackson Clarion-Ledger*, May 27, 1895 (Gibson).

[93] *See* Rev. St. § 709.

[94] Tr. of Record, *Smith v. Mississippi*, 49–53.

[95] Tr. of Record, *Smith v. Mississippi* 45–48.

[96] Justice White's handwritten notes and correspondence in the case can be found in *Smith v. Mississippi*, Appellate Jurisdiction Case Files, 1792–2017 (Case no. 160000); Records of the Supreme Court of the United States, 1772–2007, Record Group 267; National Archives, Washington DC. While White's handwritten note dated July 8 states that the writ was granted that day, the Transcript of Record in *Smith* (at page 53) gives the date as July 6 instead. *See Kosciusko, Mississippi Star Ledger*, July 12, 1895, 1 (reporting on stay).

[97] Justice White's handwritten note in *Gibson* stating that he had received the record and was issuing the writ can be found in *Gibson v. Mississippi*, Appellate Jurisdiction Case Files, 1792–2017 (Case no. 160001).

[98] *See Vicksburg Commercial Herald*, July 18, 1895, 1.

[99] The Court's file in *Smith*, cited at note 97, includes correspondence between Jones and McKenney making clear that Jones needed a member of the Supreme Court Bar to get the cases docketed and turned to Hewlett for that purpose. For Hewlett's background, see *Washington Bee*, Dec. 21, 1895, 1; Smith, **Emancipation,** 131–132 (biographical sketch of Hewlett).

[100] Jones was admitted to the Supreme Court Bar and signed the register of admitted attorneys on October 21, 1895, apparently on Hewlett's motion. *See* 1895 *Supreme Court Journal* 14. Jones's signature when he joined the bar can be found at Attorney Rolls, 1790–1961, 27 (October 21, 1895), Records of the Supreme Court of the United States, 1772–2007, Record Group 267, National Archives, Washington, D.C.

[101] Section 264 provided that "[n]o person shall be a grand or petit juror unless a qualified elector and able to read and write."

[102] 162 U.S. at 572–573.

[103] *See* 162 U.S. at 569, 584.

[104] *Gibson*, 162 U.S. at 569; *see id.* at 584.

[105] The statute's successor is now codified at 28 U.S.C. § 1343. Jones and Hewlett added in their brief that, if the trial court did not permit removal, it should have taken the petition for removal as a motion to quash the indictment and then granted it in light of the constitutional violation. *Gibson*, 162 U.S. at 577–578.

[106] 162 U.S. at 587.

[107] *See* 1895 *Supreme Court Journal* 75, 79.

[108] 137 U.S. 202 (1890). *See* 1890 *Supreme Court Journal* 16; Smith, **Emancipation,** 145 & n.175. Prof. Smith mistakenly states that *Gibson* was argued by Wilford H. Smith, another prominent Black Mississippi

lawyer who did appear in a later case before the Court. *Ibid.* 293–294. Hewlett and Jones signed the briefs in both *Gibson* and *Smith*, and the reported opinion makes clear that Hewlett argued *Gibson*. *See* 162 U.S. at 571. Wilford Smith had no apparent involvement in either case.

[109] An exchange in an African-American newspaper published in Philadelphia addressed whether Waring or Jones (or Hewlett) deserved credit as the first Black lawyer to appear before the Court. It noted that, while Waring had White co-counsel, Jones did not. *See The Christian Recorder*, Dec. 12, 1895, 2 (letter by Waring and response by editorial staff). Others have mistakenly taken Jones's side on this question. **Sowing the Wind,** 182 n.65.

[110] 162 U.S. at 581.

[111] *Ibid.*, at 582. Ironically, *Plessy* cited dicta in *Gibson* for "the right of a colored man that, in the selection of jurors to pass upon his life, liberty, and property, there shall be no exclusion of his race, and no discrimination against them because of color." 163 U.S. at 545.

[112] 162 U.S. at 584. Jones and Hewlett attacked bias in the selection of both the petit and the grand jury. *See id.* at 569–570, 572.

[113] 162 U.S. at 589.

[114] 3 Dall. (3 U.S.) 386 (1798).

[115] 162 U.S. at 590 (citing *Calder*). The *Calder* test still governs Ex Post Facto Clause claims. *See, e.g., Stogner v. California*, 539 U.S. 607, 611–612 (2003).

[116] The motion to quash in *Smith* used the 1,500:500 ratio. *See* 162 U.S. at 598. The petition for removal gives it as 1,300:300. 162 U.S. at 595. It is unclear whether the difference was an error inserted at some point or was intentional. In any event, the difference would not affect the legal analysis.

[117] 162 U.S. at 596.

[118] 162 U.S. at 596–597.

[119] 162 U.S. at 596–598, 600; *see* Brief for the Plaintiff in Error, *Smith v. Mississippi* 16.

[120] Br. of the Plaintiff in Error, *Smith v. Mississippi* 10.

[121] *Ibid.*, 17.

[122] 162 U.S. at 601.

[123] 162 U.S. at 601.

[124] *See* Schmidt, "Juries, Jurisdiction, and Race Discrimination," 61 *Tex. L. Rev.* 1464 & nn. 321–324; *Smith*, 162 U.S. at 596; *see also* Brief of the Plaintiff in Error, *Smith v. Mississippi* 16 (noting that "record shows that the accused had used due diligence to procure his witnesses and was being forced to trial, and was forced to trial without the benefit of the return of such process which he had diligently procured"). The defendant had similarly sought, but been denied, subpoenas in *Gibson*. *See* 162 U.S. at 570 (quoting petition for removal), 585.

[125] Petition for Rehearing, at 1–2 *Smith v. Mississippi*, 162 U.S. 592 (1896).

[126] *See* Engrossed Dockets, 1791–1995, vol. 31, 17097; Records Group 267, Records of the Supreme Court of the United States, 1772–2007; National Archives, Washington, D.C. (receipt and denial of rehearing petition).

[127] 170 U.S. 213 (1898).

[128] Tr. of Record, *Williams v. Mississippi*, at 9, 15.

[129] *See* **Defying Disfranchisement,** 64–66; Tr. of Record, *Williams v. Mississippi*, at 15–30 (testimony of trial witnesses).

[130] Tr. of Record, *Williams v Mississippi*, at 36.

[131] 20 So. 839 (Miss. 1896).

[132] *Williams v. State*, 20 So. 1023 (Miss. 1896).

[133] 20 So. 865 (Miss. 1896).

[134] *Ratliffe*, 20 So. at 868.

[135] *Ratliffe*, 20 So. at 867.

[136] 1897 *Supreme Court Journal* 62, 139, 162.

[137] Brief for the Plaintiff in Error, *Williams v. Mississippi* 170 U.S. 213 (1898), at 4 (No. 531).

[138] *Ibid.*

[139] *Id.* at 11 (quoting *Ratliff*, 20 So. at 868).

[140] *Id.* at 8.

[141] *Dixon*, 20 So. at 8409; *see* Brief for the Plaintiff in Error, *Williams v. Mississippi*, at 9.

[142] *Williams*, 170 U.S. at 219, 220.

[143] 170 U.S. at 222.

[144] 170 U.S. at 222 (quoting *Ratliff*, 20 So. at 868).

[145] 170 U.S. at 223 (quoting *Ratliff*, 20 So. at 868).

[146] 170 U.S. at 223.

[147] *See, e.g.*, **Defying Disfranchisement,** 41, 44, 70; J. Morgan Kousser, "Separate but not Equal: The Supreme Court's First Decision on Racial Discrimination in Schools," 46 *Journal of Southern History* 17, 34 n.39 (1980); Schmidt, "Juries, Jurisdiction, and Race Discrimination," 61 *Tex. L. Rev.* at 1463–1464, 1467–1468.

[148] *Gibson*, 162 U.S. at 574 (quoting argument); *see* Brief for the Plaintiff in Error, *Gibson v. Mississippi*, at 9 (U.S. Supreme Court).

[149] *Dixon*, 20 So. at 843.

[150] 426 U.S. 232 (1976).

[151] 471 U.S. 222 (1985).

[152] 471 U.S. at 230, 229.

[153] Klarman, "The *Plessy* Era," 1998 *Supreme Court Review* 376 (noting Court's demand for additional but unspecified evidence, its refusal to infer discrimination from the absence of Blacks on juries in a county, and its refusal to compel testimony of officials); *see also* Christopher Waldrep, **Jury Discrimination: The Supreme Court, Public Opinion, and a Grassroots Fight for Racial Equality in Mississippi** 194–195 (2010).

[154] Klarman, "The *Plessy* Era," 304–305.

[155] *Memphis Commercial Appeal*, Nov. 10, 1901, 11.

[156] *See* Motion for Leave to File Original Suit 1–2, *Bell v. Mississippi*. For the cruelty of Mississippi's system of

convict leasing and prison labor, see generally Wharton, **The Negro in Mississippi,** 239–242; **Sowing the Wind,** 118–123; David M. Oshinsky, **"Worse than Slavery": Parchman Farm and the Ordeal of Jim Crow Justice,** 34–53 (1996).

[157] 134 U.S. 1 (1890).

[158] U.S. Constitution, Art. III, § 2.

[159] *Bell v. Mississippi*, 177 U.S. 693 (1900).

[160] *Greenville Weekly Democrat-Times*, July 28, 1894, 4.

[161] *Contested Election Case of Cornelius J. Jones v. T.C. Catchings from the Third Congressional District of Mississippi*, 55th Cong., at 62, 241–242 (1897) (hereinafter *1896 Election Contest*).

[162] *Washington Bee*, Mar. 14, 1896, 4.

[163] Chester H. Rowell, **A Historical and Legal Digest of All the Contested Election Cases in the House of Representatives from the First to the Fifty-Sixth Congress, 1789–1901**, at 471 (GPO 1902). *See also* Wharton, **The Negro in Mississippi** 201.

[164] The district had 155,726 Blacks and 28,347 Whites. See **Official Congressional Directory**., 55th Cong., 2nd Sess. 71 (2nd ed. 1898) (listing the 10 counties in Third District); **Report on Population of the United States at the Eleventh Census, Part I,** 417–418 (racial composition of each of the counties).

[165] *See, e.g., 1896 Election Contest* 242–243 (notices of Republican rallies); **Defying Disfranchisement,** 61.

[166] The handbill is a part of the Jones–Sadler Family Papers at the Schomburg Center for Research in Black Culture of the New York Public Library.

[167] *Greenville Times-Democrat*, Aug. 5, 1896, 2.

[168] The extent of disfranchisement can be seen from the fact that, in a district with a population of 184,073, 4,050 total votes were cast for Congress in the 1896 election.

[169] *1896 Election Contest* 227.

[170] *1896 Election Contest* 1–7. Emanuel M. Hewlett, who had been co-counsel in *Gibson* and *Smith*, served the notice on Catchings on December 2. *1896 Election Contest* 7. It was published on page 6 of the *Vicksburg Commercial Herald* on December 9, 1896.

[171] *See* Sean Wright, "The Origin of Disputed Elections: Case Studies of Early American Contested Congressional Elections," 81 *Alb. L. Rev.* 609, 630–643 (2018).

[172] Jeffrey A. Jenkins, "Partisanship and Contested Election Cases in the House of Representatives, 1789–2002," 18 *Studies in American Pol. Dev.* 112, 127–132 (2004). *See generally* Stavis, "A Century of Struggle," 57 *Miss. L. J.* at 627–637 & n. 156 (discussing 1890s contested election cases based on Black disfranchisement). While Rowell's **Historical and Legal Digest** compiled House election contests in this period, it appears to include only election contests that were reported to the House itself, and it thus includes only 16 of the 21 challenges in the Fifty-Fifth Congress listed in the Congressional Record. 31 *Cong. Rec.* 11 (1897). Presumably because the Elections Committee did not report Jones's 1896 and 1898 contests to the House itself, neither was included in Rowell's digest.

[173] When there were numerous contests, as frequently occurred in the 1890s, several Committees on Elections were formed to hear them. In 1896, there were three such committees, and Jones's contest was heard by Elections Committee No. 2. 31 *Cong. Rec.* 11 (1897).

[174] *See* Rev. St. 105–129 (1873); C.H. Rammelkamp, "Contested Congressional Elections," 20 *Pol Sci. Quarterly* 421, 425–427 (1905). The rules for contested elections in the House are currently codified at 2 U.S.C. § 381.

[175] *1896 Election Contest* 3.

[176] *1896 Election Contest* 4–6.

[177] *Greenville Weekly Democrat-Times*, Dec 12, 1896, 2; *see Vicksburg Post*, Dec. 9, 1896, 1 (Jones's "allegations are absurd and ridiculous").

[178] Committee Papers of the Committee on Elections from the 55th Congress, NAID 8002692, Record Group 233, 3. Catchings submitted a statement and receipts for $2,250.17 and was awarded $2,000. *Id.* 43. *See* 30 Stat. 687 (1898) (1896 contest appropriation); 31 Stat. 312 (1900) (1898 contest appropriation).

[179] *See* Tr. of Record, *Williams v. Mississippi*, at 47 (petition for review sent December 12, 1896).

[180] *1896 Election Contest* 11–108.

[181] *1896 Election Contest* 109–229.

[182] *1896 Election Contest* 230–247.

[183] *1896 Election Contest* 76. Newspapers recognized that "pretty much the same questions concerning the validity of Mississippi's constitution are presented to the election committee in the contest and to the supreme court" in *Williams*. *New Orleans Picayune*, Mar. 15, 1898, 1; Biloxi Herald, Mar. 19, 1898, 4 (same).

[184] Some exhibits listed the erased names. *See, e.g., 1896 Election Contest* 74.

[185] For example, two applicants were asked the name of Queen Elizabeth I's husband, and the first was also asked the name of Queen Isabella's husband, the two greatest of the Ten Commandments, and the name of President Cleveland's wife. *1896 Election Contest* 61, 239. The registrar testified that he was "joking" with the first applicant, and there was some dispute as to whether that applicant was in fact already registered. *1896 Election Contest* 185.

[186] *1896 Election Contest* 83. The wording of the petitions varied, but were substantively similar. See *1896 Election Contest* 83–103.

[187] *See 1896 Election Contest* 221.

[188] Jones's expense account indicates he traveled to Washington for a hearing scheduled for May 13, 1897, and again in December 1897, apparently for a hearing held on January 21, 1898. *See* Committee Papers of

the Committee on Elections from the 55th Congress, NAID 8002692, Record Group 233, at 1, 18; *see also Washington Post*, Jan. 22, 1898, 4 (hearing held on Jan. 21, 1898). I have been unable to find any record in the National Archives of what occurred at either hearing.

[189] *See, e.g.*, Matthew N. Green, "Race, Party, and Contested Elections to the U.S. House of Representatives," 39 *Polity* 155, 171–175 (2007).

[190] *See Dixon*, 20 So. at 840–841.

[191] *Williams*, 170 U.S. at 225.

[192] *Vicksburg Herald*, Sept. 16, 1898, 6; *see New Orleans Daily Picayune*, Aug. 26, 1898, 12 (reconciliation).

[193] *Contested Election Case of Cornelius J. Jones vs. Thos. C. Catchings from the Third Congressional District of the State of Mississippi*. 56th Cong. 25 (1899) (hereinafter *1898 Election Contest*).

[194] *1898 Contested Election* 25–26.

[195] *Greenville Weekly Democrat-Times*, Nov. 5, 1898, 2. A paper in Bolivar County noted a similar worry. *1898 Election Contest* 26. *See also Vicksburg Herald*, Nov. 6, 1898, 4.

[196] *1898 Election Contest* 26.

[197] *1898 Election Contest* 65.

[198] *1898 Election Contest* 18.

[199] Miss. Code § 3654 (1892) (emphasis added).

[200] Miss. Code § 3649 (1892) (emphasis added).

[201] *1898 Election Contest* 10–11, 18–21, 22–23, 24–25.

[202] Brief of Contestant, Contested Election Case of Cornelius J. Jones v. T.C. Catchings in the House of Representatives of 56th Congress 24 (henceforth *1898 Brief of Contestant*). *See also ibid.* ("it was reasonably feared that there might be some excuse for political violence."). Jones's attorneys in the 1898 election contest were R.E. Doan and J.F. Walker. Jones himself testified and was cross-examined regarding his fears of violence. *1898 Election Contest* 79, 82.

[203] *1898 Brief of Contestant* 24.

[204] *1898 Election Contest* 7–23.

[205] *1898 Election Contest* 9–10, 11, 13, 15, 16.

[206] *1898 Election Contest* 30–78.

[207] *1898 Election Contest* 79–83.

[208] The contest was referred to Elections Committee No. 2. *See* Congressional Directory, 56th Cong., 1st Sess. at iii (2nd ed. 1900). A newspaper report suggests that a hearing may have been held in April 1900. *See The Colored American*, Apr. 7, 1900, 8. The records of Elections Committee No. 2 from the 56th Congress are not in the National Archives and appear not to have survived.

[209] *Vicksburg Commercial Herald*, Jan. 5, 1899, reproduced in *1898 Election Contest* 27. The *Washington Post* printed a letter regarding the contest and a response from Jones. *See Washington Post*, Jan. 17, 1899, 4, and Jan. 19, 1899, 7.

[210] *Vicksburg Evening Post*, Aug. 31, 1900, 3.

[211] Cresswell, **Multiparty Politics in Mississippi,** 183.

[212] *Ibid.*

[213] Thompson, **Black Life in Mississippi,** 58; *see also* Kirwan, **Revolt of the Rednecks,** 144–147; 162–164, 180–181; Oshinsky, **"Worse than Slavery,"** 85–87, 100–106.

[214] *See, e.g., Washington Evening Star*, Oct. 22, 1895, 1 (addressed meeting of Black Republicans); *Washington Post*, May 6, 1897, 11 (officer in Negro National Protective Association); *Washington Evening Star*, Apr. 21, 1898, 5 (signed letter from Black leaders supporting the Spanish–American War); *Washington Evening Star*, May 20, 1898, 16 (toast at dinner honoring Black Treasury official); *Washington Post*, Dec. 25, 1898, 10 (named to subcommittee examining legislation at upcoming National Afro-American Council meeting); *Washington Post*, Jan. 4, 1899, 8 (toast at banquet honoring Black Congressman from North Carolina); *Washington Post*, Jan. 30, 1899, 8 (addressed Afro-American Council seeking representation in DC government and restoration of suffrage in DC); *Washington Bee*, May 20, 1899, 4 (Jones as counsel for Negro Protective League); *Washington Post*, Feb. 14, 1900, 8 (addressed convention in DC).

[215] *The Colored American*, Apr. 23, 1898, 7.

[216] *See also ibid.*, Apr. 7, 1900, 8 (Jones a "guest" at 1517 Madison St., N.W., Washington, D.C.).

[217] *Id.*, Apr. 27, 1901, 8. *See also* id., Mar. 8, 1902, 9 (with picture and letter); Sept. 8, 1902.

[218] *See Vicksburg Herald*, Feb. 1, 1901, 5 (counsel for census worker in fraud case); *The Colored American*, Feb. 23, 1901, 8 (temporary D.A.); *Vicksburg Herald*, Nov. 9, 1901, 1 (counsel in case before the Mississippi Supreme Court).

[219] *Greenville Weekly Democrat-Times*, July 20, 1901, 8 (organizing investment company meeting); *Vicksburg Herald*, Sept. 10, 1901, 2 (approval of charter).

[220] *See Vicksburg Evening Post*, Nov. 28, 1902, 2 (chief legal advisor); *Washington Evening Star*, April 2, 1903, 2 (flood); *New Orleans Daily Picayune*, April 5, 1903, 15 (flood).

[221] *See Greenville Weekly Democrat-Times*, Nov. 17, 1900, 1 (report of judicial proceeding on Jones' complaint); *see also Vicksburg Evening Post*, Sept. 20, 1900, 1 (report of altercation); *Greenville Weekly Democrat-Times*, Jan 12, 1901, 1 (continuance); *Jackson Weekly Clarion-Ledger*, Nov 7, 1901, 5 (appeal by Jones unsuccessful).

[222] *See* Cohen, **At Freedom's Edge,** 254–257; Daniel F. Littlefield, Jr., and Lonnie E. Underhill, "Black Dreams and "Free Homes": The Oklahoma Territory, 1891–1894," 34 *Phylon* 342 (1973); Arthur L. Tolson, **The Black Oklahomans: A History 1541–1972**, 46–55 (1974).

[223] *See* Jimmie Lewis Franklin, **Journey Toward Hope: A History of Blacks in Oklahoma,** 4–9 (1971); Tolson, **The Black Oklahomans,** 19–31.

[224] *Obituary* 3; **Possibilities,** 159. The date he moved is not clear, but a September 26, 1903, Greenville newspaper legal notice listed him as already living in Muskogee. *Greenville Weekly Times-Democrat,* Sept. 26, 1903, 2.

[225] *Vicksburg Herald*, May 10, 1903, 12. *See also* S. Rep. No. 5013, Pt. 1, *Report of the Select Committee to Investigate Matters Connected with Affairs in the Indian Territory, with Hearings, November 11, 1906–January 9, 1907*, 59th Cong. 2d Sess. 550 (1907) (1906 congressional hearing in Muskogee on sale of Indian lands where chair inquired whether Jones was present, with no response).

[226] Jones's application can be found at Dawes Enrollment Jacket for Choctaw, Mississippi Choctaw, Card # MCR 6831; Applications for Enrollment in the Five Civilized Tribes, 1898–1914; Records of the Bureau of Indian Affairs, 1793–1999, Record Group 75; National Archives at Fort Worth, Texas (hereinafter *Mississippi Choctaw Application*). The quote is from page 2 of the file.

[227] *See generally* Kent Carter, **The Dawes Commission and the Allotment of the Five Civilized Tribes, 1893–1914**, 69–103 (1999).

[228] *Mississippi Choctaw Application* 5; *see* Carter, **The Dawes Commission,** 73; *id.* 26 (characterizing treatment of Mississippi Choctaws as "one of the most complicated and disgraceful episodes in the entire story of allotment"); 76–77, 85–86, 99–100, 102 n.92.

[229] *Mississippi Choctaw Application* 19–20.

[230] *Mississippi Choctaw Application* 39.

[231] *Mississippi Choctaw Application* 3. Jones's family tree, listing "Rosa A." as his second wife is on page 43 of the *Mississippi Choctaw Application.*

[232] *See* Letter from Cornelius Jones to "Rosa," dated October 15, 1904, in the Jones–Sadler Family Papers at the Schomburg Center.

[233] *See generally* Philip Mellinger, "Discrimination and Statehood in Oklahoma," 49 *Chronicles of Oklahoma* 340, 361–373 (1971).

[234] Cohen, **At Freedom's Edge,** 254–255 & n.20; Tolson, **The Black Oklahomans,** 88–89.

[235] Tolson, **The Black Oklahomans,** 61–68 (racial violence), 125–131 (segregation).

[236] *Wagoner Echo* , Aug. 18, 1904, 1; *see also Muskogee Cimeter*, Aug. 18, 1904, 1; *Daily Ardmoreite*, Aug. 18, 1904, 1.

[237] *Muskogee Comet*, July 14, 1904, 1.

[238] *Muskogee Cimeter*, Aug. 18, 1904, 1.

[239] *Wagoner Echo*, Aug. 18, 1904, 1; *see also Muskogee Democrat*, Aug. 17, 1904, 1; *Daily Ardmoreite*, Aug. 18, 1904, 1.

[240] *Wagoner Echo*, Aug. 25, 1904, 1.

[241] *Ibid.*, Aug. 18, 1904, 1.

[242] *Id.*, Aug. 18, 1904, 1; *see* 26 Stat. 84 (suffrage in Oklahoma Territory).

[243] *Muskogee Daily Phoenix*, Dec. 28, 1904, 2.

[244] *Ibid.*

[245] 34 Stat. 268, 271.

[246] 34 Stat. 269, 271.

[247] *Wagoner Weekly Sayings*, Oct. 25, 1906, 9.

[248] *Muskogee Daily Phoenix*, Nov. 4, 1906, 1.

[249] *Tulsa Democrat*, Nov. 16, 1906, p.8 (detailing charges); *see also Muskogee Times-Democrat*, Nov. 9, 1906, 1.

[250] *Muskogee Times-Democrat*, Nov. 12, 1906, 1. *See* Franklin, **Journey Toward Hope,** 38 (Democrats controlled 100 of 112 seats at convention); **Proceedings of the Constitutional Convention of the Proposed State of Oklahoma,** 13 (1907) (listing Haskell as delegate from 76th district).

[251] Tolson, **Black Oklahomans** 139–142; *see* Mellinger, "Discrimination and Statehood in Oklahoma," 49 *Chronicles of Oklahoma* 366–368.

[252] Tolson, **The Black Oklahomans,** 146–151 (railroad segregation), 152 (miscegenation), 153–159 (grandfather clause); Mellinger, "Discrimination and Statehood in Oklahoma," 372–374. In *Guinn v. United States*, 238 U.S. 347 (1915), the Supreme Court struck down Oklahoma's grandfather clause, which provided an exception to the state's Understanding Clause for anyone whose lineal ancestors had been eligible to vote prior to 1866.

[253] *See, e.g., Muskogee New-State Tribune*, Dec. 27, 1906, 6 (business card ad, repeated frequently in later issues); *Muskogee Daily Phoenix*, Feb. 2, 1906, 2 (probate of will); *Muskogee Times-Democrat*, Apr. 29, 1907, 1 (assault on his client during meeting on divorce case); *Topeka (Kansas) Plaindealer*, Feb. 3, 1905, 4 (real estate transaction).

[254] *Muskogee Phoenix*, Nov. 23, 1905, 8 (Washington); *Muskogee Times-Democrat*, Oct. 10, 1906, 7 (Fairbanks). *See also Indian Citizen*, July 19, 1906, 4 (Emancipation Day speech); *Muskogee Phoenix*, Sept. 21, 1905, 3 (Western Negro Press Assn meeting).

[255] *Muskogee Times-Democrat*, Feb. 29, 1908, 1; *Langston (Ok.) Western Age*, Mar. 6, 1908, 4.

[256] *Muskogee Times-Democrat*, Mar. 26, 1909, 8; *Muskogee Cimeter*, Apr. 2, 1909, 1; *ibid.*, Apr. 16, 1909, 1 (Republican ticket); *id.*, Apr. 30, 1909 (general election).

[257] *Muskogee Times-Democrat*, Jan. 15, 1906, 6 (fraud charge); *Muskogee Phoenix*, Jan 18, 1906, 2 (acquittal of fraud); *id.*, Jan. 27, 1906, 6 (Jones honored at banquet celebrating acquittal); *id.*, Jan. 24, 1908, 1 (contempt/property charge).

[258] *Muskogee Times-Democrat*, Sept. 1, 1910, 8.

[259] Arthur L. Tolson, "Black Towns of Oklahoma," *The Black Scholar* 18, 21–22 (Apr. 1970).

[260] *Ibid.*, 21.

[261] *Muskogee Times-Democrat*, Feb. 7, 1906, 6; *see Muskogee Times-Democrat*, Feb. 12, 1906, 5 (purchase price $4,000).

[262] *See Jones v. St. Louis & San Francisco R.R.*, 12 I.C.C. 144, 145 (1907).

[263] *Washington Post*, Sept. 27, 1906, 2; *New Orleans Daily Picayune*, Sept. 27, 1906, 7.

[264] *Jones v. St. Louis & San Francisco R.R.*, 12 I.C.C. at 145–146, 150.

[265] Hannibal B. Johnson, **Acres of Aspiration: The All-Black Towns in Oklahoma,** 206 (2002).

[266] Tolson, "The Black Oklahomans," 104.

[267] Mary Frances Berry, **My Face Is Black Is True,** 34–35, 75, 128, 167. Berry's is the most thorough study of Callie House and her movement. *See also* Walter B. Hill, Jr., "The Ex-Slave Pension Movement: Some Historical and Genealogical Notes," 59 *Negro History Bulletin*, No. 4, 8–9 (Oct.–Dec. 1996).

[268] **My Face Is Black Is True** 7 & n.2. A number of other similar, but smaller, organizations were organized during the same period. See Hill, "The Ex-Slave Pension Movement," 8–9.

[269] *See, e.g.*, **My Face Is Black Is True,** 91–92; Hill, "The Ex-Slave Pension Movement," 9–10.

[270] **My Face Is Black Is True,** 81–82, 84–85, 89–90.

[271] *Ibid.*, 190–204.

[272] *Id.*, 172–174.

[273] *See* 12 Stat. 465 (1862); 13 Stat. 15–16 (1864); 14 Stat. 98 (1866); 15 Stat. 34 (1868).

[274] *See* Certain Taxes Collected in 1866, 1867, and 1868, Hearings on H.J. Res. 166 before the House Comm. on Ways & Means, 70th Cong., 2d Sess. 10 (1929) (hereinafter *1929 Hearings*).

[275] *See 1929 Hearings* 21–25, 84–85.

[276] 157 U.S. 429 (1895). The specific result in *Pollock* was reversed by the Sixteenth Amendment, ratified in 1913.

[277] *See Topeka (Kan.) Plaindealer*, Nov. 12, 1915, 1 (letter by Jones quoting Malburn letter). A copy of Malburn's letter is in the Jones–Sadler Family Papers at the Schomburg Library in New York.

[278] *See* Plaintiff's Amended Bill in Equity, *Johnson v. McAdoo*, No. 33573, at 1 (D.C. Supreme Court, filed Oct. 26, 1915).

[279] *Ibid.*

[280] *See, e.g., Washington Post*, July 14, 1915, 14; *Greensboro Daily News*, Oct. 18, 1915, 8; *Topeka (Kan.) Plaindealer*, July 23, 1915, 8; *Chicago Defender*, July 24, 1915, 1.

[281] *See, e.g., Boston Evening Transcript*, Oct. 15, 1915, 4; *Washington Post*, Oct. 17, 1915, 1; *Chicago Defender*, Nov. 6, 1915, 1; *Greensboro, N.C. Daily News*, Oct. 18, 1915, 8.

[282] *Washington Bee*, Sept. 11, 1915, 1.

[283] *Greensboro Daily News*, Oct. 18, 1915, 8.

[284] *Topeka (Kan.) Plaindealer*, Nov. 12, 1915, 1.

[285] *See Johnson v. McAdoo*, Appellate Jurisdiction Case Files, 1792–2017, at p. 9 (Case no. No. 15727); Records of the Supreme Court of the United States, 1772–2007, Record Group 267; National Archives, Washington, D.C.

[286] *Johnson v. McAdoo*, 45 App. D.C. 440, 441(1916).

[287] Mot. to Dismiss the Application for Affirmance, *Johnson v. McAdoo*, 244 U.S. 643 (1917) (No. 897), at 3.

[288] *Johnson v. McAdoo*, 244 U.S. 643 (1917).

[289] *Muskogee Tattler*, Dec. 16, 1916, 1. "Cornelius Jones, lawyer," is listed in the 1916 and 1917 **R. L. Polk Memphis City Directory**. Jones informed the Clerk of the U.S. Supreme Court in a May 9, 1917, letter that his residence was in Muskogee and mailings should be addressed to him there. *See* National Archives Record Group 267, Appellate Case Files, *Johnson v. McAdoo*, No. 25727 (Stack area 17E3:5/3/6, box 6001).

[290] *See Savannah Tribune*, Oct. 16, 1915, p.3; *Chicago Defender*, Nov. 6, 1915, 1 (Washington and Baltimore); *Vicksburg Herald*, Nov. 28, 1915, 8 (Mississippi); *Topeka Plaindealer*, June 30, 1916, 1 (Kansas and Missouri); *Topeka State Journal*, July 6, 1916, 6; *Kansas City Advocate*, July 14, 1916, 3.

[291] *Topeka Plaindealer*, Aug. 4, 1916, 1 (call for convention), and Sept. 8, 1916, 8 (report of convention); *Memphis Commercial Appeal*, Jan. 18, 1917, 8 (song); *Washington Bee*, Jan. 27, 1917, 1.

[292] *Memphis Commercial Appeal*, Jan. 18, 1917, 8.

[293] *See Muskogee Times-Democrat*, Sept. 10, 1917, 8; *Muskogee Daily Phoenix*, Aug 28, 1919, 4.

[294] *E.g., Vicksburg Herald*, Nov. 21, 1915, 4; Nov. 28, 1915, 8; Sept. 27, 1917, 4. *Savannah Tribune*, Nov. 6, 1915, 6.

[295] *See, e.g., Chicago Defender*, Nov. 6, 1915, 1 (suit "has not merit"); *Chicago Defender*, Sept. 25, 1915, 4 (urging caution re suit); *Baltimore Freeman*, Oct. 30, 1915 (1 ("fraudulent and absurd"); *Muskogee Tattler*, Dec. 16, 1916, 1 (favorable); *Topeka Plain Dealer*, July 21, 1916, 1 ("Lawyer Jones has proven himself to be a man of great legal talent and should be commended.").

[296] *See Hutchison (Kansas) Gazette*, Nov. 21, 1915, 1; *Fort Worth Star-Telegram*, Nov. 21, 1915, 23.

[297] *See Memphis Commercial Appeal*, May 27, 1916, 8 (indictment); Sept. 29, 1916, 8 (arrest). Notwithstanding that Jones posted bond when he was arrested in Memphis, federal authorities mistakenly arrested him again in Muskogee on December 14, 2016, but he was released the same day. A federal official stated that the

arrest probably was due "to the failure of the officials [of Muskogee] to learn of his appearance [in Memphis]." *Daily Oklahoman*, Dec. 15, 1917, 2.

[298] *See Washington Bee*, Jan. 20, 1917, 1; *Memphis Commercial Appeal*, Jan. 17, 1917, 9.

[299] *See Memphis Commercial Appeal*, Jan. 18, 1917, 8 (nolle prosequi); *Washington Bee*, Jan. 27, 1917, 1 (same). *See Memphis Commercial Appeal*, Dec. 11, 1917, 8.

[300] *Memphis Commercial Appeal*, Dec. 4, 1918, 8.

[301] *See Reeves Realty Co. v. Brown*, 147 P. 318 (Ok. 1915); *United Brothers of Friendship and Sisters of the Mysterious Ten of Oklahoma v. Delancy*, 157 P. 1150 (Ok. 1916); *Washington v. Colvin*, 155 P. 251 (Ok. 1915).

[302] *Muskogee Daily Phoenix*, Aug. 28, 1919, 4.

[303] H. Journal, 66th Congress, 1st Session 230 (1919).

[304] *Washington Bee*, Feb. 7, 1920, 1; July 10, 1920, 1; Oct. 16, 1920, 1.

[305] *Muskogee Daily Phoenix*, Sept. 5, 1919, 4.

[306] Davis is listed with her former husband, John M. Davis, and their then four-year-old son Fentress in the 1910 census for Muskogee.

[307] There are newspaper reports on the filing of the divorce case by Smith, *see Muskogee Daily Phoenix*, Feb. 20, 1921, 4, and on Jones's answer, *see Muskogee Times-Democrat*, Mar. 23, 1921, 1.

[308] The *Obituary* states that Jones left behind a widow when he died, but I have been unable to find any record of any marriage after the one to Maggie Davis.

[309] May 9, 1927, Letter from Cornelius Jones to Sarah Jones Sadler, Jones–Sadler Family Papers, Schomburg Library. Greenville was especially devastated by the great 1927 Mississippi River flood, and Blacks suffered the most of all. *See* John Barry, **Rising Tide: The Great Mississippi Flood of 1927 and How It Changed America,** 303–335 (1998).

[310] September 28, 1928, Letter from Cornelius Jones to Sarah Jones Sadler, Jones–Sadler Family Papers, Schomburg Library.

[311] See *1929 Hearings* 1–2.

[312] *1929 Hearings* 105–116. The brief advanced a slightly different theory of the claim, which was now based on the work of Black tenant farmers from 1863 on, who had produced the cotton and should be viewed as the ultimate taxpayers because they had been charged the tax by their landlords. *Ibid.* at 108.

[313] *1929 Hearings* 109–110.

[314] *1929 Hearings* 110.

[315] January 21, 1929, Letter from Cornelius Jones to Sarah Jones Sadler, Jones–Sadler Family Papers, Schomburg Library.

[316] *Chicago Defender*, Mar. 28, 1931, 20.

Influence Without Impeachment: How the Impeach Earl Warren Movement Began, Faltered, But Avoided Irrelevance

Brett Bethune

Introduction

As visitors filed into the Indianapolis Speedway on Memorial Day in 1965, they were greeted by a massive billboard declaring, "Save Our Republic! Impeach Earl Warren."[1] Earlier that year, just outside the city of Selma, Alabama, observers and participants in the historic civil rights march that took place there were confronted by a similar billboard calling for the impeachment of the Chief Justice of the United States. Both billboards displayed the name of the group responsible for their conspicuous placement: the John Birch Society.[2] By 1966, there were hundreds of similar signs placed on streets, roads, and highways all across the nation. While not every billboard, sign, or pamphlet bore the name of the group, it was clear that the campaign to impeach Earl Warren was a project driven by the John Birch Society.[3]

Despite being one of the most prominent, well-funded campaigns ever to advocate for the impeachment of a Supreme Court justice, there has been little scholarship—legal or otherwise—examining the Impeach Earl Warren movement. Although Warren was never impeached, it is a mistake to treat the movement as nothing more than an interesting yet inconsequential chapter in the history of public criticisms of the Supreme Court. As this article argues, lots of people, including members of Congress and news reporters, misunderstood critical aspects of the Impeach Earl Warren movement, which led many to dismiss it.[4] However, a clearer understanding of the movement helps better evaluate both its impact and its historical significance. This article examines three lesser known aspects of the Impeach Earl Warren movement. First, although the John Birch Society can most readily be identified

DOI: 10.1111/jsch.12295

with anti-Communism, the group's campaign to impeach Chief Justice Warren originates in the Supreme Court's decision in *Brown v. Board of Education*. Second, the John Birch Society's leadership and tactics significantly impeded widespread acceptance of the Impeach Earl Warren movement into the mainstream conservative movement, despite a shared opposition to *Brown*, and may even have been counterproductive. Finally, what the John Birch Society sought to accomplish with its campaign to impeach Warren was more complicated and nuanced than simply removing the Chief Justice from the Court.

I

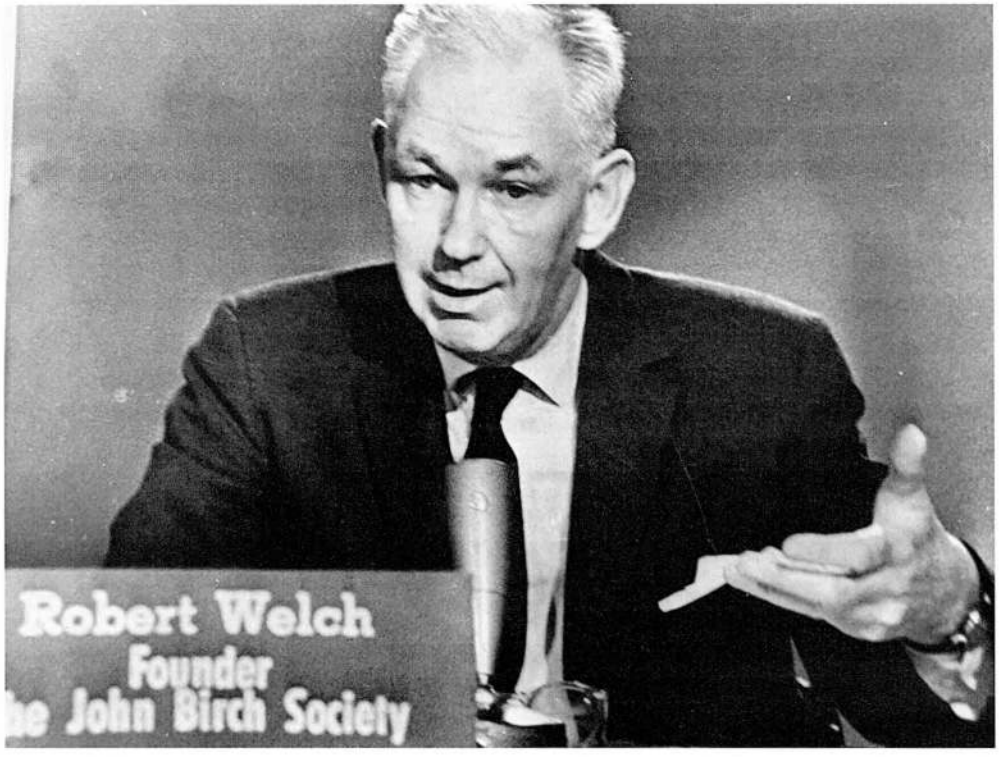
A. Robert Welch and the John Birch Society

The John Birch Society persists as an organization with a stated mission to support the Constitution and bring about "less government, more responsibility, and—with God's help—a better world."[5] The group is headquartered in Appleton, Wisconsin, hometown of former Senator and anti-Communist zealot Joe McCarthy. It offers a variety of membership packages that connect members to local chapters through field coordinators. However, the group remains secretive about how many local chapters exist and refuses to divulge membership size of the organization. Despite its persistence as an organization, it is hardly controversial to say that the group's most recognizable characteristic is its connection to the anti-Communist movement of the 1960s, which flourished around the time the group was founded by Robert Welch.

On December 1, 1899, Robert Welch was born on a farm in Chowan County, North Carolina. After graduating from the University of North Carolina, Welch attended the U.S. Naval Academy and Harvard Law School, but he graduated from neither. While it is clear that Welch's foray into the legal field did not end with a degree, it is less certain whether Welch's departure from Harvard Law School without graduating was a choice of his own or the result of poor performance. According to the current John Birch Society website, Welch left HLS because "he had had enough of the school and Marxist Professor (and later Supreme Court Justice) Felix Frankfurter."[6] Indeed, Welch later told his biographer that when he took Frankfurter's labor law class he found the professor was overly sympathetic toward labor and progressive tendencies.[7]

However, there are reasons to doubt that Welch left HLS on his own volition. First, the only evidence that Welch left Harvard because of his frustration with Frankfurter's ideology comes from the John Birch Society's own website and the sole biographer to whom Welch gave his blessing to write about him. These sources can hardly be characterized as objective and are in fact likely to depict Welch in a favorable light. Second, although Frankfurter was a professor at HLS during the years Welch attended, the Official Register of Harvard University indicates that Frankfurter did not teach a labor law class at that time.[8] The classes taught by Professor Frankfurter in the two years of Welch's attendance (1920–1921 and 1921–1922) were Public Utilities, Contracts and Combinations in Restraint of Trade, Municipal Corporations, and Administrative Law. Harvard did offer a Labor Law class during this time, but both years it was taught by Professor Francis Sayre. Harvard's records do show that Welch was enrolled as a first-year student in the 1920–1921 term[9] and classified as a second-year student during the 1921–1922 term,[10] but he was not listed in the 1922—1923 edition,[11] which would have been his final year. What is perhaps a simpler explanation than Welch leaving just a year before obtaining his degree is that he flunked out, which was not uncommon at the time.[12]

After his departure from Harvard Law School, Welch made his career working for his brother's candy company in Belmont,



Robert Welch founded the John Birch Society in 1958, four years after the Supreme Court decided in *Brown v. Board of Education* that segregated schools were unconstitutional. He headed the society until he suffered a stroke in 1983.

Massachusetts. In 1956, he retired from the business in order to devote his full attention to the cause of fighting Communism in the United States. Shortly thereafter, in December of 1958, Welch founded the John Birch Society.[13] From the time of the organization's founding until the Impeach Earl Warren movement became obsolete thanks to Chief Justice Warren's retirement, he was the sole head of the John Birch Society. Welch disseminated information to John Birch Society members through written *Bulletins*, which often announced Welch's position on various issues and contained instructions for how members should react to certain developments. Additionally, Welch published his own magazine, *American Opinion*, which further amplified his views, giving him a large platform. In short, the John Birch Society was Welch's organization, and it is impossible to completely separate the two.

II

A. Origin of the Impeach Earl Warren Movement

The John Birch Society was not the first group to call for the impeachment of Chief Justice Warren—for example, the Georgia House passed a resolution calling for the impeachment of Warren and five other justices for betraying the Constitution[14]—but the John Birch Society's campaign was the most prominent. Welch officially launched the John Birch Society's campaign to impeach Warren via an article in the January 1961 *Bulletin* to members.[15] However, Welch's distrust of and animus toward Warren pre-dated even the foundation of the John Birch Society. In the July–August 1958 edition of *American Opinion*, he had argued that Warren was among several high-profile government

officials (including President Dwight D. Eisenhower and Allen and John Foster Dulles) who were either "dedicated, conscious agent[s] of the Communist conspiracy," or, at best, Communist "tools" or "dupes."[16] Furthermore, less than a month after the official founding of the John Birch Society—but still two years prior to the official launch of the Impeach Earl Warren movement—Welch wrote to T. Coleman Andrews, a segregationist Virginia legislator and John Birch Society member.[17] Welch implored him to become the chairman of a project he was undertaking called the "Movement to Impeach Earl Warren."[18] Clearly, impeaching Warren was a high priority for Welch from the beginning.

Given the group's core mission to fight Communism, what motivated the John Birch Society to embark on a large-scale, nationwide campaign to impeach Chief Justice Warren? Although subsequent cases fueled the group's motivation to impeach the Chief Justice, the movement began as a response to the landmark school desegregation decision in *Brown v. Board of Education*,[19] which the Supreme Court had decided in 1954, four years before the founding of the John Birch Society. Warren had written the opinion in the unanimous decision.

In one of the earliest editions of Welch's magazine, he issued an impassioned plea to White Southerners displeased with desegregation.[20] In his 1956 article, titled "A Letter to the South on Segregation," he argued that the blame for political strife and social unrest in the wake of desegregation should be laid not upon African Americans but upon the true enemy: Communists. Welch rejects the idea that "the trouble in the South—even the Supreme Court decision which blew open the door for this trouble—has not been Communist inspired and contrived" and says that any such thoughts are a "manifestation . . . of gullibility and lack of perception of the true picture."[21] He proceeds to encourage the South's lawful resistance to

THE JOHN BIRCH SOCIETY

Belmont 78, Massachusetts

September 1, 1960
Bulletin For September
Copyright 1960 by The John Birch Society, Incorporated

Foreword

I live for those who love me,
For those who know me true ...
G. L. Banks

For the past five weeks -- it seems like five months -- The John Birch Society has lived through one massive smear campaign on a national scale, and several regional attacks with varying degrees of plausibility, reach, and impact.

It is not our intention to let such attacks become an obsession with us, or to belabor them repeatedly or unduly in these bulletins. While we undoubtedly shall have to return to discussions of other attacks in the future, we shall dismiss the recent campaigns, for the present, with the minimum of comment that seems necessary.

The woods are full, however, of individuals and organizations willing to "fight Communism," so long as they can do so by going through motions which are entirely comfortable and respectable. And they have about as much chance of stopping the Communists as a schoolboy traffic cop has of stopping the get-away car of successful bank robbers, by holding up his hand at a street crossing. The John Birch Society undoubtedly has a few of them here and there in its own membership, though obviously not many.

The John Birch Society communicated its anti-Communist policies to members through a monthly *Bulletin*, such as this one from 1960. Its membership likely peaked at 30,000 in 1965.

desegregation in a manner that is reminiscent of the Southern Manifesto, but he urges the South not to resort to civil war because such internal turmoil would allow foreign Communists to come to the United States and seize power. Welch concludes this section of the article with an ominous message: desegregation is a "hurricane that is replacing the beneficent winds and growing in intensity. And the place to . . . look is at the lightning strike that ushered in the storm. This was the U.S. Supreme Court decision of May 17, 1954."[22] Welch's criticism of the Supreme Court was thus laid out: "civil rights" is the Communists' way to sow disorder, and the Supreme Court is helping their cause.

Welch continued to identify *Brown* as the motivation behind the impeachment campaign. In a 1961 *Bulletin*, Welch argued that "[t]he most important *specific* result of Warrenism in our federal judiciary has been the storm over integration."[23] Echoing his "Letter to the South on Segregation," Welch goes on to say that "the whole trouble has

been brought on by the Communists" to complete their "objectives," which include "riots and civil disorder, promotion of interracial distrust and bitterness, a reopening of old animosities between North and South, [and] the creation of 'civil rights' programs and organizations which can attract gullible do-gooders and then serve many other Communist purposes."[24] An additional Communist objective, according to Welch, was the "gradual breakdown of 'all remaining vestiges of States Rights,'" and he argued that Chief Justice Warren was a "deadly opponent of those rights."[25] Furthermore, Welch displayed intense opposition to integration, stating that the John Birch Society is "bitterly opposed to forced integration, in schools or anywhere else."[26] Welch believed that integration was doing "inestimable damage to both black and white races" and was "Communist inspired, encouraged, and implemented."[27]

Another driver of the Impeach Earl Warren movement was T. Coleman Andrews, whom Welch recruited as the project's chair. Welch wrote to Andrews less than a month after the founding of the John Birch Society in 1958 and invited him to be the head of a project the group was launching. An accountant by training, Andrews was the former Commissioner of Internal Revenue.[28] What makes Welch's selection of Andrews revealing, however, is his third-party presidential campaign in 1956.[29] Running as a member of the States' Rights Party, Andrews campaigned on two major issues: opposition to the federal income tax and to *Brown v. Board of Education*. The States' Rights Party was explicitly pro-segregation, and, as its candidate, Andrews attacked the Supreme Court, telling *Life Magazine* the Court had "discarded its lawbooks for Communist novels."[30] Although the States Rights Party only won a majority of voters in one county,[31] its anti-tax, anti-*Brown* message attracted support from White segregationists in the Deep South "who considered themselves 'the forgotten white majority . . . fighting for the life and liberty' against 'the Socialistic trend.'"[32] Ultimately, Andrews declined Welch's request to lead the Impeach Earl Warren movement, although he did join the John Birch Society.[33] However, the fact that Welch sought Andrews to be the leader of this movement reinforces the notion that opposition to *Brown* was the driving force behind it.

B. John Birch Society Attacks on the Civil Rights Movement

The John Birch Society's sustained opposition to the Civil Rights Movement further connects the Impeach Earl Warren movement to *Brown*. Not only did the John Birch Society condemn "forced integration" but it leveled a sustained attack on the Civil Rights Movement in general. Welch argued that "'Civil Rights' is a perfect example of Communist strategy and Communist tactics at work."[34] The John Birch Society advertised a collection of literature called the "Civil Rights Packet," which included more of Welch's work making similar arguments.[35] In a 1965 John Birch Society *Bulletin*, Welch referred to the "Negro Revolutionary Movement, now headed by Martin Luther King and all of the Communists with whom he has surrounded himself" and called it "the most important single part of the Communist program and strategy for taking over our country."[36] *American Opinion* often attacked King by calling him a Communist and even circulated photos of King attending an alleged "Communist training school."[37]

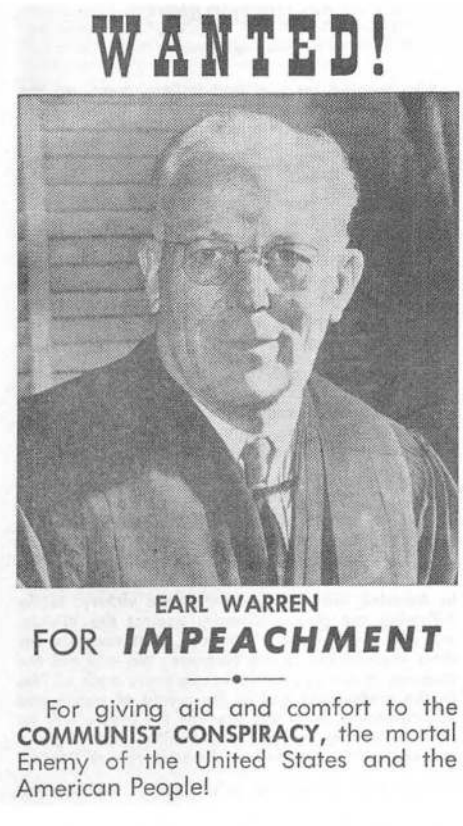
In addition to King, the Civil Rights Act of 1964 was also a frequent target. For example, in a June 1964 *Bulletin*, Welch encouraged members to form local committees specifically for the purpose of opposing the Civil Rights Act.[38] The John Birch Society even went so far as to produce a film in 1966 called *Anarchy, USA*. The film showed graphic videos and photographs of squalid conditions and oppressive government action

in Communist strongholds like China and Cuba. These images were cross cut with videos of civil rights demonstrations in the United States. It concludes with the message that "the civil rights movement, as we know it today, is simply part of a worldwide movement, organized and directed by Communists, to enslave all mankind."[39]

C. Other Cases Provided Fuel for the Movement

To be sure, the Impeach Earl Warren movement was not singularly focused on the Supreme Court's decision in *Brown*. There were a number of other cases decided by the Warren Court that generated outrage from the John Birch Society. In particular, the John Birch Society pointed to two other areas of jurisprudence—in addition to *Brown*—at various points in the campaign to impeach Chief Justice Warren. The first area was the so-called Red Monday decisions protecting the rights of alleged Communists,[40] and the second area was the school prayer decision announced in *Engel v. Vitale*.[41] However, Robert Welch's criticism of the Supreme Court began prior to any of these decisions by the Supreme Court.[42] Furthermore, these cases did not supplant *Brown* as the focus of the group's criticism. Rather, they were incorporated into the John Birch Society's already-existing thesis regarding the Supreme Court. To the John Birch Society, these cases merely confirmed the pro-Communist bent that the Supreme Court revealed with its decision in *Brown*.

In his privately published book called *The Politician*, Welch characterized the decisions handed down on Red Monday as possibly "the greatest victory the Communist Party ever had," although in the same paragraph he notes that other Supreme Court decisions were "equally disastrous" or "equally bad."[43] While *Brown* was almost certainly one of the cases being referred to here as being just as bad, it is clear that



The John Birch Society's radical campaign to Impeach Earl Warren prevented it from being widely accepted by the mainstream conservative movement.

Welch saw the Red Monday cases as further evidence of the need to impeach Earl Warren. Multiple contemporary news outlets seemed to identify the Red Monday cases as on at least equal footing in terms of the motivation behind the John Birch Society's Impeach Earl Warren movement. For example, the *Christian Science Monitor* said that the Impeach Earl Warren movement "springs from anger with the desegregation decision and rulings which have protected individual rights under the first amendment."[44] James Clayton, a Supreme Court correspondent for the *Washington Post*, argued that the Impeach Earl Warren movement focused on three cases[45]: *Greene v. McElroy*,[46] *Pennsylvania v. Nelson*,[47] and *Watkins v. United States*.[48] In addition, George Todt of the *Los Angeles Herald-Express* identified

one of the Red Monday cases—*Sweezy v. New Hampshire*[49]—as one of the motivating factors behind the Impeach Earl Warren movement.[50] While these contemporary news accounts were correct that the Red Monday cases drew criticism from the John Birch Society, it was a mistake to characterize them as equally important as *Brown* in the Impeach Earl Warren movement. The Red Monday decisions were announced in 1957, by which time Welch already had his sights on removing Chief Justice Warren. The Red Monday decisions added fuel to the impeachment fire, but that fire was already lit by *Brown*.

Another significant target of the John Birch Society's criticism was *Engel v. Vitale*, in which the Court held that the state cannot hold prayers in public schools, even if participation is not required and the prayer is not tied to a particular religion. When *Engel* was handed down in June 1962, the John Birch Society *Bulletin* lambasted the decision as a violation of both the First and Tenth Amendments and argued that the decision was an "insidious seizure of authority" displaying "incredible arrogance" by the Supreme Court.[51] In another *Bulletin* written by Welch one year later, he argued that *Engel* was evidence "that the Warren-led Court intends, step by step, to declare the whole Constitution of the United States unconstitutional."[52] This *Bulletin* goes on to demonstrate how *Engel v. Vitale* was folded into their pre-existing thesis regarding the Court stemming from *Brown*. Welch argues that "[t]wo of the most important of all the aims of the Communists are: (1) To promote strife and bitterness, and civil war wherever possible, over racial and religious difference; and (2) to destroy all religion." He says that "[f]or several years it has been evident . . . that the U.S. Supreme Court under Chief Justice Warren is determined to do all it can, as rapidly as it dares, to help the Communists to carry out these aims in our country." This *Bulletin* suggests that the Supreme Court had been helping the Communists for "several" years, so although Welch's argument seems to put racial and religious strife on the same level, the timeframe of the John Birch Society's sustained opposition to Chief Justice Warren predates *Engel*, issued the year before.

Not all contemporary newspapers offered the same explanation for why *Brown* was the origin of the Impeach Earl Warren movement. An April 1961 *Chicago Sun Times* article described the John Birch Society as a group that "hold[s] the view that Chief Justice Earl Warren of the U.S. Supreme Court should be impeached because of the Court's school segregation decision, which Welch believes was brought about by Communists to foment civil war."[53] Interestingly, *Los Angeles Herald-Express* columnist George Todt wrote multiple articles defending Welch and the John Birch Society, while confirming that *Brown* was the basis for the Impeach Earl Warren movement. However, Todt argued that Welch's opposition to *Brown* was more complicated than a fear of desegregation. He said it was based on the use of "a set of psychological and sociological theories advanced by a Swedish Socialist named Gunnar Myrdal and a group of American Communist fronters with whom Myrdal had been associated."[54] Todt's anti-Communist explanation for Welch's aversion to *Brown* was not unfounded. In his "Letter to the South on Segregation," Welch did criticize the "communist sympathies and connections of the 'authorities' on modern psychology to which the Court referred in its decision, and on which its action was theoretically based." However, references to the social science cited by the Court in *Brown* are few and far between in both Welch's writings and the John Birch Society's messaging, whereas desegregation is a consistent topic of criticism. While such social science may have contributed to Welch's opposition to the

Brown decision, it was a much less frequent target of criticism than forced integration in the wake of *Brown*.

III

That the Impeach Earl Warren movement began as and was driven by an opposition to desegregation in the wake of *Brown* makes it all the more surprising that the movement failed to gain traction among the mainstream conservative movement. Although there are a few instances of members of Congress defending the John Birch Society,[55] there is virtually no evidence that members of Congress seriously supported the Impeach Earl Warren movement. Articles of impeachment were never brought, nor is there any indication in the *Congressional Record* that impeaching Chief Justice Warren was a serious option on the table. Even Senator Strom Thurmond, a segregationist and fellow *Brown* critic, consciously disavowed impeaching Warren when criticizing the Supreme Court, cabining his criticism of the Court's decision in *Engel v. Vitale* by saying, "Remember, this is not a call to impeach Earl Warren."[56] Why did the John Birch Society's Impeach Earl Warren movement fail to capitalize on conservatives' shared opposition to *Brown*? An undeniable culprit is the group's leader, Robert Welch. Welch adopted a strategy that resembled a "fight fire with fire" approach that proved to be too aggressive and too extreme and ultimately compelled leaders of the conservative movement to distance themselves from him. In fact, Welch's bombastic style actually opened him and the John Birch Society up to attacks from other conservatives and anti-Communists.

A. Welch's Perception as Extreme Hindered His Acceptance

The perception of Robert Welch by many contemporary observers was that he was extreme. From calling President Eisenhower a conscious, dedicated agent of the Communists,[57] to alleging that more than half of the American government was controlled by Communists,[58] it is not hard to understand why he received this label. These bombastic claims about the extent of the Communist conspiracy within the upper levels of the U.S. government were too aggressive for most conservatives. William F. Buckley, among the most influential conservatives of the time and himself a fierce critic of *Brown*,[59] essentially excommunicated Welch from the mainstream conservative movement.[60] In a lengthy 1962 editorial, Buckley chastised Welch as persisting "in distorting reality and in refusing to make the crucial moral and political distinction . . . between (1) an active pro-communist, and (2) an ineffectually anti-Communist liberal."[61] Buckley further criticized Welch's absolutist worldview by saying he "anathematizes all who disagree with him" and "brooks no disagreement on his central thesis" that Communists have infiltrated America.[62] Buckley concluded that the Impeach Earl Warren movement is an "ill-conceived campaign" and that in continuing the movement, "Mr. Welch, for all his good intentions, threatens to divert militant conservative action to irrelevance and ineffectuality."[63] Russell Kirk, the author of **The Conservative Mind**[64] and another influential conservative thinker, characterized Welch as having "an excess of zeal, intemperance, and imprudence."[65] Kirk wrote to Welch, "Cry wolf often enough and everyone takes you for an imbecile or a knave."[66] Conservatives like Buckley, who was critical of both *Brown* and the Warren Court in general, saw Welch as toxic and thought it harmful to embrace a project with his fingerprints all over it, such as the Impeach Earl Warren movement.

Many prominent conservatives initially tried to embrace the members of the John Birch Society while simultaneously distancing themselves from Robert Welch. One of

This billboard urging the impeachment of the chief justice was erected on the side of a highway in Florida in the late 1950s. Southerners opposed to desegregation supported the impeachment movement, but so did many members of the John Birch Society in California, Arizona and many northern states.

the foremost figures of the contemporary conservative movement was Senator Barry Goldwater (R-AZ), who was hesitant to criticize the John Birch Society.[67] Goldwater called its members some of the "finest people" in his community and "the type of people we need in politics."[68] However, while Goldwater's comments likely represent an attempt to avoid alienating John Birch Society members, in a later interview he distanced himself from Welch, saying he did not "recall speaking to Bob Welch other than 'hello' and 'goodbye' over the last nine years or so."[69] Senator James Eastland (D-MS), another vocal critic of *Brown*, displayed a similar reluctance to publicly criticize the John Birch Society. An internal memorandum within his office revealed a concern for going after the John Birch Society because of a fear of alienating some of the Society's supporters.[70] However, in response to an inquiry about the Impeach Earl Warren movement, Sen. Eastland emphasized that it was the House's power, not the Senate's, to impeach a federal judge, thus distancing himself from the movement without either endorsing or rejecting it.[71] William F. Buckley, who at first tried to distinguish his feelings toward Welch from his feelings toward the individual members of the John Birch Society, eventually came to realize that the Society's members shared the same views as Welch.[72] For him and other prominent conservative leaders, association with Welch, and eventually the John Birch Society as a whole, became an object sought to be avoided.

B. The John Birch Society's Tactics Alienated Conservatives

The most significant tactical impediment to widespread acceptance of the Impeach

Earl Warren movement was that critics of the Warren Court could not coalesce on a strategy. Welch eschewed more measured, concrete proposals to curb the Supreme Court's power. Whereas many conservatives in Congress introduced legislation to remedy the perceived wrongs of the Warren Court, such as the Jenner-Butler Bill[73] and term limits,[74] Welch favored the unprecedented objective of impeaching a justice because of a judicial decision.[75] When asked why he preferred a strategy of impeachment instead of remedial legislation, Welch responded that "not enough people will understand, or will get excited about, amendments to limit the appellate jurisdiction of the Supreme Court . . . [w]hile anybody and everybody can understand, and quickly acquire very strong feelings about, the impeachment of Earl Warren."[76] Welch's answer reveals a coherent strategy behind pursuing impeachment instead of remedial legislation, but it is nevertheless indicative of disagreement among critics of the Warren Court.

Furthermore, Welch often directed members of the John Birch Society to undertake intense letter writing campaigns, which, in some cases, led the recipients to criticize the group. For example, in a personal letter to Buckley, conservative commentator James Kilpatrick described such an episode: "As you know, these idiots set off on a harebrained campaign to impeach Earl Warren. The word got back to Welch that I thought the idea preposterous, whereupon he commanded all his faithful members to write Mr. Kilpatrick a letter. By God, they all did."[77] Kilpatrick then described his exasperation and disbelief of the volume of letters and intensity of the pressure applied by the John Birch Society.[78] This episode is illustrative because it shows not only how another conservative commentator viewed the Impeach Earl Warren movement, but also because it shows how Welch's aggressive tactics may have actually driven a wedge between the John Birch Society and other conservatives. Like Buckley, Kilpatrick was a fervent critic of the Supreme Court's decision in *Brown*, even going so far as to characterize the decision as a "naked and arrogant declaration of nine men" that constituted an assault on the Constitution.[79] Yet, despite this shared animosity toward Warren's decision in *Brown*, there remained a divide between Welch and other conservatives, such as Kilpatrick and Buckley.

C. Welch's Tactics May Have Backfired

In the end, Welch and his aggressive tactics left the Impeach Earl Warren movement vulnerable to attack and probably proved to be politically counterproductive. Morrie Ryskind, a *Los Angeles Times* columnist and former John Birch Society member, succinctly described Welch's error as a "violation of a tenet of the Birch faith, which holds that 'only a damned fool provides ammunition to the enemy.'"[80] The "ammunition" referred to here are Welch's outlandish claims and the John Birch Society's aggressive tactics. As early as March 1961, an FBI memorandum revealed that the bureau considered the John Birch Society "a lunatic-fringe type organization that is doing more harm than good" to the anti-Communist cause.[81] In a 1967 column, Buckley argued that if one were to analyze the Impeach Earl Warren movement using "Birchite logic, one would conclude that the movement to impeach Earl Warren, which after nine years' effort was unable to enlist the support of a single Congressman, was a communist plot to discredit the opposition to Mr. Warren."[82] Buckley concluded that the Impeach Earl Warren movement "contributed not to the weakening of the influence of Earl Warren but to the consolidation of his power and prestige."[83] Even Warren himself said that "[i]t was kind of an honor to be accused by the John Birch Society."[84] The fact that many observers, including Chief Justice Warren himself, saw the Impeach Earl Warren

After Warren retired in 1969 the John Birch Society turned its focus to international affairs, such as protesting U.S. membership in the United Nations.

movement as potentially strengthening the Supreme Court's legitimacy suggests that Robert Welch's movement backfired. While the ultimate goals of the movement were more complicated than merely removing him from the Court, and while the success of those goals is difficult to quantify, it is quite possible, if not likely, that the John Birch Society's campaign to turn public opinion against Warren and the Supreme Court after *Brown* did exactly the opposite.

IV

On June 21, 1968, Chief Justice Warren quietly submitted his resignation to President Lyndon B. Johnson, stating his plan to retire at the end of the current term.[85] He hoped to travel the world with his wife, and he wanted to leave the bench before he suffered a mental decline. After announcing his retirement, the Chief Justice was widely praised, and his tenure was celebrated by a number of news outlets.[86] If the goal of the Impeach Earl Warren movement had been to remove him from office, then the Chief Justice's retirement marked the movement as an objective and unequivocal failure. Many members of Congress mocked such a goal, calling it a "silly slogan"[87] or a "[n]onsensical [i]tch."[88] Given that in the entire history of the United States only fourteen federal judges have been impeached, only seven of whom were actually convicted, and in none of those cases did judicial decisions provide the basis for impeachment,[89] it would not be inaccurate to characterize a movement with the goal of impeaching the Chief Justice as outlandish.

Despite the movement's obvious failure to generate articles of impeachment and regardless of whether it actually bolstered the influence and perception of Chief Justice Warren, this article argues that it is far too simplistic to point to the Chief Justice's voluntary resignation as the decisive metric for the movement's success. In fact, Robert

Welch's papers reveal that the John Birch Society's strategy and goals behind the Impeach Earl Warren movement were more subtle and nuanced than impeach-or-bust. Welch identified at least three subsidiary goals of the Impeach Earl Warren movement, none of which involved actually removing the Chief Justice. Thus, viewing the Impeach Earl Warren movement as an impeach-or-bust mission—and thereby overlooking the subordinate goals of the movement—may have prevented observers and historians from accurately evaluating the success of the movement.

A. Welch Did Not View the Movement as Impeach-or-Bust

On a number of occasions, Robert Welch indicated that he had a more realistic appraisal of his chances of removing Earl Warren than some of the John Birch Society's critics alleged. From the very beginning, even before the public launch of the campaign, Welch understood that removing Warren from his seat was not likely to be achieved. In his letter requesting that T. Coleman Andrews lead the Impeach Earl Warren movement, Welch told Andrews that "I am not deceiving myself that we have very much a chance of really bringing about the impeachment of Earl Warren."[90] In a 1964 *Bulletin* to members of the John Birch Society, Welch acknowledged that actually impeaching Chief Justice Warren was impractical unless "enough of our members can be expected to give the time and labor required."[91] These two admissions by Welch—the first in a private letter and the second in public—show that Welch knew that impeachment was not likely and if it were to be accomplished, it would require a great deal of resources and effort from John Birch Society members.

Furthermore, Welch seemed to use the word "impeachment" in its literal sense, thus lowering the bar for success. In another John Birch Society *Bulletin*, Welch pointed out that the House of Representatives can impeach on any grounds, but "[c]onviction and removal from office, in the trial by Senate, is an entirely different matter in which, quite properly, we have taken no position."[92] This revelation is interesting for a number of reasons. First, it seems strange to assert that the leader of the group responsible for hundreds of billboards declaring "Save Our Republic! Impeach Earl Warren," who was the same leader who repeatedly characterized Warren as a tool for advancing the Communists' cause in the United States, had not taken a position on actually removing the Chief Justice if the Senate had such an opportunity. Second—and perhaps explaining the oddity of the first point—by framing the goal of the Impeach Earl Warren movement as merely impeachment by the House and not necessarily requiring removal by the Senate, Welch gave the group more avenues with which he could declare the movement a success. By framing it this way, Welch allowed the group to declare victory if the House impeaches and the Senate acquits. Such a framework implicitly acknowledged the difficulty of the task sought to be accomplished by Welch and the John Birch Society. Regardless of his purpose in doing so, Welch's conscious effort not to conflate impeachment with removal demonstrates that the Impeach Earl Warren movement had goals besides the removal of the Chief Justice.

Given Welch's bombastic style, it is highly unlikely that he would have admitted that the Impeach Earl Warren movement failed in achieving its central purpose. Indeed, there is no evidence that he ever publicly conceded. As late as November of 1967, less than a year before Chief Justice Warren's retirement, Welch maintained in a *Bulletin* that the campaign to impeach Warren had not been abandoned and that the John Birch Society had merely "been letting the Warren impeachment drive simmer on a back burner because we could not do everything at

once."[93] Even after six years of pushing for impeachment without gaining concrete traction among members of Congress, Welch refused to abandon the project. If the Impeach Earl Warren movement was an impeach-or-bust enterprise, then this 1967 *Bulletin* would likely come as close to an admission of defeat as Welch would ever issue. However, Welch's goals for the Impeach Earl Warren movement did not wholly depend upon the Chief Justice's removal. Therefore, Welch never had to publicly admit defeat.

B. Subordinate Goals

In the course of his personal writings and his bulletins to members of the John Birch Society, Robert Welch identified at least three goals of the Impeach Earl Warren movement that did not depend upon Warren's removal. An accurate accounting of the historical significance of the Impeach Earl Warren movement requires examining each of these goals and evaluating their success. These goals can be characterized as (1) educating the public about the damage Warren has caused, (2) projecting a message of strength to Communists who may seek to take over the United States, and (3) applying enough political pressure to influence the Supreme Court's future decisions. Although there is no definitive metric for evaluating each of these goals, doing so clearly requires a more thorough examination than merely pointing to Warren's voluntary resignation.

(1) Education

From the outset of the movement, Welch downplayed the significance of actually removing Chief Justice Warren and instead highlighted the importance of drawing attention to Warren himself. In his invitation to T. Coleman Andrews to lead the movement, Welch said that he did not think removing Warren was "really as important as dramatizing to the whole country where he stands, where the Supreme Court as now constituted under him stands, and how important it is to face the facts about the road we are now traveling so fast."[94] This letter shows that before the public launch of the Impeach Earl Warren campaign, Welch was emphasizing to others in private that the real purpose of the Impeach Earl Warren movement was to help Americans see how Warren was hurting the country. In addition to regular John Birch Society *Bulletins* and other similar publications, Welch employed more creative strategies to raise awareness of his criticism of Chief Justice Warren. For example, in 1961, the John Birch Society launched an essay contest open to all college students, the topic of which was grounds for the impeachment of Chief Justice Warren.[95] The group offered a total of $2,300 in prize money, and Welch indicated that he "hope[d] to stir up a great deal of interest among conservatives on the campuses on the dangers that face this country."[96] Welch persisted in his effort to raise awareness of the perceived dangers posed by Warren years later. In a 1964 John Birch Society *Bulletin*, he linked the group's opposition to the Civil Rights Act to the Impeach Earl Warren movement by arguing that "bringing more Americans to understand the real meaning of the proposed Civil Rights Act will also increase their knowledge of where Warren fits into the picture."[97] Raising awareness of certain issues was a central tenet of the John Birch Society's mission. Welch saw the Impeach Earl Warren movement as a vehicle for doing so. Even if Chief Justice Warren was never impeached, Welch hoped to at least increase awareness among the population of the John Birch Society's criticisms of the Warren Court.

That the Impeach Earl Warren movement became a controversial topic at all is evidence of its success in raising awareness. Even if the publicity received by the movement was negative, it nonetheless amplified the group's message. From billboards and bumper stickers displaying the group's

slogan, to Welch's lengthier messages in publications like *American Opinion* and John Birch Society *Bulletins*, the group demonstrated an ability to call attention to its movement. However, a less apparent indicator of the Impeach Earl Warren movement's ability to raise awareness of the Supreme Court as a political issue lies in the geographic footprint of the John Birch Society. As politicians in the South launched a fierce opposition to the Supreme Court's ruling in *Brown*, perhaps best exemplified by the Southern Manifesto, it is no surprise that the John Birch Society's message gained traction in Southern states. What is more interesting, however, are the numerous instances in which the Impeach Earl Warren movement manifested in places outside the South. For example, on multiple occasions Congressmen from states outside the South, such as Michigan[98] and West Virginia,[99] took to the House floor to voice their surprise at a "flood" of constituent mail calling for the impeachment of Chief Justice Warren.

Even more striking is the John Birch Society's strength in Western states, like California, Arizona, and Texas.[100] Historians have estimated that there were approximately 300 John Birch Society chapters in California,[101] with at least thirty-eight in Orange County alone.[102] Even Senator Barry Goldwater remarked at how pervasive the John Birch Society was in his home state of Arizona, saying "[e]very other person in Phoenix is a member of the John Birch Society."[103] Given that one of the group's primary issues was Impeach Earl Warren, which itself started as a response to *Brown*, it appears that the John Birch Society was successful in getting people other than White Southerners to care about the Court's desegregation decision. Furthermore, the number of John Birch Society chapters in the West demonstrates that the group was able to stimulate and mobilize a significant conservative populace in these states. Regardless of whether Warren was impeached, the strong presence of the John Birch Society in states like California suggests that there was an appetite for the message regarding the Supreme Court that Robert Welch was sending.

(2) Projecting an Anti-Communist Message

A second objective of the Impeach Earl Warren movement outside of removing the Chief Justice from the bench was to project to the Communists that Americans would fight back and eventually defeat them. According to Welch, the pro-Communist decisions issued by the Warren Court "encouraged the Communists" and "convinced them there is no longer any practicable limit to the permissible length and speed of their strides to the left."[104] He went on to argue that "by the same token, the successful impeachment of Earl Warren, and his removal from the Supreme Court, would be one of the most effective warnings the American people could possibly issue."[105] In addition to being consistent with Welch's effort to distinguish between impeachment and removal, this message demonstrates that the Impeach Earl Warren movement was about more than removing the Chief Justice. Here, Welch viewed the Impeach Earl Warren movement as a vehicle for projecting America's devotion to anti-Communism. While the effectiveness of this message would certainly be amplified by both the impeachment and removal of Warren, presumably a similar, albeit less resounding, message could be projected by impeachment without removal.

Of the three subsidiary goals of the Impeach Earl Warren movement identified by Welch, this one is the hardest to evaluate concretely, in part because it is probably the most esoteric of the three. However, visibility is one key metric by which to measure the Impeach Earl Warren movement's success in projecting an anti-Communist message. The group's use of billboards, road signs, and bumper stickers suggests a conscious effort to be conspicuous. The placement of some

of the billboards in highly visible places, including the Indianapolis 500[106] and Selma near the time of the historic civil rights march,[107] demonstrates that the John Birch Society was strategic about placing their billboards in locations that would garner lots of attention. The group even displayed their message from banners hanging off of chartered airplanes.[108] Welch's goal of using the Impeach Earl Warren movement as a vehicle to project a message of anti-Communism was borne out of his extreme concern (or, as some would call it, paranoia[109]) surrounding the alleged infiltration of the United States by Communists. Nonetheless, the highly visible nature of the Impeach Earl Warren campaign may be one metric supporting the success of this subsidiary goal.

(3) Influencing the Supreme Court

Yet another goal of the Impeach Earl Warren movement for which success did not depend wholly upon the removal of the Chief Justice was the attempt to influence the decision-making of members of the government, especially the justices of the Supreme Court. Welch noted to his followers that "[e]ven before obtaining impeachment, the Movement can produce many results beneficial to the Americanist cause."[110] He argued that "the Supreme Court reads the election returns the same as anybody else" and "listens to the winds of opinion howling around it."[111] Welch concluded that "[i]f those winds become strong enough and loud enough, we believe we shall see increasingly less deviation by the Supreme Court from its Constitutional duties, without waiting for any impeachment drive to come to a head."[112] Welch's argument here convincingly demonstrates that he believed the Impeach Earl Warren movement could be successful without actually impeaching the Chief Justice. A 1965 John Birch Society *Bulletin* indicates that Welch pursued the strategy of using the upcoming mid-term election to influence the Supreme Court by reporting the Society's "announced intention of making the question of Warren's impeachment a very important criterion by which to judge congressional candidates in the summer of 1966."[113] For this electoral strategy to succeed, Welch needed neither the Senate to remove Warren nor even the House to impeach him. Welch merely thought that if enough vocal critics of Warren were elected, the Supreme Court would get the message and respond by altering their decisions. In this way, the Impeach Earl Warren movement's success did not rest upon the removal of Chief Justice Warren from office.

The most relevant source with which to evaluate this final subsidiary goal is the Supreme Court itself, particularly the reaction of Chief Justice Warren. Not surprisingly, the justices declined to offer any public rebukes or rebuttals of the John Birch Society's campaign to impeach the Chief Justice. However, the limited evidence of Warren's reaction to the movement suggests that he did not view it as a serious threat. In fact, Warren appeared to respond to the campaign to impeach him with humor. For example, in response to a conference memorandum from Justice William O. Douglas informing his colleagues that a John Birch Society film would be playing at a nearby high school the following night, the Chief Justice replied, "I can hardly wait to see the John Birch Society movie about our Court. I am sure they must know that."[114] Similarly, Warren remarked facetiously on a separate occasion that "[i]t was kind of an honor to be accused by the John Birch Society."[115] In his posthumously published memoir, Warren revealed his dismissive attitude toward the movement, characterizing it as "a public relations stunt . . . carried on . . . as a means of collecting funds for their organization."[116] While Warren's reaction cannot definitively disprove that the movement had any effect whatsoever on the Supreme Court, it suggests that the evidence weighs

heavily in favor of concluding that Welch's goal of influencing the Supreme Court was unsuccessful.

V

On June 21, 1968, Chief Justice Warren submitted his resignation to President Lyndon B. Johnson as he had decided it was time to retire.[117] With this voluntary resignation, the apparent purpose of the John Birch Society's impeachment campaign was thwarted. However, Robert Welch and his group were far from finished. In fact, Welch remained chair of the John Birch Society for fifteen more years until 1983, when Welch, age eighty-three, suffered a serious stroke from which he never recovered.[118] Yet during this time Welch never again pursued a similar impeachment campaign against any other member of the judiciary. A lack of funding cannot explain the absence of similar impeachment campaigns, as the John Birch Society received a substantial financial infusion from Texas oil magnate Nelson Bunker Hunt in the 1970s.[119] Nor can the abandonment of the impeachment strategy be blamed on a general lack of activity, as the John Birch Society remained vocal on a host of other issues after Warren's retirement. Two factors—a reduction in members' enthusiasm and a shift in attention toward other issues, such as the Vietnam War and the Soviet Union—partially explain why the John Birch Society may have been reluctant to pursue another impeachment campaign against a Supreme Court justice after Warren's departure. However, the fact that this strategy was never adopted again by Welch and his group illustrates the uniqueness of the Impeach Earl Warren movement.

One potential reason why Robert Welch did not attempt to replicate his impeachment strategy was an admitted decline in enthusiasm among John Birch Society members starting in the mid-1960s. According to historian Edward H. Miller, Welch privately admitted that Barry Goldwater's election loss resulted in a tremendous loss of momentum for the John Birch Society.[120] Miller further argued that in the aftermath of Goldwater's defeat, Welch began to moderate his positions, evolving from a more extreme and aggressive approach to one designed to give the group broader appeal. Specifically, Welch sought to make the John Birch Society "sound more sensible and reasonable" by appealing "largely to a commonsense argument that liberal programs failed."[121] The aggressive, sometimes outlandish Impeach Earl Warren campaign likely would not have fit into this moderation strategy, which may explain why sustained calls for impeachment were not wielded against subsequent justices. Indeed, Welch's pivot away from extreme tactics may have actually succeeded in making the John Birch Society palatable to a larger audience. While membership of the John Birch Society likely peaked at 30,000 in 1965, it experienced a significant decline for several years thereafter, dropping to half its peak membership.[122] However, by 1973, the Society had gained back several thousand members to rebound to about 24,000.[123] This rebound in membership coincides with Edward Miller's hypothesis of a moderate turn.

The second possible contributor to the abandonment of pursuing impeachment campaigns against other justices is Welch's focus shifting toward other issues not involving *Brown* or the Supreme Court. This may be in part that Warren's successor as chief justice, Warren Burger, and other new appointments by Richard Nixon moved in a more conservative direction. In any case, Welch concentrated on international affairs. He became increasingly vocal about the Vietnam War, staking out a hawkish position and questioning why the U.S. military could not secure a quick victory against the Communists.[124] Further, Welch began to adopt aggressive foreign policy views, even advocating for a nuclear first strike against the Soviet

Union and openly calling for war with China in 1973.[125] Clearly, Robert Welch and the John Birch Society were still engaging with and taking stances on topical issues of the time but were less focused on the Supreme Court.

The apparent lack of interest in impeachment campaigns against members of the Court is made all the more interesting by a prominent impeachment drive targeted at another liberal justice: William O. Douglas. On April 15, 1970, then-Congressman Gerald Ford (R-MI) made a lengthy speech outlining Justice Douglas' conduct, which, according to Ford, warranted his impeachment.[126] Representative Ford accused Douglas of ethical impropriety and judicial misconduct, including sitting for cases in which a conflict existed, improper practice of law as a judge, and improper income received for his publications in media outlets. Ford's allegations even echoed Welch's rhetoric. He suggested that Douglas' book, **Points of Rebellion,** demonstrated the Justice's sympathy for radical revolutionaries who hoped to overthrow the establishment.[127] Further, Ford criticized Douglas' ties to the Parvin Foundation, a "mysterious entity" that had connections to Communists in Latin America, including Fidel Castro.[128] Ford's rhetoric, though less explicit, seems entirely consistent with Welch's crusades against allegedly Communist sympathizing government officials. Despite this characteristic line of attack, however, Welch and the John Birch Society never seemed to adopt Congressman Ford's calls for the impeachment of Justice Douglas. One potential reason that Ford's impeachment push may not have attracted the enthusiasm of the John Birch Society is Welch's distaste for President Richard Nixon. In fact, Welch was fiercely critical of Nixon, arguing that "[e]very important thing Nixon has done leads toward totalitarian government" and that "Nixon's life ambition is to be the first ruler of the world."[129] This enmity toward Nixon would prevent the group from latching onto an effort spearheaded by one of Nixon's staunchest allies in Gerald Ford. Further, as Professor Joshua Kastenberg has argued, Ford's impeachment campaign against Justice Douglas may well have been an orchestrated ploy to detract attention away from Nixon's activity in Vietnam.[130] Regardless, for whatever reason, Ford's impeachment crusade against Justice Douglas failed to garner significant support from the John Birch Society. Given the similarities between Ford and Welch's arguments, this lack of support for Douglas' impeachment is surprising, and it shows how unique the Impeach Earl Warren movement was.

CONCLUSION

The Impeach Earl Warren movement was among the most visible sustained attacks on the Supreme Court in American history. The movement was primarily driven by the John Birch Society and its eclectic leader, Robert Welch. Given that Chief Justice Warren voluntarily resigned, it is hard to understand what concrete impacts, if any, the Impeach Earl Warren movement achieved. However, a closer look at the movement reveals that its motivations, goals, and success (or lack thereof) is more complicated than what a surface-level analysis may indicate. Despite being championed by a group dedicated to fighting Communism, the movement was actually a response to the Supreme Court's school desegregation decision in *Brown*. Further, the aggressive approach from the John Birch Society and Welch may have backfired and lent legitimacy to the Warren Court. Finally, the Impeach Earl Warren movement had nuanced political goals that did not depend on removing Chief Justice Warren from the Court. Considering these subordinate goals not only helps illuminate an interesting chapter in the history of the Supreme Court, but it also shows that the Impeach Earl Warren movement should not be disregarded as an

inconsequential and irrelevant episode in history.

ENDNOTES

[1] *The Indianapolis News*, May 10, 1965, 16.
[2] *Ibid.*
[3] *Id.*
[4] Cong. Rec. September 17, 1968 (statement of Rep. Bradford Morse (R-MA)) at 4246 (dismissing the "cranks" who supported Impeach Earl Warren).
[5] See https://jbs.org/about/.
[6] https://jbs.org/about/robert-welch/.
[7] G. Edward Griffin, **The Life and Words of Robert Welch,** 1975 at 67–68.
[8] See "The Law School 1921-1922," Official Register of Harvard University, Vol. XVIII, No. 12 (March 24, 1921) (available at: https://iiif.lib.harvard.edu/manifests/view/drs:42728441O$1i).
[9] "The Law School 1920-1921," Official Register of Harvard University, Vol. XVII, No. 10 (March 18, 1920), at 54 (https://iiif.lib.harvard.edu/manifests/view/drs:42728440S$1i).
[10] "The Law School 1921-1922," Official Register of Harvard University, Vol. XVIII, No. 12 (March 24, 1921), at 41 (https://iiif.lib.harvard.edu/manifests/view/drs:42728441O$43i).
[11] "The Law School 1922-1923," Official Register of Harvard University, Vol. XIX, No. 13 (March 27, 1922) (https://iiif.lib.harvard.edu/manifests/view/drs:42728441Z$67i).
[12] See generally Bruce A. Kimball and Daniel R. Coquillette, **The Intellectual Sword** (2020).
[13] "FBI File on Robert Welch and the John Birch Society" (62-HQ-104401-04) at 97. https://archive.org/details/FBI-John-Birch-Society/62-HQ-104401-04/page/n95/mode/2up?q=harvard.
[14] See "Impeachment Pushed," *New York Times*, February 19, 1957.
[15] See Gene Grove, **Inside the John Birch Society** (1961) 104.
[16] *American Opinion* (July–August 1958).
[17] See Nancy MacLean, **Democracy in Chains: The Deep History of the Radical Right's Stealth Plan for America** (2018) 54.
[18] A January 7, 1959, letter from Robert Welch to T. Coleman Andrews (in Ernie Lazar FOIA Collection, https://archive.org/details/DocumentaryHistoryOfJBS/page/n5/mode/2up?q=warren).
[19] 347 U.S. 483 (1954).
[20] *One Man's Opinion*, vol. 1, no. 4 (September 1956) ("To be accurate, the logotype above should read: A Letter To The White People Of The South."). The magazine was renamed *American Opinion* in 1958.
[21] *Ibid.*
[22] *Id.*
[23] Gene Grove, **Inside the John Birch Society** (1961) 105–106 (emphasis in original).
[24] *Ibid* 106.
[25] *Id.*
[26] *Id.*
[27] Kenton Kilmer, Cong. Research Serv., "The John Birch Society: History, Organization, Principles, and Activities" (December 15, 1961) xvi (quoting Robert Welch).
[28] Cong. Rec. March 22, 1961 (statement of Rep. Mendel Rivers (D-SC)) at 4606.
[29] Nancy MacLean, **Democracy in Chains: The Deep History of the Radical Right's Stealth Plan for America** (2018) 54.
[30] *Life Magazine*, vol. 41, no. 18 (October 29, 1956), 35.
[31] The sole county happened to be Virginia's Prince Edward County, "where Barbara Johns and her fellow student strikers had started the fight for equal education that led to *Brown*." MacLean, **Democracy in Chains,** 54.
[32] Nancy MacLean, **Democracy in Chains: The Deep History of the Radical Right's Stealth Plan for America** (2018) at 54.
[33] Andrews' son would later become a member of the Virginia House of Delegates and a political organizer who supported George Wallace's bid for president in 1968. "T.C. Andrews Jr., 64, Political Organizer" *New York Times* April 20, 1989 B13.
[34] "What's Wrong With Civil Rights?," *American Opinion* (October 1965). https://federalexpression.files.wordpress.com/2017/11/whats-wrong-with-civil-rights.pdf.
[35] *Ibid.*
[36] Kenton Kilmer, Cong. Research Serv., "The John Birch Society: History, Organization, Principles, and Activities" (December 15, 1961) at 42–43.
[37] Scott Stanley, "Revolution: The Assault on Selma," *American Opinion* (May 1965).
[38] John Birch Society *Bulletin* (June 1, 1964) at 8. https://archive.org/details/JBSHQEBF2541/page/n9/mode/2up?q=%22impeach=earl=warren%22.
[39] https://www.filmpreservation.org/sponsored-films/screening-room/anarchy-u-s-a-1966#.
[40] See *Service v. Dulles*, 354 U.S. 363 (1957) (overturning a State Department Foreign Service officer's dismissal for "disloyalty"); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (reversing the contempt convictions of a university professor investigated for Communist ties); *Watkins v. United States*, 354 U.S. 178 (1957) (holding that the House Un-American Activities Committee exceeded Congress's investigative authority when it punished a labor organizer for refusing to disclose his private affairs); *Yates v. United States*, 354 U.S. 298 (1957) (limiting the government's ability to prosecute suspected members of the Communist Party).
[41] 370 U.S. 421 (1962).

[42] See "Letter to the South on Segregation," *One Man's Opinion* vol. 1, no. 4 (September 1956).

[43] Cong. Rec. April 12, 1961 (statement of Sen. Milton Young (R-ND)) at 5611.

[44] Cong. Rec. April 12, 1961 (statement of Sen. Mike Mansfield (D-MT)) at 5612.

[45] Cong. Rec. March 20, 1961 (statement of Sen. Thomas Kuchel (R-CA)) at 4267 (introducing Clayton's *Washington Post* article).

[46] 360 U.S. 474 (1959) (holding that the revocation of an aeronautics engineer's security clearance based on confidential informants violated Due Process).

[47] 350 U.S. 497 (1956) (holding that the federal Smith Act preempted state investigations of persons charged with sedition against the federal government pursuant to Pennsylvania's sedition statute).

[48] 354 U.S. 178 (1957) (holding that the House Un-American Activities Committee exceeded Congress's investigative authority when it punished a labor organizer for refusing to disclose his private affairs).

[49] 354 U.S. 234 (1957) (reversing the contempt convictions of a university professor investigated for Communist ties).

[50] Cong. Rec. May 10, 1961 (statement of Rep. John Rousselot (R-CA)) at 7733.

[51] Kenton Kilmer, Cong. Research Serv., "The John Birch Society: History, Organization, Principles, and Activities" (Dec. 15, 1961) at 39.

[52] John Birch Society *Bulletin*, "To All Coordinators, Section Leaders and Chapter Leaders" (June 18, 1963) (in Ernie Lazar FOIA Collection, https://archive.org/details/DocumentaryHistoryOfJBS/page/n59/mode/2up?q=warren).

[53] "How to Fight Communism," *Chicago Sun Times*, April 9, 1961.

[54] George Todt, "A View of the News," *Los Angeles Herald-Express*, February 10, 1961.

[55] See, e.g., Cong. Rec. May 10, 1961 (statement of Rep. John Rousselot (R-CA)) at 7733; Cong. Rec. March 22, 1961 (statement of Rep. Mendel Rivers (D-SC)) at 4604 (calling the John Birch Society "a nationwide organization of patriotic Americans").

[56] Cong. Rec. July 2, 1963 (statement of Sen. Strom Thurmond (D-SC)) at A4184.

[57] Cong. Rec. April 12, 1961 (statement of Sen. Milton Young (R-ND)) at 5609 (reading excerpt of Welch's *The Politician* into the record).

[58] *American Opinion* (July–August 1958).

[59] In 1957, Buckley wrote an editorial for the *National Review* titled "Why the South Must Prevail," in which he argued that "the White community in the South is entitled to take such measures as are necessary to prevail" because "it is the advanced race" (available at: https://adamgomez.files.wordpress.com/2012/03/whythesouthmustprevail-1957.pdf).

[60] Cong. Rec. February 6, 1962 (statement of Sen. John Tower (R-TX)) at 1764–65 (introducing and endorsing Buckley's *National Review* article titled "The Question of Robert Welch").

[61] *Ibid.*

[62] *Id.*

[63] *Id.* at 1765.

[64] Russell Kirk, **The Conservative Mind** (1953).

[65] Cong. Rec. February 6, 1962 (statement of Sen. John Tower (R-TX)) at 1765.

[66] *Ibid.*

[67] Alvin Felzenberg, "The Inside Story of William F. Buckley Jr.'s Crusade against the John Birch Society," *National Review* (June 20, 2017).

[68] *Ibid.*

[69] "Goldwater Denies Knowing He Joined Birch Front Group," *New York Times*, October 10, 1964, 16.

[70] Memorandum from Ben Mandel to Courtney Pace, James O. Eastland Collection, Box 23, Folder 46.

[71] *Ibid.*

[72] Cong. Rec. March 2, 1966 (statement of Sen. Dale McGee (D-WY)) at 4660.

[73] Introduced by Senator William Jenner in 1957, this bill would have revoked the Supreme Court's jurisdiction over cases involving government investigation and prosecution of individuals' subversive political activities.

[74] Clifford Lyte, **The Warren Court and its Critics** (1968) 19.

[75] See Carl E. Stewart, "Contemporary Challenges to Judicial Independence," 43 *Loy. L. Rev.* 293 (1997) 304.

[76] John Birch Society *Bulletin* (June 1965). See also Cong. Rec. March 9, 1966 (statement of Sen. Dale McGee (D-WY)) at 5434.

[77] March 27, 1961 letter from James Kilpatrick to William F. Buckley Jr. in Buckley papers at Yale University Library, collection number MS-576 (in Ernie Lazar FOIA Collection, https://archive.org/details/JohnBirchSocietyReport2019Combined/page/n127/mode/2up?q=harebrained).

[78] *Ibid.*

[79] "Nine Men, or 36 States?" in **Interposition: Editorials and Editorial Page Presentations, 1955–1956** (*Richmond News Leader*).

[80] Cong. Rec. November 14, 1963 (statement of Sen. William Fulbright (D-AR)) at 21,833.

[81] March 9, 1961, Memorandum from Chief Inspector W.C. Sullivan to Alan Belmont (FBI HQ 62-104401-791).

[82] William F. Buckley, "How Goes the Birch Society," *The Victoria Advocate*, November 14, 1967, 4.

[83] *Ibid.*

[84] Alden Whitman, "For 16 Year, Warren Saw the Constitution as Protector of Rights and Equality," *New York Times*, July 10, 1974, 24.

[85] Fred Graham, "Warren Leaving Court; G.O.P. Begins Fight to Bar a Succession Before 1969," *New York Times*, June 22, 1968.

[86] See, e.g., "The Warren Court," *St. Petersburg Times*, June 22, 1968; "Controversial Chief Justice Guarded Everyone's Rights," *Dayton Daily News*, June 23, 1968; "Warren's Name Is Writ in Greatness," *Sacramento Bee*, June 25, 1968 ("One of America's greatest jurists is about to leave the Supreme Court"); "Warren Court's Legacy," *Des Moines Register*, June 28, 1968 ("America will look back on those 15 years of the Warren court as an astonishing accomplishment").

[87] Cong. Rec. April 14, 1967 (statement of Rep. Stephen Young (D-OH)) at 9641.

[88] Cong. Rec. April 22, 1963 (statement of Sen. Thomas Kuchel (R-CA)) at 6666 (reading headline from *San Francisco Examiner*).

[89] See Carl E. Stewart, "Contemporary Challenges to Judicial Independence," 43 Loy. L. Rev. 293 (1997).

[90] January 7, 1959 letter from Robert Welch to T. Coleman Andrews (in Ernie Lazar FOIA Collection, https://archive.org/details/DocumentaryHistoryOfJBS/page/n5/mode/2up?q=warren).

[91] John Birch Society *Bulletin* (June 1, 1964) 8. https://archive.org/details/JBSHQEBF2541/page/n9/mode/2up?q=%22impeach=earl=warren%22.

[92] Robert Welch, "Why Join the John Birch Society," *American Opinion* (October 1962).

[93] Kenton Kilmer, Cong. Research Serv., "The John Birch Society: History, Organization, Principles, and Activities" (December 15, 1961) at 57–58.

[94] January 7, 1959, letter from Robert Welch to T. Coleman Andrews (in Ernie Lazar FOIA Collection, https://archive.org/details/DocumentaryHistoryOfJBS/page/n5/mode/2up?q=warren).

[95] John Wicklein, "Birch Society Will Offer $2,300 for Impeach-Warren Essays," *New York Times*, August 4, 1961, 1.

[96] *Ibid.*

[97] John Birch Society *Bulletin* (June 1, 1964) at 8. https://archive.org/details/JBSHQEBF2541/page/n9/mode/2up?q=%22impeach=earl=warren%22.

[98] Cong. Rec. February 21, 1961 (statement of Rep. Clare Hoffman (R-MI)) at 2500.

[99] Cong. Rec. March 13, 1961 (statement of Rep. Ken Hechler (D-WV)) at 3799.

[100] See J. Allen Broyles, **The John Birch Society: Anatomy of a Protest** (1964) 3.

[101] Lisa McGirr, **Suburban Warriors** (2001) 63.

[102] Maurice Isserman and Michael Kazin, **America Divided** (1999) 212.

[103] William F. Buckley, "Goldwater, the John Birch Society, and Me," *Wall Street Journal*, February 27, 2008, https://www.wsj.com/articles/SB120413132440097025).

[104] Gene Grove, **Inside the John Birch Society** (1961) 104.

[105] *Ibid.*

[106] *The Indianapolis News*, May 10, 1965, at 16.

[107] Cong. Rec. March 9, 1966 (statement of Sen. Dale McGee (D-WY)) at 5434.

[108] "Birchers Trail Anti Warren Banner in Sky," *Sacramento Bee*, September 17, 1961.

[109] Cong. Rec. April 17, 1961 (statement of Rep. Harlan Hagen (D-CA)) at A2559.

[110] Robert Welch, "Why Join the John Birch Society," *American Opinion* (October 1962).

[111] *Ibid.*

[112] *Id.*

[113] Cong. Rec. March 9, 1966 (statement of Sen. Dale McGee (D-WY)) 5434.

[114] March 6, 1968, Correspondence with William O. Douglas, Box 352, Folder 1, Earl Warren Papers, Manuscript Division, Library of Congress.

[115] Alden Whitman, "For 16 Years, Warren Saw the Constitution as Protector of Rights and Equality," *New York Times*, July 10, 1974, 24.

[116] **The Memoirs of Chief Justice Earl Warren** (1977) 303.

[117] Fred. P. Graham, "Warren Leaving Court; G.O.P. Begins Fight to Bar a Succession Before 1969," *New York Times*, June 22, 1968, 1.

[118] Edward Miller, **A Conspiratorial Life: Robert Welch, the John Birch Society, and the Revolution of American Conservatism** (2021) 368.

[119] *Ibid.* 333.

[120] *Id.* 302.

[121] *Id.* 303.

[122] *Id.* 318.

[123] *Id.*

[124] *Id.* 307.

[125] *Id.* 325.

[126] Cong. Rec. April 15, 1970 (statement of Rep. Gerald Ford (R-MI)) at 11,913.

[127] *Ibid.* at 11,915.

[128] *Id.* at 11,916.

[129] Edward Miller, **A Conspiratorial Life: Robert Welch, the John Birch Society, and the Revolution of American Conservatism** (2021) 368.

[130] See generally Joshua Kastenberg, **The Campaign to Impeach Justice William O. Douglas: Nixon, Vietnam, and the Conservative Attack on Judicial Independence** (2019).

Goldberg v. Kelly: The Case, the Clerk, and the Justice

Michael Nelson

During his nearly thirty-four years on the Supreme Court, Justice William J. Brennan wrote 461 majority opinions, including those in landmark cases such as *Baker v. Carr*, *New York Times v. Sullivan*, *Cooper v. Aaron*, *Frontiero v. Richardson*, and *Texas v. Johnson*.[1] Yet Brennan described his opinion for the Court in *Goldberg v. Kelly* as "probably the most important thing that came out of these chambers from me."[2]

Brennan was not alone in that assessment. According to Stephen Breyer, who is perhaps as deeply versed in the subject as any justice in the history of the Court, "*Goldberg v. Kelly* revolutionized administrative law."[3] Yale Law School Professor Jeffrey Mashaw described it as the opening salvo in a "due process revolution."[4] Henry Friendly, the chief judge of the Second Circuit Court of Appeals, suggested that the case caused "a greater expansion of procedural due process . . . than in the entire period since the ratification of the Constitution."[5] Legal analyst Jeffrey Toobin wrote, "*Goldberg v. Kelly* is one of those cases that is so big, its influence so persuasive, its implications so immense, that it is difficult to get a firm grip on it." Toobin recalled "that I was assigned to read the case in no fewer than five different classes in law school: Constitutional Law (what due process means and who is entitled to it and for what?); Property (do welfare benefits count as property?); Civil Procedure (how much process is 'due' process?); Administrative Law (how much process is 'due' process—specifically?); and Law of the Welfare State (that course was basically about *Goldberg v. Kelly*)."[6]

The Case

The Goldberg in *Goldberg v. Kelly* was Jack Goldberg, New York City's Commissioner of Welfare. He was appealing a lower court ruling in favor of John Kelly and nineteen other welfare recipients. Their benefits were terminated by their caseworkers for various reasons, and their only recourse was to file a written appeal to their caseworker's supervisor. Even if they made such an appeal,

DOI: 10.1111/jsch.12296

their benefits would remain cut off unless and until they prevailed.

Welfare owed its existence to a patchwork of state and federal laws, the most important of which was the Social Security Act of 1935. In addition to its most prominent feature—old-age insurance—the act provided modest financial support for other categories of people, including dependent children. Commonly referred to as welfare, this support came in the form of Aid to Families with Dependent Children (AFDC), a program jointly funded by the state and federal governments to provide financial support for single-parent households headed by unmarried, divorced, or widowed women. Widows featured prominently among early beneficiaries, but over time the typical AFDC recipient was more likely to be a politically less sympathetic unwed mother. Most states responded to this change by authorizing local program administrators to deny or cut off benefits to families in which, for example, a man was living in the home. But New York, an unusually generous state, provided additional payments to eligible recipients through its Home Relief program to help cover additional housing, clothing, and certain other needs.

The origin of *Goldberg v. Kelly* lay mostly with lawyers at New York City's Mobilization for Youth (MFY) Legal Unit and Columbia University's Center on Social Welfare Policy and Law (CSWPL). For years, such legal representation as AFDC beneficiaries were able to obtain when their benefits were terminated or reduced usually had come from Legal Aid Society lawyers, whose limited number, narrow mission, and slender resources restricted them to helping individuals navigate existing laws and regulations rather than challenging the laws and regulations themselves. According to legal scholar Martha F. Davis, "Despite eighty-nine years of representing the poor, Legal Aid lawyers had never appealed a case to the Supreme Court."[7] In 1964, however, MFY expanded its focus on "organizing the unaffiliated—the lower fifth of the economic ladder" by creating a unit to mount legal challenges to "social policy and administrative practices rather than to supply legal help to clients."[8] One year later, Columbia's School of Social Work created the CSWPL to join MFY's Legal Unit in the effort.

Jack Sparer, the Legal Unit's director, explicitly modeled his group's strategy on other legal organizations that sought to use "law as an instrument of social change," especially the NAACP Legal Defense Fund (LDF) and the American Civil Liberties Union (ACLU).[9] In addition to providing skilled advocacy on legal matters that affected large categories of people, these groups were strategically astute in deciding which clients had the best cases, which legal issues to pursue and in what sequence, which courts would be most receptive, and which arguments were most likely to prevail. The LDF's victory in *Brown v. Board of Education*, for example, was the culmination of a long series of cases that started in 1938 with a challenge to racially segregated law schools and culminated in 1954 with a legal ban on all segregated public educational institutions.[10]

For Sparer and his fellow MFY lawyers, as well as for the CSWPL, which Sparer left MFY to head in late 1965, the goal was to "create new legal rights for the poor" through litigation, ideally a "right to live" grounded in the Fourteenth Amendment's Equal Protection Clause that would require the government to guarantee everyone at least a subsistence income.[11] Once at CSWPL, Sparer forged a cooperative arrangement with the LDF, which agreed to direct welfare-related cases the Center's way. Their targets included state laws and regulations that denied benefits to women and their children because they had not resided in a state long enough, sheltered a man in the house, or did not open their doors to caseworkers' fact-finding "midnight raids." Initially, MFY, CSWPL, and other elements of the rising poverty law movement

New York City's Mobilization for Youth Legal Unit and Columbia University's Center on Social Welfare Policy and Law joined forces in the 1960s to mount legal challenges on behalf of welfare recipients. Above, the radio press interviewed young people on public assistance.

thought that the Equal Protection Clause would provide the strongest constitutional basis for seeking Supreme Court rulings against such requirements and practices.

Procedurally, poverty-focused lawyers concentrated on the ways in which welfare benefits were taken away, reduced, or denied by state and local caseworkers who determined that a beneficiary was ineligible. Federal law required that an administrative process—a "fair hearing"—allow at least for written appeals of adverse decisions, but such appeals were rare because clients were unaware of their rights, lacked ready access to legal representation, or were unable to articulate their claims in writing. In New York City, local antipoverty groups, spurred by Columbia's CSWPL and the recently formed National Welfare Rights Organization, helped ramp up the number of appeals, many of them successful, in the mid-1960s.[12] But even beneficiaries who prevailed suffered because their benefits were terminated pending a successful appeal.

The CSWPL's first major victory came on June 17, 1968, when a unanimous Supreme Court ruled in its client's favor in *King v. Smith*.[13] The suit challenged an Alabama law that ended benefits for mothers hosting a man even if he was helping her family financially. Rather than ground its ruling in the equal protection clause, however, the Court based the decision on the Social Security Act. It was a victory, but one that rested on a statutory, not a constitutional, foundation.

The Court's next welfare case, *Shapiro v. Thompson*, was argued on May 1, 1968, eight days after *King*. It was brought not by the CSWPL but by lawyers in three

states who were part of the Great Society's two-year-old Legal Services Program. Their clients challenged residency requirements for welfare eligibility on a variety of constitutional grounds, including the Equal Protection Clause and the right to travel implicit in Article I's Interstate Commerce Clause. After siding at a conference with Chief Justice Earl Warren and four other justices in rejecting this argument, Justice Brennan was persuaded to change sides by Justice Abe Fortas' draft of a dissenting opinion, in which he accepted both of the appellants' legal claims. When Justice Potter Stewart decided to leave the majority but withhold his vote, the Court was deadlocked 4–4. The case was scheduled for reargument in October 1968, and it was taken over by the CSWPL, which persuaded former solicitor general Archibald Cox to present its argument.[14]

In 1968 MFY Legal Unit storefront lawyers filed a suit on behalf of John Kelly, a homeless man, and nineteen other welfare recipients whose benefits had been terminated. They named both New York City's commissioner of social services Jack Goldberg (above) and New York State welfare commissioner George Wyman as defendants.

On April 21, 1969, Brennan published his opinion for the Court in *Shapiro* on behalf of a six-justice majority that included everyone but Chief Justice Warren, Justice Hugo Black, and Justice John Marshall Harlan. Using language previously reserved for cases involving racial discrimination, Brennan rested his majority opinion on equal protection grounds, arguing that residency requirements created two classes of needy people within a state: those who had lived there long enough to be eligible and those who had not. In doing so Brennan replaced the "rational basis" test of a state legislature's decision to create a residency requirement for budgetary reasons with a "compelling interest" standard that required "strict scrutiny" whenever a fundamental constitutional right (in this case the right to travel) is involved.[15]

Both *King* and *Shapiro* expanded certain welfare-related rights, but neither embedded those rights in the Fourteenth Amendment's Due Process Clause. To get that sort of protection—the kind that would require states to change their procedures for denying, terminating, or reducing welfare benefits—meant persuading the Court to classify such benefits as a form of "property" that, under the terms of the amendment, no state could "deprive any person" of without "due process of the law." Historically, welfare had always been treated as a "gratuity"—a gift that government gave to recipients, a privilege rather than an entitlement to which they had a legal right.

Hoping to find suitable cases that would enable them to argue that welfare was at least a statutory entitlement under federal law, MFY Legal Unit storefront lawyers encountered John Kelly on January 24, 1968. Kelly had been told by his caseworker to move from one "welfare hotel" to another, and he found the latter so awful that he moved again to a friend's home and ultimately into the streets. The caseworker's response was to terminate Kelly's benefits and then refuse to grant his requests for a meeting. MFY soon found additional clients whose benefits were reduced or ended for various reasons, eventually signing up twenty in all. They filed suit, naming both New York City's Jack Goldberg and New York State welfare commissioner George Wyman as defendants. MFY brought in CSWPL lawyers to handle the case.

At about the same time, a similar case was unfolding in California in which Mae Wheeler, a Social Security recipient whose additional benefits were cut off pending a hearing, filed suit against John Montgomery, the state's director of social welfare. In the lower courts, the aggrieved beneficiaries lost in *Wheeler v. Montgomery* when the California northern district court judged the state's appellate process to be adequate, and won in *Kelly v. Wyman*, in which a three-judge panel in New York's southern district ruled that their state's process was inadequate.[16] Both rulings were appealed to the Supreme Court by the losing party. Commissioner Wyman dropped out of the New York case after the state changed its procedures so that benefits could not be terminated before a hearing, leaving Goldberg the sole appellant on behalf of New York City. For budgetary reasons, the city decided it could only afford to allow recipients who lost benefits to submit a written appeal, which saved the expense of an in-person hearing that would require the presence of a hearing officer, a stenographer, and at least one clerk.

The CSWPL, with support from MFY and the ACLU and representation by attorney Lee Albert, persuaded the Supreme Court to grant cert in *Goldberg v. Kelly* and to consider it alongside *Wheeler v. Montgomery*, which was already on the docket. Kelly's homelessness and New York's severely limited appellate process, the groups' lawyers felt, made him a more sympathetic client than Wheeler, who still received her Social Security retirement benefit even though her other payment was ended. The Court scheduled back-to-back, sixty-minute-long oral arguments on both cases on Monday, October 13, the first day of the second week of the 1969 Term.[17]

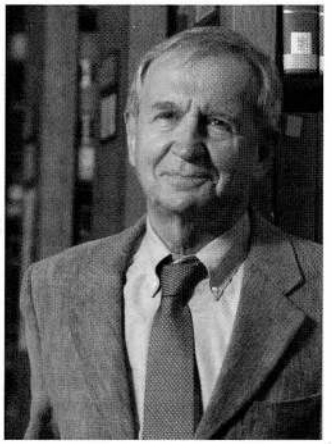
In his written brief, Albert argued that once welfare benefits are granted to an individual, they should be treated as a form of property that cannot be taken away without due process of law. At a minimum, he urged, due process required an advance written notice stating that benefits were going to be curtailed and explaining why, followed by an in-person administrative hearing before an impartial decision-maker at which evidence could be presented and witnesses confronted. Unless and until the hearing officer ruled against the petitioner, Albert argued, the benefits should continue. New York City's brief—just nine pages long—claimed that its procedures for appeal satisfied all legal requirements.[18]

The oral arguments were heard by an eight-member Court that included Chief Justice Warren Burger, whom President Richard Nixon appointed to replace the retiring Earl Warren in June 1969. The Court was shorthanded because Fortas resigned in May in the wake of a series of *Life* magazine articles alleging financial impropriety. It remained so until June 9, 1970, more than a year later, when Harry Blackmun joined the Court after Nixon's first two nominees were rejected by the Senate.[19]

During the oral argument about *Wheeler*, Justice Black repeatedly referred to welfare benefits as a "gratuity," accurately foreshadowing his written opinion's objection to the idea that they are a form of property that entitles recipients to due process protection. Justice Thurgood Marshall bore down repeatedly on the question of "whether the person eats or not" during the period between their loss of benefits and the administrative hearing that might restore them. In response, Elizabeth Palmer, the attorney representing California, conceded, "Your honor, I can't defend the welfare system, and I don't think anyone can. It's indefensible." The two contending justices continued to press their points during the oral argument on *Goldberg* that followed. Marshall badgered John Loflin, who was representing New York City, with a series of skeptical questions: "Is that what you consider due process?"; "that's your idea of due process?"; "that's your idea of fairness?" Black then hectored Lee Albert on the issue of whether welfare is a "gift or gratuity" or, as

Albert contended, a "statutory entitlement." Black's argument became difficult to sustain because both parties in *Goldberg* agreed that the Fourteenth Amendment's Due Process Clause applied to terminations of welfare benefits, even as they disputed what else due process entailed.

When the justices met in a conference on October 17, four days after the oral arguments, they treated *Wheeler* and *Goldberg* as companion cases, to be decided together. Burger and Black voted that the California and New York procedures were entirely adequate because welfare is a gratuity and the due process clause, therefore, does not apply. Stewart agreed that the procedures were adequate even though he thought that welfare, once granted, is a form of property. Marshall, Brennan, and Justice William O. Douglas sided with the welfare recipients. Harlan agreed with them that welfare is "a vested right as long as the state chooses to give it" but was concerned that any due process procedures the Court might impose must not be inflexible. White, who worried during the oral argument about requiring "trial-type" proceedings, agreed with Harlan. In sum, the vote at the conference was 5–3 in Kelly's favor. Since the chief justice and Black, the Court's senior justice, were in the minority, Douglas, the senior justice in the majority, assigned drafting responsibility for the opinion for the Court. The assignment went to Brennan.[20]



As director of Columbia University's Center on Social Welfare, Policy and Law, Lee Albert presented the *Goldberg v. Kelly* case in the Supreme Court. In his written brief, Albert argued that once welfare benefits are granted to an individual, they should be treated as a form of property that cannot be taken away without due process of law.

The Justice and the Clerk

Douglas' decision to assign Brennan the opinion was far from arbitrary. He knew that Brennan was savvy enough not to make an argument so expansive as to drive White and Harlan to the other side, thereby losing the majority. To lose one of them would create a 4–4 tie; to lose both would transform the majority opinion into a dissent. Brennan famously adhered to the "rule of five," which required making whatever reasonable concessions in law and language were necessary to hold a narrow majority together. As Taylor Reveley, the Brennan clerk who worked on *Goldberg*, says, "he did make clear that he was more interested in holding the result than on his prose or on doctrinal purity. He wasn't very much into doctrinal purity," as long as the opinion was consistent with "his view of the Constitution as a living document that did evolve and should evolve in the interests of the larger whole. He was interested in making things happen that he thought were very important to the country. And if it detracted from the elegance and purity of the written draft? Well, life isn't perfect, but you get the result if you can."

Brennan's political astuteness had deep roots. His father and, to a lesser extent, Brennan himself had been involved in local Democratic politics in Newark, New Jersey. He was also an accomplished Harvard-educated lawyer in private practice who rose through the ranks of his state's court system to secure an appointment to the highly regarded New Jersey Supreme Court. During his 1956 reelection campaign, President

Dwight D. Eisenhower found attractive the idea of appointing a respected northeastern Catholic Democrat with state court experience to fill the vacancy on the Supreme Court created by Justice Sherman Minton's retirement. Brennan had been appointed to the New Jersey court by the state's Republican governor, Alfred Driscoll. U.S. Attorney General Herbert Brownell, who was impressed by a speech Brennan gave at a judicial conference, met no resistance when he recommended him to Eisenhower.

Eisenhower may or may not have said, when later asked if he had made any mistakes as president, "Yes, two. And they both are sitting on the Supreme Court."[21] But there is no doubt that he was disappointed by the Court's liberal jurisprudence, in which Brennan and Warren, whom Eisenhower appointed chief justice in 1953, played a leading part. "I get more confused every time the Court delivers another opinion," Ike wrote to William Rogers, Brownell's successor as attorney general, in 1958.[22] Brennan, Warren, Black, Douglas, and, later, Fortas, Thurgood Marshall, and Arthur Goldberg were formidable liberal voices on the Court, and some combination of them usually outnumbered their more conservative colleagues as late as 1969, when *Goldberg* was decided.

Brennan's practice when the justices' Friday conferences ended was to return to chambers, preceded by his messenger pushing a large cart filled with books and papers relating to the cases the justices had just discussed. According to Reveley:

> He would talk to us about what the conference had done, the decisions that had been made, and in particular, about any opinions he was to write, whether for the majority or in dissent, and what needed to be stressed, and what needed to be avoided, and how to, in his judgment, hang on to the majority, which was not always easy.
>
> He would tell us a lot. He would say, "Here's the vote, here's who was on each side, here's who's picky about this or that." He would tell us where the potential problems were, and whose support we had to hold in particular.

At that point, it was up to the clerks to decide which of them would assume drafting responsibility for each of the week's opinions. "We just divided it up based on which of us had time to take on something new," says Reveley, "as opposed to the justice saying, 'You do this, you do that.'" Brennan took for granted that because his clerks "had significant law review experience, which involves intense research, analysis, writing, editing, they already knew" how to write a professional draft on his behalf. Almost certainly, Reveley recalls, he took on *Goldberg* because his fellow clerk, Richard Cooper, was busy with other opinions. Not knowing in advance that he would get the case, Reveley did not attend the oral argument, though he likely listened to a recording of it afterward. His guidance when drafting came from what Brennan told him after conference plus all the material on the cart relating to the case, which was then turned over to him. Essentially random in its assigning as the *Goldberg* draft was, the case stood out for its legal importance in a term that was "pretty barren ground for significant constitutional law" because the Court put off many cases until a ninth justice was appointed.

Reveley grew up in Memphis, where his father taught, coached football and baseball, and was a dean and chaplain at Rhodes College before becoming president of Hampden-Sydney College near Farmville, Virginia, the summer before Reveley's junior year at Princeton University.[23] After earning his law degree at the University of Virginia in 1968, Reveley spent a year teaching at the University of Alabama Law School. Drawing on his experience on the *Virginia Law*

Review, he worked hard to help students improve the *Alabama Law Review*. Without ever meeting Brennan, Reveley applied for a clerkship, was selected by one of the justice's former clerks with the justice's blessing, and eventually received a "small envelope" in the mail that was not the "flush-o-gram" he feared based on the size of the envelope but instead was "a very nice letter from Brennan inviting me to be one of his clerks" for the Court's 1969 Term. In a family letter written at the time, Reveley described clerking for Brennan as

> all that could be desired. The atmosphere is very relaxed and, of course, very stimulating. The justice is clearly one of the world's nicest men—very friendly, accessible, interested in his clerks . . . and very willing to have us become involved in the substantive aspects of decision writing. Each morning begins with coffee in the "inner" chambers—the J, his secretary and the two clerks sit together for thirty minutes or more drinking the brew and talking about [sports, politics, the work of the Court, or] anything that comes to mind.

Brennan's affability was especially remarkable because early in the term his wife underwent cancer surgery, followed by an extended period of treatment and recovery. The year was "hugely difficult" for him personally. And although the matter was never discussed in chambers, leaving Reveley mostly "oblivious" to it, Brennan was concerned enough about the circumstances that led to both Fortas's resignation and, in April 1970, House Republican leader Gerald Ford's motion to impeach Douglas—both involving alleged financial indiscretions—that he canceled all speaking engagements and resolved to participate in no outside activities, whether paid or not, including a seminar he helped teach at New York University and membership on Harvard Law School's Visiting Committee. Douglas even warned his friend and colleague that "there were indications that Brennan would be next" to be targeted for impeachment.[24] In truth, Brennan had already been publicly criticized by Representative John Rarick, a Louisiana Democrat, for a real estate investment he made with four other judges, including Fortas.[25]

With all that going on, Reveley says, "Brennan didn't wear his personal troubles on his sleeve at all. He remained his usual, genuinely wonderful self." Professionally, it worried Brennan that Burger was both more conservative than Warren and less sure-footed in his role as chief. In addition, Black was moving, albeit unevenly, to the right. "Hugo changed, the man changed, right in front of us," Brennan told Black's biographer. "He has hardened and gotten older," said Warren. "It's a different Black now."[26] In particular, Black grew less willing to acknowledge the existence of any right that was not specifically stated in the Constitution, as well as more insistent on his views. During the course of the term, Brennan voted with Burger only 53 percent of the time and with Black only 52 percent of the time, significantly less than with any other justices.[27] And although Douglas was a reliable ally, he was unwilling to accommodate his colleagues' concerns for the sake of securing a majority. According to Brennan, "His great mistake—Bill's—was his insistence—and he repeated it time and time again", "I have no soul to worry about but my own.' . . . He was not a team player."[28]

Goldberg was Reveley's first major assignment. Brennan, unlike most of his colleagues, "usually picked up the cert petitions himself" and, in this instance, "found a case that had good facts" involving a "sympathetic figure—a very worthy recipient who was absolutely screwed." Because Brennan "rarely wanted a bench memo" from his clerks before cases were argued, Reveley

knew very little about *Goldberg* (or *Wheeler*) before he took responsibility for them except that his "job was to do what the justice wants to do."[29] But, he adds,

> the more you are set free to actually draft the opinion, especially its rationale, the more you are, in reality, expressing your own views. And that's to some extent problematic, when you get this group of hotdog young lawyers writing rationales that legions of judges, lawyers and law professors then parse closely as if revealed from on high.

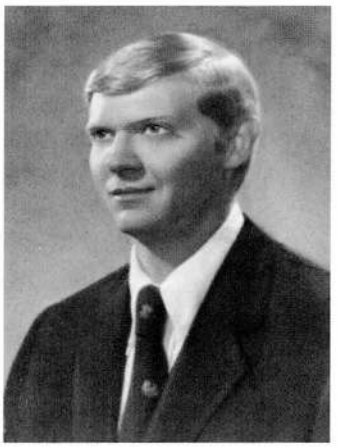
The great benefit for Brennan's clerks of not having to write many bench memos or review cert petitions except during the summer—reviewing certs being something the justice did "because he wanted to see what was coming to the Court," and "because he was always looking for cases congenial to his constitutional understandings that he felt he could find majorities for"—was that they had ample time to spend working on the justice's opinions.[30] Although Brennan would tell us "how the Court has voted and something about the rationale" he wanted in the opinion, "he then set us loose to write a first draft, leaving much, at least initially to our discretion."[31] The challenge Reveley faced in *Goldberg* was twofold: to draft an opinion that made a sound legal case for why welfare benefits should receive the due process protection accorded to more traditional forms of property, and to do so without scaring off Harlan and White. "We got five votes," Reveley remembers Brennan saying. "It's going to be hard to hold them. You've got to explain in the opinion why the Fourteenth Amendment applies here, why this is due process."

Neither welfare law nor administrative law were familiar subjects to Reveley. He began his work by diving into the briefs:

> *Read* the briefs is too tame a verb. I *mined* the damned things for everything I could extract from them. You got an enormous amount of help from the briefs, in which much of the research had been done for you by extremely able lawyers who were very eager to do a great job—and often the amici briefs would be even more helpful than the ones from the parties because they spoke for those who knew that the decision, however it came down, was going to have a real impact on their lives. Now, you didn't take as given anything you read in a brief. But they could really speed you on your way as you began doing your own research.

One challenge Reveley faced was that "you can't get the Fourteenth Amendment to do you much good if what you're talking about is simply a gratuity—a charitable offering. It's got to be more substantive, like property." In reading the briefs, Reveley came across references to a 1964 *Yale Law Journal* article by Yale law professor Charles Reich called "The New Property."[32] Brennan also "knew of Charles Reich's work."[33] Reich argued that properly conceived, property had outgrown its common law definition as something one owns to include important government-granted benefits such as licenses and subsidies. By this logic, welfare was also a form of "new property" once one became eligible for it. "Inescapably, it's a stretch," Reveley says of Reich's argument. "But it's the kind of leap you would want to take if you were sympathetic to your fellow mortals' human condition and trying to help. And Brennan had a really big heart."

Neither Reveley nor, he thinks, Brennan followed the poverty law movement in asserting "a constitutional right to welfare."[34] Such an argument would surely have alienated Harlan and White and, Reveley says, "I don't



Taylor Reveley (above) was the clerk Justice William J. Brennan assigned to helped draft the *Goldberg* majority opinion. Brennan told him not to lose the votes of John M. Harlan and Byron White: "It's going to be hard to hold them. You've got to explain in the opinion why the Fourteenth Amendment applies here, why this is due process."

know that Brennan would have believed that was a fair reading of the Constitution." In any event, there was no need to go that far. As a statutory entitlement embedded in the Social Security Act, welfare recipients could plausibly be understood to have a form of "new property" protected by the Due Process Clause from removal without an in-person hearing before an impartial decision-maker.

When a clerk in Brennan's chambers completed a draft opinion, Reveley says, he would give it "to his co-clerk to take a really close look at. We wanted all the wise counsel we could get from one another." The draft next would go to the justice. "We'd write—he'd edit—we'd edit," and so on.[35]

> The justice would then tell us what he wanted added, cut, strengthened, restated—whatever. We would rewrite as necessary and keep bringing the draft back until it passed muster.
>
> The draft next went to the Court's print shop to be turned into something that looked good. The justice would then send it around to all the other justices, and the negotiating would begin. "I don't agree with this or that," or, "if you want to hold on to my vote you need to say this or not say that." The justice handled all this, letting us know when changes were essential, and we'd do our best to make them in a way satisfactory to all concerned.

The *Goldberg* opinion that Brennan circulated on November 24, 1969, included a Reveley-drafted statement that poverty is "largely a product of impersonal forces." Welfare, he wrote, is "the treatment of a disorder inherent in our society. Government has an overriding interest in providing welfare to the eligible, both to help maintain the dignity and well-being of a large segment of the population and to guard against the societal malaise that may flow from an unwarranted frustration and insecurity."[36]

Of this passage, Reveley says, "You write it, you give it to the justice, and it either flies or doesn't fly. And if it flies with the justice, it goes out to his colleagues and it either flies or it doesn't fly with enough of them." In any event, "why not give Harlan and the others a chance to say yes? Or, failing that: you've got to tone it down."

When Harlan and White strongly objected to the passage and some other language, Brennan replaced it. "From its Founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders," he wrote instead, and "forces not within the control of the poor contribute to their poverty." "On *Goldberg* there had to be a lot of changes," Reveley recalls:

> Hanging on to Harlan's vote was hard. He, in particular, and White were concerned about certain things. And while Brennan preferred the language in his draft,

> he would make whatever changes were necessary to hang on to Harlan and White. So there was a good bit of fine-tuning of the language to hold the majority. And I think the Justice was personally communicating a good bit with Harlan and White.

Contrary to common perceptions of how Brennan operated, Brennan's communications with his colleagues were chiefly in writing. "Brennan did not like to be characterized as a hail-fellow-well-met, back-slapping, Irish leprechaun politician," Reveley says. He mostly relied on written revisions to persuade his colleagues. "The Court's print shop printed God only knows how many drafts of opinions before you finally get to something that was pretty stable."[37] That said, author David Halberstam was surely right to observe that Brennan had "a rare ability to bring others of seemingly different views to a consensus that a less graceful and generous-spirited man might not have been able to do."[38] His effectiveness in doing so rested on his result-centered focus, which led him to treat colleagues whose votes he needed respectfully and, when possible, to find mutually acceptable language that accommodated their concerns.[39] As such, Brennan was less the "playmaker"—a label he despised—than the collaborator.[40]

To placate Harlan and White, Brennan also changed the wording of a footnote that began, "It is probably unrealistic today to deny that welfare entitlements constitute 'property.'" He revised it to read: "It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'" "May be" softened "is" and, even more important, "like property" tempered "constitute property." Either Brennan or Reveley, with the justice's approval, also added: "We do not consider whether a recipient has a substantive due process right to receive welfare"—that is, a constitutional entitlement to the sort of "trial-type" proceedings and assured permanence that Harlan and White rejected. Brennan further made clear that his opinion relied only the procedural due process afforded by a statutory entitlement. And he added conservative-sounding language about welfare's value in bringing "within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community." White in particular thought the purpose of welfare was to tide people over until they could find work.[41]

"Brennan did not like to be characterized as a hail-fellow-well-met, back-slapping, Irish leprechaun politician," Reveley recalls. The justice mostly relied on written revisions to persuade his colleagues. Above is a signed portrait Brennan gave to his clerk thanking him for "remarkable help during the October 1969 Term."

Brennan circulated his revised draft on November 28, the day after Thanksgiving. Four days later White signed on, adding his name to those of Douglas and Marshall, who already had approved Brennan's original draft. Harlan, whom Reveley described as "fastidious about *Goldberg*, how he wanted some things said and some things not said," was not entirely satisfied. Brennan's draft still called for a "trial-type" hearing at which the recipient could present oral arguments, call witnesses, have a lawyer, and confront adverse testimony. "Harlan and White were always concerned that Brennan was slipping

in some language that in the future might be understood more expansively than they wanted," says Reveley. In this case, Harlan was afraid that establishing the right to counsel at administrative hearings would lay the foundation for a subsequent case declaring a right to have the government appoint one.

After asking for research on the issue, Brennan accepted Harlan's substitution of "evidentiary hearing" for "trial-type hearing."[42] Regarding Harlan's additional request that only factual matters, not legal issues, be considered at these hearings, Brennan proposed that the Court simply not address the issue in this case. Harlan agreed. By December 16, the five-justice majority necessary to announce the decision and publish the opinion to which all of them agreed had formed.

What did *Goldberg*'s majority opinion require? That a welfare recipient whose benefits are in jeopardy receive "timely and adequate notice detailing the reasons for termination" and, at the hearing itself, be given "a chance to state his position orally," "confront and cross-examine adverse witnesses," and "be allowed to retain an attorney." Afterward, the "impartial" decision-maker conducting the hearing "should state the reasons for his determination and indicate the evidence he relied on."[43] Beyond that, the recipient's benefits must remain in place before the hearing. Although continuity of benefits was not a typical due process requirement, Brennan wrote in the final draft of the opinion, it was the

> crucial factor in this context—a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose government entitlements are ended— [because] termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means to live while he waits.

And there *Goldberg* sat for three months. "Black was deeply angry with Brennan about the case," says Reveley. "He felt very strongly that Brennan was creating constitutional law out of whole cloth, and just construing the Constitution to say what he wanted it to say." Reserving his right to circulate a dissent before the case was formally decided, "Black kept walking back its delivery, perhaps hoping that someone in the majority would change his mind, in which case Black would have prevailed."

Black finally circulated his dissent, which no other justice joined, and the case was decided on March 23, 1970. He furiously accused the majority of creating a right not found in the Constitution, even reading his dissent from the bench and extemporizing that welfare is a gratuity "nice for those who do not work," not an entitlement, statutory or otherwise.[44] Brennan's *Goldberg* opinion did double-duty for the "companion case" of *Wheeler v. Montgomery*, which was also announced that day. Burger attached his own brief dissent in both cases to *Wheeler*, largely agreeing with Black while also criticizing the majority opinion for its lack of concern for how "costly" a labor-intensive hearing process would be for state and local governments. Stewart dissented as well in a one-sentence opinion, stating simply that he did "not believe the procedures that New York and California now follow in terminating welfare payments are violative of the United States Constitution."

One surviving remnant of the opinion-drafting process was a passage from Reich's article quoted in *Goldberg*'s footnote 8, which Toobin has described as "one of the most famous footnotes in Supreme Court history."[45] It read:

> Society today is built around entitlement. . . . Many of the most

The Court that decided *Goldberg* was missing a justice, as Abe Fortas had resigned. The vote was 5-3. Hugo Black (second from left) read his dissent from the bench and extemporized that welfare is a gratuity "nice for those who do not work," not an entitlement, statutory or otherwise.

> important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long-term contracts for defense, space, and education; social security pensions for individuals. . . . [T]o the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced.

Conclusion

What happened to the clerk, the justice, and the case in the aftermath of *Goldberg*?

Reveley, like other clerks in his era, did not receive the quarter-million dollar-plus signing bonus or sky-high starting salary that later became customary for Supreme Court clerks. All he got was a year's credit on the partner track when he joined the Richmond-based firm of Hunton & Williams.[46] Early in his tenure with the firm, he took a year-long leave as a fellow with the Woodrow Wilson International Center for Scholars and the Council on Foreign Relations, advancing the research for his 1981 book **War Powers of the President and Congress**.[47] During much of the 1970s and 1980s, he represented the Long Island Lighting Co. in its protracted effort to build and operate a nuclear power plant in Shoreham, New York, winning every legal battle but losing politically. In all, Reveley spent nearly three decades at Hunton & Williams, nine of them as managing partner during a period of rapid national and international expansion for the firm. From there he went to William and Mary, which he served as dean of the law school from 1998 to 2008 and president from 2008 until his retirement in 2018.[48] Along the way he helped lead organizations such as the Andrew W. Mellon Foundation and JSTOR.

Brennan remained on the Court for another two decades, retiring on July 20, 1990. Of his fellow justices in the 1969 Term, Brennan outlasted all but Marshall and White

but, with Republicans serving as president during sixteen of his final twenty years on the Court, he fought an increasingly rearguard action on behalf of his "living Constitution"-based jurisprudence. "I never heard Brennan disparage a fellow justice (or anyone else!) during my time with him," says Reveley. "It's true, however, that as time went on and he got older and less influential on the Court, he felt marginalized and probably became somewhat bitter."[49] Even so, Brennan's main originalist antagonist on the Court, Justice Antonin Scalia, described him as "probably the most influential justice of the century."[50] To the end, Brennan occasionally was able to mobilize five votes for his majority opinions in landmark cases such as *Texas v. Johnson*. As senior justice in the majority in several such cases after Black and Douglas retired in 1971 and 1975, respectively, he assigned the opinions for the Court when Chief Justice Burger and, starting in 1986, Chief Justice William H. Rehnquist, were in the minority.

As narrow victories in major cases became increasingly out of reach, however, Brennan's opinions centered less on results and more on doctrine, but doctrine of a particular kind. In a much-quoted Benjamin N. Cardozo Lecture, delivered on September 17, 1987, the two hundredth anniversary of the signing of Constitution, Brennan argued that not reason alone, but the "interplay of reason and passion does not taint the judicial process, but in fact is central to its vitality. This is particularly true, I think, in constitutional interpretation." By "passion," Brennan meant "the range of emotional and intuitive responses to a given set of facts or argument," responses of the kind that made John Kelly's loss of welfare benefits without a fair hearing so compelling. Indeed, *Goldberg v. Kelly* was the centerpiece of Brennan's argument that the "requirements of due process in a bureaucratized society" make necessary an understanding of the clause's meaning that "the founders could not have specifically foreseen" but would appreciate if they had. Their "basic" and "subtle" understanding of due process, after all, was that it should protect "the essential dignity and worth of each individual."[51] For Brennan, "our whole constitutional structure and objective is the protection of the dignity of the human being."[52] "Rulings emerged out of everyday human dramas," he wrote.[53]

Goldberg "may have made the welfare system more rational," Brennan argued. But more important was its "injecting of passion into a system whose abstract rationality had led it astray." Allowing, as New York did, a welfare recipient to submit a written statement when benefits were cut off pending a hearing, with a judicial appeal ultimately available, "was a model of rationality." But the process lacked any "appreciation of the drastic consequences of terminating a recipient's only means of existence" as well as any understanding of the "lack of educational attainment" that would make submitting a persuasive written statement unrealistic. A passion-infused understanding of due process, Brennan wrote, would acknowledge the centrality of "dignity, decency, and fairness" as requirements of the law.

Goldberg's important consequence for welfare policy were immediately apparent. State and local governments hastened to create administrative appeals processes for recipients whose benefits were cut off or reduced that met the decision's due process requirements. *Goldberg*'s larger consequences were not as obvious, perhaps with some reason. It was not a high-profile, culture war-style case involving issues such as crime, school prayer, abortion, or school integration. Bob Woodward and Scott Armstrong did not even mention the case in their sixty-six-page chapter on the 1969 Term in **TheBrethren**.[54]

Further, to the extent that MFY, the CSWPL, and other elements of the poverty law movement thought *Goldberg* would open the door to additional rulings that, for example, would declare a constitutional "right to live" or at least define welfare as

a constitutional entitlement, that did not happen. Indeed, in *Dandridge v. Williams*, a decision handed down two weeks after *Goldberg*, the Court ruled that states could set a limit on beneficiaries' family size, beyond which benefits would not increase. In this case, which involved an equal protection claim, Harlan and White sided not with Brennan, Marshall, and Douglas, but with Burger, Black, and Stewart, who wrote the majority opinion. During the 1970 Term, with Justice Blackmun now on the Court, a 6–3 majority of justices ruled in *Wyman v. James* that welfare recipients could lose their benefits if they refused their caseworkers' demand to schedule a visit to their home. In Blackmun's first majority opinion as a justice, he argued that neither the Due Process Clause nor the Fourth Amendment required that caseworkers first obtain a search warrant. Douglas and Marshall, the latter joined by Brennan, wrote furious dissents.[55] In the 1975 Term, a 5–2 majority—this time with Marshall joining Brennan's dissent—ruled in *Mathews v. Eldredge* that although *Goldberg* correctly treated government benefits as property entitled to procedural due process, the Social Security Administration's written pretermination process for disability benefits was adequate because the administrative costs of hearings at that stage were high and the risk of error was low. Blackmun once again was in the majority, along with Black's replacement, Justice Lewis Powell, who wrote the opinion for the Court.[56]

In general, traditional welfare's status within the larger political system became more controversial and less secure with the passage of time. In 1996 Congress passed the Clinton Administration's Welfare Reform Act, replacing AFDC with Temporary Assistance for Needy Families, which limits eligibility to two years at a time and five years in one's lifetime.[57] Reveley, who later served ten years as a law school dean, observes that "constitutional common law"—judge-made extensions of existing rulings into new kinds of cases—in the area of welfare rights did not evolve to fulfill the poverty law movement's hope that courts would extend a welfare recipient's procedural due process right to a pretermination hearing to a substantive due process right to receive welfare in the first place.[58] Yet *Goldberg*'s requirement of pretermination hearings for beneficiaries on property-related due process grounds remains settled law.[59] And the case's significance not just for welfare but also for administrative law writ large became even more apparent.

In practice, observed legal scholar Bernard Schwartz, "evidentiary hearing" came to be understood as "the generic administrative law term for what used to be called trial-type hearings"—the very thing Harlan thought he had forestalled when he persuaded Brennan to substitute the former term for the latter in *Goldberg*.[60] Beyond that, according to Justice Breyer, the case established that when it comes to due process, "'new property' and 'old property' warrant somewhat similar treatments" in many areas of life and law, among them "certain trial-type procedural protections, including face-to-face contact between individuals and government decision-makers." Breyer's assessment that *Goldberg* "revolutionized administrative law" makes reasonable *New York Times* legal writer Linda Greenhouse's judgment that the case belongs in "pantheon of the Court's rulings." Indeed, she wrote, *Goldberg* serves "as a reminder that it is not only the most famous Supreme Court decisions—the *Brown v. Board of Education*s and *Roe v. Wade*—that make a difference."[61]

Michael Nelson is the Fulmer Professor of Political Science at Rhodes College.

ENDNOTES

[1] *Baker v. Car* 369 U.S. 186 (1961); *New York Times v. Sullivan* 376 U.S. 264 (1964); *Cooper v. Aaron* 358 U.S. 1 (1958); *Frontiero v. Richardson* 411 U.S. 677 (1973); *Texas v. Johnson* 491 U.S. 397 (1989).

[2] Seth Stern and Stephen Wermiel, **Justice Brennan: Liberal Champion** (Lawrence: University Press of Kansas, 2010), 336.

[3] Stephen G. Breyer, "*Goldberg v. Kelly*: Administrative Law and the New Property," in **Reason and Passion: Justice Brennan's Enduring Influence,** eds. E. Joshua Rosenkranz and Bernard Schwartz (New York: W.W. Norton, 1997), 245.

[4] Jeffrey L. Mashaw, "The Supreme Court's Due Process Calculus for Administrative Adjudication," *University of Chicago Law Review* 28 (1976–1977) 28–59.

[5] Henry Friendly, "Some Kind of Hearing," *University of Pennsylvania Law Review* 123 (1975): 1267–1317.

[6] Jeffrey Toobin, "Á Fair Shake and a Square Deal: The Role of the Administrative Judiciary," in **Reason and Passion**, eds. Rosenkranz and Schwartz, 258, 262.

[7] Martha F. Davis, **Brutal Need: Lawyers and the Welfare Rights Movement, 1960–1973** (New Haven, CT: Yale University Press, 1993), 10. This section of the article draws heavily from Davis's excellent account, as well as from Stern and Wermiel, **Justice Brennan**, chap. 14.

[8] Davis, **Brutal Need,** 28–29.

[9] *Ibid.*, 30.

[10] *Missouri ex rel. Gaines v. Canada* 305 U.S. 337 (1938); *Brown v. Board of Education of Topeka* 347 U.S. 483 (1954).

[11] Davis, **Brutal Need**, 37–38. The Center soon left the Columbia School of Social Work and became part of the Columbia Law School.

[12] Davis, **Brutal Need**, 50.

[13] *King v. Smith* 392 U.S. 309 (1968).

[14] Davis, **Brutal Need,** 79

[15] *Shapiro v. Thompson* 394 U.S. 618 (1959). In legal scholar Bernard Schwartz's judgment, Brennan's opinion in *Shapiro* was at least as "far-reaching" as any other he wrote. "How Justice Brennan Changed America," in **Reason and Passion**, eds. Rosenkranz and Schwartz, 35.

[16] *Wheeler v. Montgomery* 296 F. Supp 138 (N.D. Cal. 1969); *Kelly v. Wyman* 294 F. Supp 893 (S.D.N.Y. 1968).

[17] The oral arguments in *Wheeler* may be heard and read at https://www.oyez.org/cases/1969./14. The argument for *Goldberg* is available at https://www.oyez.org/cases/1969/62. Goldberg's argument spanned a thirty-minute lunch break. Bizarrely, the transcript of *Wheeler* attributes Black's statements to Lewis Powell, who did not join the Court until 1971.

[18] Davis, **Brutal Need,** 102.

[19] Brennan thought Nixon's first nominee, Fourth Circuit Court of Appeals Judge Clement Haynsworth "was worthy of being on the Court," says one of the justice's clerks that year, Taylor Reveley. "He did not think that of [Judge Harrold] Carswell," Nixon's second nominee. Unless otherwise noted, all the statements by Reveley in this article are from interviews conducted by the author in the period January–March 2022.

[20] Bernard Schwartz, **The Unpublished Opinions of the Burger Court** (New York: Oxford University Press, 1988), 376–377; Davis, **Brutal Need,** 111.

[21] Former CBS news executive Fred Friendly claimed that Eisenhower said this to him and Walter Conkite after leaving office in 1961. Nat Hentoff, "The Constitutionalist," *New Yorker*, March 12, 1990: https://www.newyorker.com/magazine/1990/03/12/the-constitutionalist

[22] Stern and Wermiel, **Justice Brennan,** 139.

[23] Rhodes, then called Southwestern at Memphis, was the alma mater of Justice Fortas and, later, Justice Amy Coney Barrett.

[24] William O. Douglas, **The Court Years, 1939–1975: The Autobiography of William O. Douglas** (New York: Random House, 1980), 359; Stern and Wermiel, **Justice Brennan,** 320–321; Michael Bibelian, **Battle for the Marble Palace: Abe Fortas, Earl Warren, Lyndon Johnson, Richard Nixon, and the Forging of the Modern Supreme Court** (Tucson, AZ: Schaffner Press, 2019), 317.

[25] Stern and Wermiel, **Justice Brennan,** 319.

[26] Roger K. Newman, **Hugo Black: A Biography** (New York: Pantheon, 1994), 570.

[27] Michael E. Tigar, "The Supreme Court, 1969 Term," *Harvard Law Review* 84 (November 1970): 1–255. Brennan actually hired Tigar as a clerk for the 1968 Term and then, in a controversial move he later regretted, withdrew his offer in response to allegations that Tigar had been involved in some left-wing activities while a law student at the University of California. "Liberal Is Denied Court Clerk Post," *New York Times*, July 17, 1968.

[28] Jeffrey T. Leeds, "A Life on the Court," *New York Times Magazine*, October 5, 1986: https://www.nytimes.com/1986/11/09/magazine/l-a-life-on-the-court-819486.html

[29] Subsequent Brennan clerks, including Mary Mikva, who clerked during the 1981 Term, report that by then "clerks wrote short bench memos on each case that was to be argued" and "the justice discussed all of the cases that were set for argument with all four of his clerks, the day before argument." **Of Courtiers and Kings: More Stories of Supreme Court Law Clerks and Their Justices**, eds. Todd C. Peppers and Clare Cushman (Charlottesville: University of Virginia Press, 2015), 348–351. Hearing this, Reveley remarked of his year as clerk, "Good Lord. That's totally not the way we did it. He never wanted bench memos. He never wanted to talk about the cases."

[30] See also "Justice Brennan Calls National Court of Appeals Proposal 'Fundamentally Unnecessary and

Ill-Advised,'" *American Bar Association Journal* 59 (August 1973): 835–840.

[31] Letter from Taylor Reveley to "Aunt Pink and Virginia," January 15, 1970 (supplied to the author).

[32] Charles A. Reich, "The New Property," *Yale Law Journal* 73 (April 1964): 733–787.

[33] Davis, **Brutal Need,** 111; Stern and Wermiel, **Justice Brennan,** 339.

[34] Tony Mauro, "Fair Hearing: Legacy to the Poor," in **Reason and Passion**, eds. Rosenkranz and Schwartz, 234.

[35] This quotation is from notes Reveley prepared for a seminar on judicial decision-making at Virginia Polytechnic Institute and State University on May 9, 1974 (supplied to the author).

[36] Davis, **Brutal Need,** 113.

[37] See also Hentoff, "The Constitutionalist."

[38] David Halberstam, "The Common Man as Uncommon Man," in **Reason and Passion,** eds. Rosenkranz and Schwartz, 26.

[39] For an excellent discussion of this form of influence, see the discussion of "marshalling the Court" in Walter F. Murphy, **Elements of Judicial Strategy** (Chicago: University of Chicago Press, 1964), chap. 3.

[40] Leeds, "A Life on the Court."

[41] Schwartz, **The Unpublished Opinions of the Burger Court,** 378.

[42] Davis, **Brutal Need,** 117.

[43] *Goldberg v. Kelly* 397 U.S. 254 (1970).

[44] Stern and Wermiel, **Justice Brennan,** 344.

[45] Toobin, "Á Fair Shake and a Square Deal," 259.

[46] The firm name at the time was Hunton, Williams, Gay, Powell and Gibson. Since merging with another firm in 2018, its name has been Hunton Andrews Kurth.

[47] W. Taylor Reveley III, **War Powers of the President and Congress: Who Holds the Arrows and Olive Branch?** (Charlottesville: University of Virginia Press, 1981).

[48] Not only were Reveley and his father (also W. Taylor) college presidents at prominent Virginia institutions, so was Reveley's son Taylor, who has been president of Longwood University since 2013.

[49] Letter from Taylor Reveley to the author, January 28, 2021.

[50] Patricia Brennan, "Seven Justices, On Camera," *Washington Post*, October 6, 1996.

[51] William J. Brennan, "Reason, Passion, and 'The Progress of the Law,'" *Cardozo Law Review* 10 (1988): 3–23.

[52] Bill Moyers, "Supreme Court Justice William J. Brennan," *In Search of the Constitution*, May 7, 1987: https://billmoyers.com/content/justice-william-brennan/

[53] William J. Brennan, "A Life on the Court," in **Reason and Passion**, eds. Rosenkranz and Schwartz, 19.

[54] Bob Woodward and Scott Armstrong, **The Brethren: Inside the Supreme Court** (New York: Simon and Schuster, 1979), 27–92.

[55] *Wyman v. James* 400 U.S. 309 (1971).

[56] *Mathews v. Eldredge* 424 U.S. 319 (1976).

[57] Michael Nelson, "Bill Clinton and Welfare Reform: A Perspective from Oral History," *Congress and the Presidency* 42 (September–December 2015): 243–263.

[58] See also Henry P. Monaghan, "Constitutional Common Law," *Harvard Law Review* 89 (November 1975): 1–45.

[59] Vicki Lens, "Revisiting the Promise of *Kelly v. Goldberg* in the Era of Welfare Reform," *Georgetown Law Review* 41 (2013): 43–89.

[60] Schwartz, **The Unpublished Opinions of the Burger Court,** 378.

[61] Linda Greenhouse, "New Look at an 'Obscure' Ruling, 20 Years Later," *New York Times*, May 11, 1990.

Northern Schools and *Lemon*'s Forgotten Segregation Claim

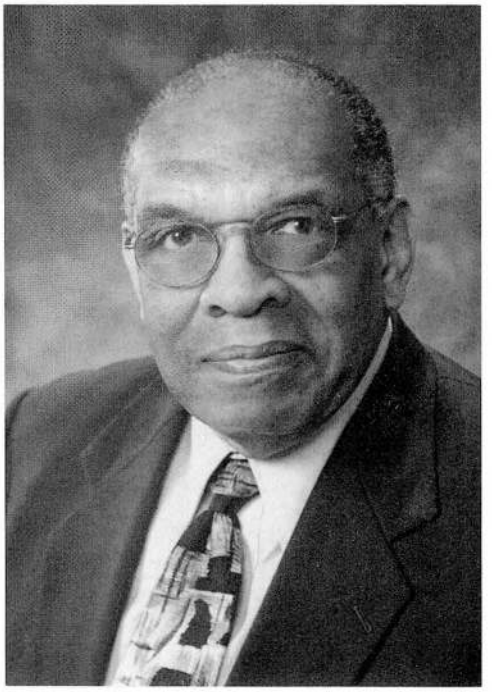
Catherine Ward

Introduction

For decades, scholars have studied *Lemon v. Kurtzman*[1] for its First Amendment impact—failing to probe *Lemon*'s impact on racial segregation. *Lemon*, a 1971 landmark Establishment Clause case, involved civil rights advocates trying to use the First Amendment Establishment Clause *and* Fourteenth Amendment Equal Protection Clause to limit government support for segregated religious schools in Pennsylvania.[2] *Lemon*'s petitioners recognized that segregated religious private schools—and government aid to such schools—proliferated at the same time public schools faced post-*Brown v. Board of Education* desegregation requirements.[3] Parochial school aid thus prevented successful public school integration.[4] The *Lemon* petitioners sought to strike down Pennsylvania's Nonpublic Elementary and Secondary Education Act, which allowed the Superintendent of Public Schools to reimburse private (predominantly Catholic) schools for the salaries of educators teaching with public school instructional materials.[5] This article considers the history surrounding *Lemon*'s colorblind approach to private school segregation in religious private schools—a subject not yet given due attention in scholarly literature.[6]

In a suit conceived as a national test case, petitioners assigned Alton T. Lemon, a Black civil rights activist and social worker, as the named plaintiff, rather than one of the white taxpayer or organizational plaintiffs—underscoring that the case was about racial discrimination in private religious schools, in addition to a constitutional right not to support others' religious beliefs.[7] As a father with Black children in Philadelphia public schools, Lemon believed white parochial private schools created a segregated school system negatively affecting his own children's education.[8] Data in the appellants' brief to the Supreme Court supported this allegation.[9] Thus, the *Lemon*

DOI: 10.1111/jsch.12299



A civil rights activist and father of Black children in Philadelphia public schools, Alton T. Lemon gave his name to a national test case filed in 1969 arguing that statutes providing state funding for nonpublic, nonsecular schools violate the separation of church and state described in the First Amendment. The attorneys placed his name before the other plaintiffs, white taxpayers, to underscore that the case was also about racial discrimination in private religious schools.

petitioners brought a Fourteenth Amendment segregation claim, in addition to their better-known Establishment Clause claim.[10] Yet, no ustice ruled on the former.[11] The Court dismissed the segregation claim for lack of standing,[12] ignoring evidence that Pennsylvania's government-funded parochial schools harmed Black children like Mr. Lemon's by creating white-only and Black-only student bodies. However, every justice noted the issue of segregation in *Lemon*, and school desegregation was a major topic in courts across the nation,[13] making it unlikely that no member of the Court was influenced by the issue.[14]

Although the segregation claim was dismissed, the *Lemon* Court put forward a new Establishment Clause test, which acted functionally as a weapon to wield against Pennsylvania private school segregation. Under this test, for a law to be constitutional, it must (1) have a legitimate secular purpose, (2) not have the primary effect of advancing or inhibiting religion, and (3) not result in excessive government–religion entanglement.[15] As the Pennsylvania Act failed the new test, the *Lemon* Court used the Establishment Clause to invalidate government aid to racially segregated religious schools—*without* acknowledging their segregation.[16] Thus, striking the Pennsylvania Act down only on religious grounds, the Court acted in a colorblind manner, i.e., without considering race.

The segregation claim at issue in *Lemon* alleged that "[t]he [Nonpublic Elementary and Secondary Education] Act on its face and as applied . . . authorizes payments thereunder to private schools whose policies and practices, by purpose or effect, exclude from admission, or otherwise discriminate against persons by reasons of race."[17] The district court held that there was not a sufficient nexus between Mr. Lemon and the alleged racial discrimination for him to bring suit.[18] The Court unanimously affirmed, holding that no plaintiff had standing to raise an Equal Protection Clause violation "because the complaint did not allege that the child of any plaintiff had been denied admission to any nonpublic school on racial or religious grounds."[19]

The Court may have ultimately provided an anti-segregation tool through its Establishment Clause test, but *Lemon* also indicates the Court's adoption of colorblind defenses for segregation. After all, the Court dismissed Lemon's segregation claim for lack of standing despite evidence that his children, because of the Act at issue, faced discrimination via segregation in local public schools. To understand the implications of *Lemon*'s segregation holding, this article discusses segregation litigation from *Brown* to *Lemon*, establishing the Court's recognition of private school segregation causing public

school racial harms in a southern context. It then delves into how the *Lemon* Court ignored facts related to race discrimination in Pennsylvania private schools.

Segregation Litigation: From *Brown* to *Lemon*

In the 1960s, between *Brown*'s declaration that public school segregation violates the Equal Protection Clause and *Lemon*, fundamentalist and evangelical Protestants embraced government aid to private religious schools.[20] Such institutions allowed white parents to continue sending their children to segregated schools, therein avoiding court-ordered desegregation. Before *Brown*, Protestants largely positioned themselves as staunch separationists, against government aid to religious schools, which were primarily Catholic.[21] Early public schools had promoted a nondenominational Protestant education, allowing Protestant parents to ensure their children received a government-funded religious education.[22] Religious minorities, particularly Catholics, were thus alone in seeking government support for parochial schools, which their children could attend without being religiously indoctrinated in a manner they deemed violative of parents' rights of consciousness. Anti-Catholic nativists opposed such aid.[23] However, after *Brown*, Protestants recognized supporting state aid to parochial schools could allow them to retain government-funded, segregated schools; thus, as Protestants championed state aid to religious schools, such aid shifted from a means to support Catholics to a method of augmenting segregated private schools' opportunity for growth.[24]

Prior to *Lemon*, the Court recognized that southern white parents avoided integration but did not recognize the same for northern parents.[25] Between the 1954 *Brown* decision and *Lemon*, the Court invalidated programs in Virginia,[26] Louisiana,[27] Alabama,[28] South Carolina,[29] Arkansas,[30] and Mississippi[31] that provided grants to students to avoid desegregated public schools by attending segregated private schools.[32] The Court held, in southern contexts, that (1) "[s]tate support of segregated schools through any arrangement, management, funds, or property"[33] and (2) voluntary desegregation plans that did not produce significant racial integration violate the Equal Protection Clause.[34] Even in the same term as *Lemon*, the Court recognized, again in the South, school districting plans that appear racially neutral may be discriminatory in practice and fail to fulfill court-ordered desegregation requirements.[35]

As civil rights groups urged the Internal Revenue Service (IRS) to deny segregated private schools' tax-exempt applications, the Court's focus remained on the explicitly maintained segregation of southern private schools.[36] In 1969, the Court affirmed that the "tax benefits under the Internal Revenue Code meant a substantial and significant support by the Government to [Mississippi's] segregated private school pattern[.]"[37] Consequently, a permanent injunction restricted the IRS from granting a tax exemption to any Mississippi private school that applied for the benefit,[38] and the IRS released new national nondiscrimination requirements for tax exemption.[39] However, this did little in actuality. Private schools could avoid losing tax-exempt status by filing a declaration of nondiscrimination, while maintaining de facto segregation.[40] This was easy for northern schools that had already learned to mask their segregation with colorblind defenses.

Facts Unconsidered by the *Lemon* Court

Lemon's initial complaint alleged Pennsylvania's private, parochial schools were segregated and contributed to preserving the segregated public education system *Brown* struck down.[41] The complaint argued these de facto segregated private schools became "quasi-public" through extensive tax

The plaintiffs alleged that Pennsylvania's private, parochial schools were segregated and contributed to preserving the segregated public education system *Brown* had struck down. Because the schools (such as Archbishop Wood Catholic High School, in Warminster, pictured) benefitted from tax subsidies, they claimed this constituted a discriminatory state action.

subsidy,[42] a state action argument ultimately supported by the Court.[43] Thus, as appellants went on to argue, private school segregation became state action forbidden by the Equal Protection Clause.[44] The complaint alleged the Act's subsidy would allow private schools to increase their "exclusively or almost exclusively white" enrollment, therein increasing the Black student population percentage in Pennsylvania public schools.[45] Based on nationwide trends, the complaint predicted a greater Black public school student population percentage would prompt more white parents to enroll their children in private schools—either due to prejudice or because the public schools would receive a smaller percentage of the community's education funds, leading to inferior public schooling.[46]

Even without the opportunity for discovery related to their segregation claim, the *Lemon* petitioners presented the Court with ample evidence indicating the cycle of public school segregation Pennsylvania religious schools encouraged, which the Act could support.[47] The petitioners explained that, in Philadelphia's parochial school system, 71,000 schoolchildren attended schools with *only* white students, 6,366 students attended all-Black schools, and only 2,920 students attended schools in which "the mixture between black and white" was between 40% and 60%.[48] Over 26,000 Philadelphia parochial schoolchildren attended schools with a Black enrollment between 5% and 9%.[49] Petitioners claimed discovery would reveal the level of Black enrollment in the four counties surrounding the City of Philadelphia, which were included in the Philadelphia Archdiocesan School System, was less than 1% of the student body.[50] Thus, at oral argument, Henry Sawyer III, representing the petitioners, explained the

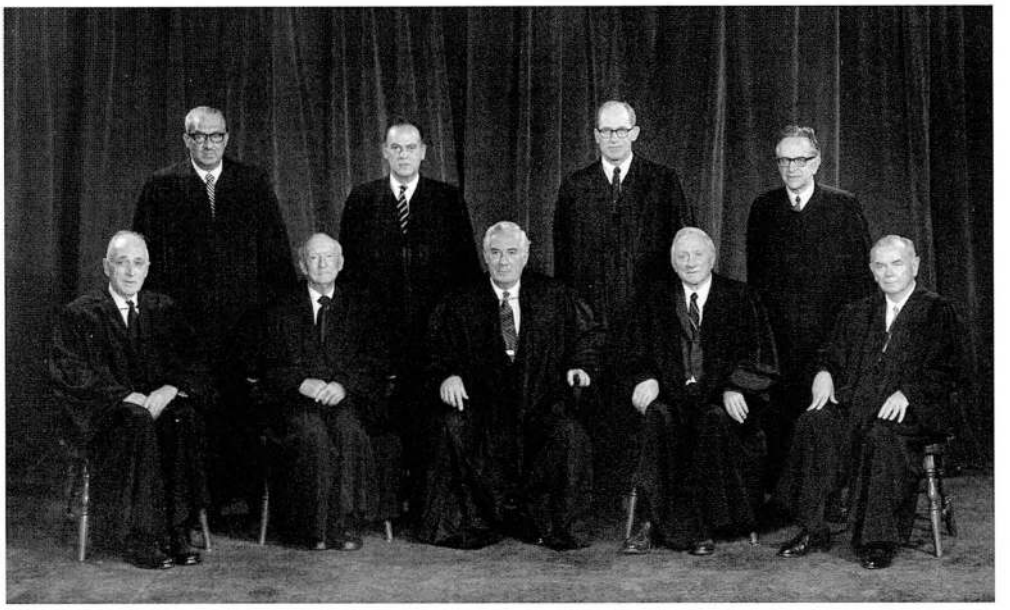
Pennsylvania Act at issue would "perpetuate the effect of racial segregation that's exemplified by the non-public school system."[51] Sustaining the Act would therefore nourish a "dual school system"—a "primarily affluent and suburban and White," private parochial school system and a "poor, inferior, practically custodial and Black" public school system.[52]

Despite having emphasized the discrimination inherent to dual school systems prior to *Lemon*, albeit in a southern context,[53] the Court considered none of the evidence provided by petitioners regarding religious private schools' role in promoting such a system in Pennsylvania. Instead of responding to appellants' request for discovery by remanding for further factfinding, the Court upheld the segregation claim's dismissal.[54] As the lower court had dismissed the claim for lack of standing, the Supreme Court lacked a factual record and only considered the Pennsylvania Act on its face.[55] The Act was neutral on its face.[56] In fact, Sections 2 and 4 of the Act emphasized religious schools' right to give preference in selecting for enrollment students of a particular faith if they do not discriminate based on "race, color, ancestry, or national origin."[57] The Court thus never considered appellants' predictions that maintaining the Act would diminish funds available for public schools, therein fueling white flight to private schools.[58]

Consequently, despite its awareness of *southern* parochial schools' role in furthering segregation, the *Lemon* Court largely ignored *northern* parochial schools' role in maintaining segregated school spaces. The Court thus failed to reckon with the full racial history of "school choice" programs after *Brown*, i.e., programs supporting parents in sending their children to schools other than traditional public schools.[59] Justice William J. Brennan and Justice Byron R. White expressed interest in the case's racial concerns. Brennan, when concurring, recognized as "plain error" the district court's holding that "appellants lacked standing" for their segregation claim.[60] Meanwhile, in dissent White added a "postscript" to his opinion, indicating that "if the evidence in any of these cases showed that any of the involved schools restricted entry on racial or religious grounds . . . the legislation would to that extent be unconstitutional."[61] Yet, in a footnote, the *Lemon* majority acknowledged it was unnecessary to reach the Equal Protection Clause claim put forward because "no plaintiff had standing to raise this claim," as "the complaint did not allege that the child of any plaintiff had been denied admission to any nonpublic school on racial or religious grounds."[62] Relatedly, in his concurrence, Justice Douglas reviewed Court precedent regarding tuition subsidies to avoid desegregation, without directly considering the facts underpinning *Lemon* in relation to such precedent.[63] This is no surprise, considering the political landscape of northern school segregation at the time.

The Political Landscape of *Lemon v. Kurtzman*'s Segregation Claim

Although *Brown* described school segregation as a nationwide issue,[64] northern federal courts pre-*Lemon* largely adopted northern white communities' view that *Brown* did not implicate northern de facto segregation.[65] When northern school boards received complaints for their maintenance of de facto segregation, they replied that children were assigned to schools in a race-neutral manner.[66] The Court recognized southern race-neutral districting plans could fail to achieve court-ordered desegregation in formerly de jure segregated schools, but they did not consider this in the North.[67] Northern school districts not under such court orders discovered they could hide illegal discrimination—and avoid court orders to desegregate—by describing segregation patterns in schools



The Supreme Court ruled that Pennsylvania's Nonpublic Elementary and Secondary Education Act was unconstitutional, violating the Establishment Clause. The act had allowed the Superintendent of Public Schools to reimburse private schools (mostly Catholic) for the salaries of teachers, textbooks, and instructional materials for secular subjects. Chief Justice Warren Burger (center) wrote the opinion; Justice Byron White (standing, second from left) dissented.

as the consequences of geographical residences and economics, separate from racial discrimination.[68]

Northern school districts thus adopted colorblindness as a defense, denying their role in any systemic promotion of racial inequality by positioning such inequality as existing for nonracial reasons.[69] The *Lemon* Court indicated its acceptance of this colorblind approach by choosing not to engage with the topic when Sawyer presented it during oral argument[70] and deciding not to remand *Lemon* to the lower court to consider the facts related to private schools' role in furthering Pennsylvania public school segregation.[71] Its ability to do so stemmed largely from a lack of northern precedent related to school desegregation. However, Pennsylvania private schools—much like schools across the North—actively maintained segregation while hiding behind colorblind defenses.[72]

Lacking Northern Precedent, Lacking Standing

Around the time of the *Lemon* litigation, most northern whites "dismissed any connection" between their schools and *Brown*.[73] Shortly after *Brown*, in 1957, the *New York Times* editors summarized many northern whites' views, which continued in the coming decades: "[T]he more subtle forms of segregation . . . create, *as if by accident*, a school almost wholly white, Puerto Rican or Negro in its student body."[74] Yet, the NAACP knew maintaining such segregation was no accident—practices like residential segregation preserved school segregation without schools requiring it, and schools maintaining white student bodies could position themselves as nondiscriminatory by distinguishing between "intentional and adventitious segregation."[75] That is, through a colorblind approach, northerners cast de facto segregated schools as constitutional because they

did not *actively* promote race-based segregation. Northern schools like those in Pennsylvania were hence segregated "de facto," but segregated nonetheless.

Such northern "colorblindness" contributed to the dismissal of *Lemon*'s segregation claim. The Eastern District of Pennsylvania claimed that no preceding cases supported Lemon as having Equal Protection Clause standing without *himself* being an object of a direct discriminatory practice.[76] Previous federal cases related to segregated private school systems stemmed from legislation perpetuating formerly "de jure," not de facto, segregation.[77] Before *Brown*, southern states typically intentionally segregated schools by law, creating systems of de jure segregation, which many states sought to maintain post-*Brown*.[78] Yet, in northern states like Pennsylvania, school segregation became illegal in the late nineteenth century.[79] Northerners could thus claim that, without a system of legalized segregation post-Reconstruction, their school enrollment policies were racially neutral, or colorblind, so school segregation stemmed from societal differences beyond government control, not racial discrimination.

Against this background, the district court (1) dismissed the *Lemon* organizational plaintiffs' standing entirely and (2) held individual taxpayers had standing for the First Amendment issues raised but not for the segregation claim.[80] This interpretation stemmed from *Flast v. Cohen*'s standing test, which asks whether a plaintiff has a "requisite personal stake" in a government spending program.[81] Under the two-part *Flast* test, taxpayers have to (1) establish a logical link between their status as taxpayers and the type of legislation they sought to strike down, and (2) show the challenged legislative enactment exceeded specific constitutional limitations.[82]

The district court loosely construed *Flast* standing requirements for individual plaintiffs' First Amendment claims. It concluded that plaintiff Lemon met both aspects of the *Flast* test as a taxpayer seeking standing under the First Amendment Religion Clauses. The First Amendment applies to state governmental powers[83]—thus, the exercise of state taxing and spending is limited by the First Amendment—and Lemon paid the specific tax financing the Education Act.[84] The other individual plaintiffs had standing as affected taxpayers for the First Amendment claims, even without paying the tax subsidizing parochial schools.[85]

Although individual taxpayers had First Amendment standing *without* paying the tax, paying this specific tax was insufficient for Lemon to have standing on equal protection grounds. The district court allowed individuals who did not pay to bring Establishment Clause claims because doing so "would require them to pay tax for the support of religion in violation of their rights of conscience."[86] Yet, the court held that a Black father lacked a "requisite personal stake" in parochial schools' contribution to segregation because, although parochial school aid furthering public school segregation would negatively impact his children, he had not alleged that "his particular children were refused admittance to a school receiving aid."[87] The court emphasized there was no case where an individual was allowed to challenge discriminatory practices "where he himself was not the object of such practice."[88] It refused to recognize that a Black father whose children experienced greater school segregation because of white flight to private schools had a personal stake in the Act's racial impact.[89]

The district court also neglected to acknowledge comparable southern precedent. In southern states, courts had not doubted standing for claims comparable to Lemon's. For example, when Black parents and their children, who attended public schools, challenged a Mississippi tuition grant statute supporting private schoolchildren, the district court found no standing problem.[90] It did not

matter that the Black families never alleged they themselves sought to enroll in the white private schools. The court invalidated the tuition grant program for "tend[ing] in a determinative degree to perpetuate segregation."[91] In this case, some of the state-funded private schools explicitly would not allow Black children to attend.[92] However, like the Pennsylvania parochial schools at issue in *Lemon*, some were segregated despite a lack of overt policies requiring segregation.[93]

In deciding *Lemon*, the Eastern District of Pennsylvania court never cited this precedent—perhaps because, as all but one private school began operation in the same year relevant public schools desegregated,[94] the Mississippi schools' desegregation resistance efforts were more obvious than that of the Pennsylvania parochial schools. School segregation ran rampant in both regions, but Pennsylvania districts could more easily claim their segregation stemmed from nonracial factors.

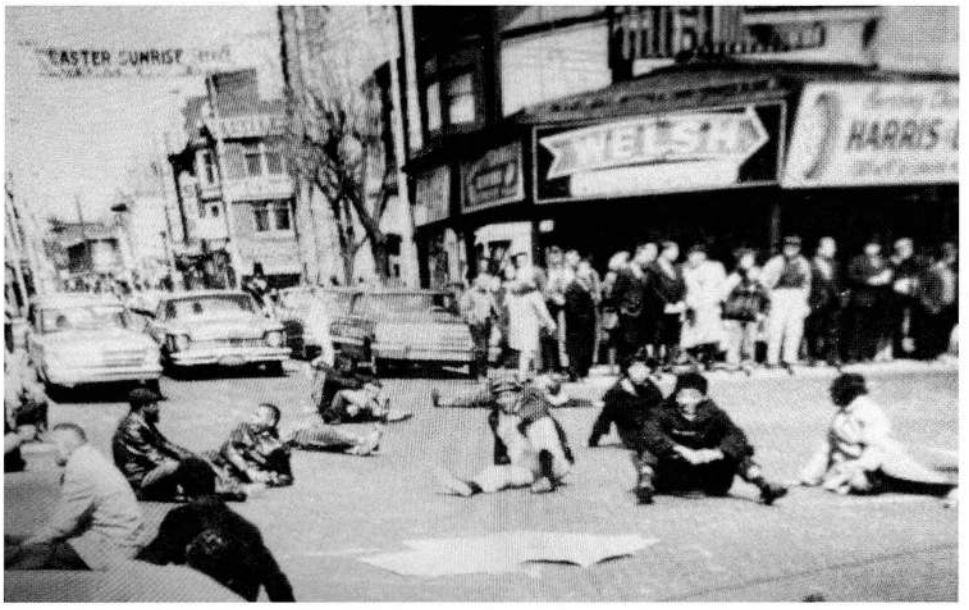
Segregation's Colorblind Defenses: Considering Pennsylvania

Before adopting colorblind defenses to maintain segregation, many Pennsylvania schools resisted desegregation between Reconstruction and *Brown*. Although the Pennsylvania state legislature passed a school anti-segregation statute in 1881, local school boards maintained segregationist sentiments and violated the statute.[95] For example, days after Pennsylvania statutorily abolished school segregation post-Reconstruction, the Philadelphia Board of Education chose to maintain officially segregated schools;[96] Black children in Philadelphia were turned away from white schools when they tried to enroll.[97] Smaller Pennsylvania communities, such as Lancaster, similarly violated state law by maintaining segregated schools.[98]

As the North's Black population swelled during the Great Migration, northern school segregation increased.[99] Small eastern Pennsylvania towns commonly established segregated schools from the 1910s through the 1930s.[100] Some districts used geographic school assignments as a guise for following Pennsylvania's anti-segregation statute.[101] However, white children living in Black school districts were assigned to the closest white school, and vice versa.[102] In 1926, the Philadelphia school superintendent even stated that if a given school had a predominant "colored" presence, it would be "wise to transfer all of the white students and faculty members and install a colored faculty."[103] Lawsuits sought to enforce the nineteenth-century school anti-segregation legislation,[104] but several Pennsylvania school districts still maintained officially segregated schools by the time *Brown* deconstitutionalized such segregation.[105]

Pennsylvania Catholic schools actively resisted integration requirements pre-*Brown* despite formal anti-segregation policies. For example, in 1932, the Archdiocese of Philadelphia ordered parish schools to admit Black schoolchildren seeking enrollment.[106] In response, some pastors sought to evade the order, and prelates often varied in their support for integration.[107] Typically, parish school desegregation came only with appointing a new ordinary.[108]

Even post-*Brown*, some Pennsylvania public schools, like many southern schools, actively preserved their own racial separation.[109] Pennsylvania state courts were unsuccessful in ending such segregation.[110] Chester, Pennsylvania offers a prime example of segregative public school actions. After facing litigation threats, school authorities in Chester redrew racially gerrymandered school district lines following *Brown*, thus reducing racially motivated student transfers in the fall of 1954.[111] A decade later, the Pennsylvania Human Relations Commission (PHRC), an entity empowered to stop school boards from maintaining racially imbalanced schools,[112] found the Chester School Board still organized schools



In April 1964, civil rights demonstrators protested de facto segregated public schools in Chester, PA. Since *Brown*, the Chester school board had been racially gerrymandering schools, a gap that was amplified by parochial school segregation.

based on racially gerrymandered attendance lines.[113] Parochial school segregation only amplified these problems.

Post-*Brown*, some church–state scholars expected parochial schools to be more socially, economically, racially, and ethnically diverse than public schools, as children would not be districted based on residential segregation.[114] Yet, this was not the case. Only 0.016% of non-Black Catholic elementary school students and 0.11% of non-Black Catholic secondary school students were exposed to Black students in New England in 1970—making New England the region with the lowest interracial exposure rate in Catholic schools nationwide.[115] Catholic school leaders in Pennsylvania, much like public school leaders in Pennsylvania, largely evaded integration, despite orders from a governing body to end segregation.[116]

In 1966, Richard Dilworth, president of the Philadelphia School Board and former city mayor, recognized Catholic school policies could "compound" racial injustice.[117] He predicted that, in the next twenty to twenty-five years, big cities "may find themselves with public school systems almost entirely non-white, and parochial and private school systems at least 90 per cent white."[118] At the time, 40% of Philadelphia's total school population already attended private and parochial schools, resulting in 57% of the public school population being non-white, while the city-wide non-white population was only 30%.[119] In other areas of Pennsylvania, racial differences between public and parochial schools were even greater.[120]

Residential segregation fueled the de facto school segregation noted by Dilworth.[121] Although the Court invalidated racially restrictive covenants in 1948,[122] many northern communities defied this judgment.[123] The Federal Housing Authority encouraged the use of racially restrictive covenants until 1950, so most insured homes were in white suburbs.[124] Furthermore, real estate agents conducted business in a manner that reinforced northern neighborhoods' existing racial homogeneity.[125] After *Brown*, many white families moved to the suburbs to

avoid school integration.[126] Thus, these parents could defend their children's segregated schools by claiming that their children attended primarily white schools because they lived in predominantly white neighborhoods, while ignoring the underlying racial discrimination of such residential segregation.

Northern Catholic communities, the communities that primarily benefited from the act at issue in *Lemon*,[127] contributed to such residential segregation. The white Catholic urban North largely supported African-American workplace integration but resisted neighborhood integration.[128] Priests encouraged northern white working-class urban Catholics to purchase homes within their local parish, the center of community life.[129] In 1945, the Archdiocese of Philadelphia announced that, beginning on January 1, 1946, Black Catholics could join the territorial parish in which they lived.[130] This facially meant they would no longer be restricted to segregated Black parishes.[131] While most pastors generally observed this order, many white parishioners and some local priests opposed it, commonly making territorial parishes unwelcoming for Black Catholics.[132]

Thus, unsurprisingly, while *Brown* contributed to the end of de jure school segregation in Pennsylvania,[133] de facto racial separation largely remained.[134] In fact, racial school separation increased in the North after states abolished racially based school assignments in the 1940s and early 1950s.[135] In Pittsburgh, for example, from 1945 to 1965 the percentage of Black schoolchildren enrolled in predominantly Black schools increased from 45% to 67% at the elementary level and from 23% to 58% at the secondary level.[136] By 1980, nine years after *Lemon*, minority students composed at least two-thirds, usually more, of the student body in each big-city school district in America. The North had the highest degree of racial separation, and Pennsylvania was among the five states with the highest percentage of Black students attending predominantly Black schools.[137]

Catholic parishioners defended racial imbalance in parochial schools using colorblind factors. For example, in 1969, Philip Jacobson, a prominent writer on church–state topics, stated that parochial schools, despite being barred from federal funds under Title VI of the Civil Rights Act if they were to discriminate based on race, "will nevertheless maintain largely white enrollments" because of non-racially discriminatory factors.[138] He posited three colorblind factors including private schools' (1) denominational appeal, (2) economic cost for attendance, and (3) selectivity.[139]

The first factor, private schools' denominational appeal, overlooked Pennsylvania's Black Catholic community. This population grew during the Haitian revolution (1791–1804), when many refugees immigrated to Philadelphia,[140] and again during the Great Migration.[141] Northern Black Catholics had shown an appreciation for Catholic schooling since at least 1889, when the First Colored Catholic Congress met in Philadelphia and lauded Catholic schools' distinctive value in providing children with a religious education.[142] Following the Great Migration, parochial schools contributed to Black Protestants converting to Catholicism.[143] During *Lemon*'s appeal to the Supreme Court, the Catholic parochial school system, though segregated, had a larger percentage of Black pupils than non-Catholic religious schools did.[144] In the Philadelphia Archdiocesan schools, the only Pennsylvania Catholic school system with racially aggregated data for Black and white students available during the *Lemon* litigation, over half of the schools had no Black students, while fifteen schools were entirely Black.[145] A substantial number of the remaining Black students in Philadelphia's parochial school system were in three schools where the student population was more than 58% Black.[146] Thus, Black families

appeared to value private schools' religious opportunities.

The second factor, economic cost of private school attendance, was symptomatic of and a mask for racially based discrimination. Based on historic differences in job opportunities and generational wealth, Black families have typically had less financial means than white families, making the cost of funding a child's private schooling less attainable.[147] In 1969, around when *Lemon*'s litigation began, only 2% of Black elementary schoolchildren lived in families whose incomes were in the top 10% of national income distribution among families with children attending elementary school.[148] No 1960s studies probed Black–white private school enrollment rates. Nevertheless, a review of 1979 U.S. Census Bureau data revealed that, less than a decade after *Lemon*, income differences could not account for total racial imbalance in private schools.[149] Thus, it seems economic cost alone did not bar Black students from parochial schools.

The third factor, school selectivity, also masked racial discrimination. For example, Jacobson argued that parochial schools were often primarily white because they could be more selective, enrolling students "on the basis of high academic quality and to exclude the emotionally disturbed, the troublemakers, those with a high rate of failure or a high dropout rate."[150] Such a description promotes a biased view of Black students by assuming they are less intellectually and social-emotionally capable of academic success than their white counterparts.

Economic theory further offered a nonracial defense for government-funded school vouchers supporting segregated private schools. Such vouchers, as economist Milton Friedman described in 1955, would allow parents to ensure their children received the best education possible, by making private schools compete for enrollment, therein striving to efficiently meet consumer demands.[151] Friedman acknowledged this could create "exclusively white schools, exclusively colored schools, and mixed schools" but described this as merely a symptom of efficient consumerism, not racism.[152] This idea of "choice," in neighborhoods and schools allowed white parents fleeing to predominantly white suburbs post-*Brown*—where schools would reflect the white neighborhood population—to act as if economic choice, not prejudice, underpinned their communities' segregation.[153]

Choosing religious education, a Court-sanctioned right for parents, rooted in liberty and privacy interests,[154] itself became a nonracial defense for parents seeking to avoid school integration.[155] Four years after *Lemon*, prominent church–state separationist Leo Pfeffer, who argued before the Court for *Lemon*'s Rhode Island petitioners and shared Establishment Clause arguments with the Pennsylvania petitioners,[156] stated: "[M]any parents are withdrawing their children from public schools and sending them to parochial schools, not so that they may better pursue God but more effectively avoid racial integration."[157] Pfeffer emphasized parents could conceal their racism by describing their interest in private schools as "an aversion to inferior and unsafe schools,"[158] later explaining parents expected an "influx of blacks and Hispanic-American pupils in public schools" to lead to declining teaching standards and an increase in physical violence.[159] Parents could claim they sought to ensure their children's safety and that their children received the best schooling possible, without mentioning any underlying prejudice fueling their decision to promote segregated environments. They could champion their liberty interests at the expense of racially based equality.[160]

Conclusion

Some fifty years after *Lemon*, data indicate private schools contribute more to a school system's segregation patterns than traditional public schools, when compared

with traditional public schools of similar size and located in similar neighborhoods.[161] In neighborhoods with higher Black and Hispanic representation, private schools are equally likely to contribute to segregation when compared with traditional public schools.[162] Private schools in neighborhoods with lower Black and Hispanic representation are 30% more likely than traditional public schools to contribute to segregation.[163]

Religious schools remain a major proportion of private schools and are thus a driving force of the above statistics. In fall 2015, the most recent semester with data considered by the Department of Education, 5.8 million students were enrolled in private schools.[164] Of these students, 36% were enrolled in Catholic schools, 13% in conservative Christian schools, 10% in affiliated religious schools, 16% in unaffiliated religious schools, and only 24% in nonreligious schools.[165] Contributing to public school segregation, 69% of private schoolchildren were white, and white schoolchildren comprised the largest portion of the student body across all private school categories: Catholic (66%), conservative Christian (70%), affiliated religious (76%), unaffiliated religious (74%), and nonreligious (65%).[166]

Private religious schools, even if government-funded, have more opportunities to discriminate than public schools. They can, for example, avoid Title IX nondiscrimination rules and turn students away based on their disabilities.[167] Private schools seeking tax-exempt status cannot explicitly discriminate based on race,[168] as Title VI dictates private schools accepting federal funds cannot discriminate based on race, color, or national origin.[169] However, private religious schools can put forward toothless nondiscrimination policies, therein maintaining all-white environments *and* tax-exempt status.[170]

Further, private religious schools continue to mask racial discrimination through colorblind methods.[171] For example, parochial schools have removed Black voucher students funded through Florida's Tax Credit Scholarship Program because their hair, worn in styles traditional to Black or Latinx children, violated the dress code.[172] Silent on race, such facially neutral dress codes allow schools to maintain tax-exempt status while disproportionately affecting minority students. Even if schools become quasi-public actors through using government aid, plaintiffs have no private right to disparate impact litigation—i.e., litigation based on a claim that racial disparity results from a facially neutral practice.[173] Thus, without policy change, if private schools maintain "colorblind" policies, they can receive government aid *and* discriminate without consequence.

More than fifty years after dismissing *Lemon*'s segregation claim, the Court has yet to grapple with segregated northern private schools' effects on the public sphere. Understanding such racial history could provide insights into how the Court's current decisions might affect the daily lives of schoolchildren nationwide.

Author's Note: I would like to thank Professor Micah J. Schwartzman, Professor Martha Minow, Professor Leah Litman, Professor Justin Driver, Professor Steven K. Green, Professor Joshua Weishart, Professor Benjamin Justice, Dean Erwin Chemerinsky, Scott Harman-Heath, Dave Roberts, and Kayla Steinberg for the support they provided in the drafting of this article. Thank you, also, to Professor Kimberly J. Robinson and Professor A.E. Dick Howard for further encouraging the relevance of the argument in legal scholarship today.

Catherine Ward, J.D., University of Virginia School of Law.

ENDNOTES

[1] 403 U.S. 602 (1971).

[2] Brief for Appellants at 47–57, *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (No. 89) [hereinafter Appellants' Brief].

[3] *E.g.*, Leah Litman, *How the Court Inverted Constitutional Protections Against Discrimination*, ATL. (Oct. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/10/how-court-inverted-constitutional-protections-against-discrimination/616911//.

[4] *Ibid.*

[5] 403 U.S. at 609–10.

[6] Although Professor Douglas Laycock has touched on the topic in a three-paragraph summary, much remains to be unpacked. Douglas Laycock, *Why the Supreme Court Changed Its Mind About Government Aid to Religious Institutions: It's a Lot More than Just Republican Appointments*, 2008 BYU L. REV. 275, 285–86 (2008).

[7] Adam Liptak, *Alton T. Lemon, Who Challenged State Aid to Religious Schools, Dies at 84*, N.Y. TIMES (May 25, 2013), https://www.nytimes.com/2013/05/25/us/alton-t-lemon-civil-rights-activist-dies-at-84.html.

[8] *Lemon v. Kurtzman*, 310 F. Supp. 35, 42–43 (E.D. Pa. 1971).

[9] Appellants' Brief, at 49–54.

[10] *Ibid.*

[11] 403 U.S. at 611 n.5.

[12] *Ibid.*

[13] 403 U.S. at 611 n.5; *id.* 632, 632 n.17 (Douglas, J., concurring); *id.* 642 (Marshall, J., recusing himself, likely because of Pennsylvania NAACP involvement); *id.* 644 n.1 (Brennan, J., concurring); *id.* 671 n.2 (White, J., dissenting). The Court affirmed its first busing order to desegregate schools in the same term *Lemon* was decided. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 29–31 (1971).

[14] Laycock, *Why the Supreme Court Changed Its Mind*, 285–86.

[15] 403 U.S. at 612–13.

[16] *Ibid.*

[17] The litigants posited this claim in their initial complaint as one of two racially based charges under the Equal Protection Clause. Appendix at A13, *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (No. 89) (1971) [hereinafter Lemon Appendix]; *see also* Appellants' Brief, *supra* note 3, at 47. Various amicus briefs for both parties also highlighted the claim. *E.g.*, Brief of Am. Jewish Comm., et al. as Amici Curiae at 31–45, Lemon, 403 U.S. 602 (1971) (no. 89), 1970 WL 116840; Brief of City of Philadelphia as Amicus Curiae at 39–41, Lemon, 403 U.S. 602 (1971) (No. 89), 1970 WL 116841.

[18] Appellants' Brief, 48; *Lemon v. Kurtzman*, 310 F. Supp. 35, 42–43 (E.D. Pa. 1969).

[19] 403 U.S. at 611 n.5.

[20] *E.g.*, John C. Jeffries, Jr. & James E. Ryan, *The Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 282-83 (2001); STEVE SUITTS, OVERTURNING BROWN: THE SEGREGATIONIST LEGACY OF THE MODERN SCHOOL CHOICE MOVEMENT 68–71 (2020); Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814, 823–24 (2011). By the late 1970s, fundamentalist Protestant educators eschewed government aid for religious schools to resist government regulation, trying to block federal efforts to withdraw tax exemptions from Christian schools based on discrimination. Thomas C. Berg, *Anti-Catholicism and Modern Church–State Relations*, 33 LOY. U. CHI. L.J. 121, 161 (2002).

[21] *E.g.*, Jeffries & Ryan, *The Political History of the Establishment Clause*, 301–05. *Lemon* recognized refusing aid to parochial schools had previously centered on anti-Catholic nativism. 403 U.S. at 628–31.

[22] *Ibid.* 298; STEVEN K. GREEN, THE BIBLE, THE SCHOOL, AND THE CONSTITUTION: THE CLASH THAT SHAPED MODERN CHURCH–STATE DOCTRINE 17–18 (2012).

[23] *See ibid.* 35–44.

[24] *E.g.*, Jeffries & Ryan, *The Political History of the Establishment Clause*, 281–82; Chris Ford et al., *The Racist Origins of Private School Vouchers*, CTR. FOR AM. PROGRESS (July 12, 2017), https://www.americanprogress.org/issues/education-k-12/reports/2017/07/12/435629/racist-origins-private-school-vouchers/.

[25] Federal researchers in President Nixon's Task Force on Education explicitly recognized white parents used religious private schools to "avoid the consequences of integration." 115 CONG. REC. H1660 (Mar. 12, 1969). The Task Force appeared to focus on southern schools, describing that, the more government-funded vouchers for private religious schools became public policy, "the greater the danger of undermining integration efforts *in those states* where substantial numbers of parents have sought to avoid the consequences of integration . . . ." *Ibid.* (emphasis added).

[26] *Griffin v. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218 (1964).

[27] *Poindexter v. La. Fin. Assistance Comm'n*, 389 U.S. 571 (1968); *Hall v. St. Helena Parish Sch. Bd.*, 368 U.S. 515 (1962).

[28] *E.g.*, *Wallace v. United States*, 389 U.S. 215 (1967).

[29] *Brown v. South Carolina State Bd.*, 393 U.S. 222 (1968).

[30] *Faubus v. Aaron*, 361 U.S. 197 (1959).

[31] *Coffey v. State Educ. Fin. Comm'n*, 296 F. Supp. 1389 (1969).

[32] Justice Douglas recognized this in *Lemon*. 403 U.S. 602, 632, 632 n.17 (1971) (Douglas, J., concurring). Lower federal courts invalidated such programs in North Carolina and Virginia. *Hawkins v. N.C. State Bd. of Educ., 11 Race Relations L. Rep.* 745 (W.D.N.C. 1966); *Pettaway v. Cnty. Sch. Bd.*, 339 F.2d 486 (4th Cir. 1964). In Georgia, such a program ended before a court ruling. STEVE SUITTS, OVERTURNING BROWN, 49.

[33] *Cooper v. Aaron*, 358 U.S. 1, 78 (1958); *see also* 267 F. Supp. at 475–76.

[34] *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 439–42 (1968).

[35] *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971).

[36] SUITTS, OVERTURNING BROWN, 61.

[37] *Green v. Kennedy*, 309 F. Supp. 1127, 1130 (D.D.C. 1970), *aff'd sub nom*, Cannon v. Green, 398 U.S. 956 (1970); Eileen Shanahan, *Private Schools That Bar Blacks to Lose Tax Aid*, N.Y. TIMES, 1 (July 11, 1970).

[38] *Green v. Connally*, 330 F. Supp. 1150 (1971), *aff'd sub nom*, *Coit v. Green*, 404 U.S. 997 (1971).

[39] Rev. Rul. 71-447, 1971–2 C.B. 202.

[40] SUITTS, OVERTURNING BROWN, 62–63 (the IRS revoked tax exemptions for only around 110 private schools in the 1970s); Charles R. Babcock, *School Tax Status: Old Issue Was Heated Up by Courts in 1978*, WASH. POST (Jan. 25, 1982), https://www.washingtonpost.com/archive/politics/1982/01/25/school-tax-status-old-issue-was-heated-up-by-courts-in-1978/195023fa-d9b2-42a9-8ce3-43dd6e37b3d5/.

[41] Lemon Appendix, at A10–11; *see also* Oral Argument at 27:35, *Lemon*, 403 U.S. 602 (1971), https://www.oyez.org/cases/1970/89 [hereinafter Lemon Oral Argument].

[42] *Ibid.* 27:45; Appellants' Brief, 47–48, 54–57; *see also Cooper v. Aaron*, 358 U.S. 1, 19 (1958) ("State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws."); *Reitman v. Mulkey*, 387 U.S. 369, 375 (1966) (positing that "significant" government involvement becomes state action); *Poindexter v. Louisiana Fin. Assistance Comm'n*, 275 F. Supp. 833, 854 (1967), *aff'd* 389 U.S. 571 (1968) (per curiam) ("The criterion is whether the state is so *significantly* involved in the private discrimination as to render state action and the private action violative of the equal protection clause.").

[43] 403 U.S. at 621–22, 625; *see also ibid.* 632 (Douglas, J., concurring) ("Where the governmental activity is the financing of the private school, the various limitations or restraints imposed by the Constitution on state governments come into play.").

[44] Lemon Oral Argument, 27:50.

[45] Lemon Appendix, A10; *see also, e.g.*, Carmel Martin et al., *Lessons from State School Finance Inform a New Federal Right to Equal Access to a High-Quality Education*, *in* A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 291–93 (Kimberly J. Robinson ed., 2019) (explaining funding matters for educational quality).

[46] Lemon Appendix, A10. The district court "assume[d] for the purpose of deciding this aspect of the standing issue that these alleged facts could be proved at a hearing on the merits." 310 F. Supp. at 42.

[47] Appellants' Brief, 48–54.

[48] *Ibid.* 51.

[49] *Id.*

[50] *Id.* 50 ("The Philadelphia Archdiocesan schools have more white students than the public schools. However, if the figures are taken for the greater Philadelphia area which comprises the Archdiocesan School System . . . this percentage would drop precipitously, since for all practical purposes, Catholic schools in these counties have no Negro enrollment.").

[51] Lemon Oral Argument, at 8:37.

[52] *Ibid.* 9:07.

[53] *E.g.*, *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 438–39 (1968); *Alexander v. Holmes Cnty. Bd. of Educ.*, 396 U.S. 19, 20 (1969).

[54] *Lemon v. Kurtzman*, 403 U.S. 602, 611 n.5 (1971).

[55] *Ibid.* 644 n.1 (Brennan, J., concurring); *id.* 670–71 (White, J., dissenting).

[56] Unlike *Norwood v. Harrison*, decided two years earlier, no schools receiving funds from the Pennsylvania Act declined to attest they had a racially nondiscriminatory admissions policy. 413 U.S. 455, 462–63 (1969) ("[A] State's special interest in elevating the quality of education in both public and private schools does not mean that the State must grant aid to private schools without regard to constitutionally mandated standards forbidding state-supported discrimination.").

[57] Lemon Appendix, A74 (A.G.'s Suppl. Mem.).

[58] Appellants' Brief, 51–53.

[59] Modern normative arguments regarding school choice programs and segregation are outside the scope of this article. For consideration of such arguments, *see, e.g.*, Joshua Weishart, *Separate But Free*, 73 FLA. L. REV. 1139 (2022); Derek W. Black, *Preferencing Educational Choice: The Constitutional Limits*, 103 CORNELL L. REV. 1359 (2018); *see also, e.g.*, Benjamin Justice, *The Originalist Case Against Vouchers: The First Amendment, Religion, and American Public Education*, 26 STAN. L.& POL'Y REV. 437 (2015) (discussing, rather than segregative impact of school choice, the questionable historical support for the constitutionality of such educational opportunities in relation to religious schools).

[60] *Lemon v. Kurtzman*, 403 U.S. 602, 644 n.1 (1971) (Brennan, J., concurring).

[61] *Ibid.* 671 n. 2 (White, J., dissenting).

[62] *Id.* 611 n. 5.

[63] *Id.* 632, 632 n.17 (Douglas, J., concurring).

[64] *Brown v. Bd. of Educ.*, 347 U.S. 483, 491 n.6 (1954) ("[S]uch segregation has long been a nationwide problem . . . .").

[65] JASON SOKOL, ALL EYES ARE UPON US: RACE AND POLITICS FROM BOSTON TO BROOKLYN 100 (2014); MATTHEW F. DELMONT, WHY BUSING FAILED: RACE, MEDIA, AND THE NATIONAL RESISTANCE TO SCHOOL DESEGREGATION 22–23 (2016) (describing challenges faced

in leading NAACP efforts to challenge northern school segregation); *Barksdale v. Springfield Sch. Comm.*, 348 F.2d 261, 266 (1st Cir. 1965) (overturning a decision requiring desegregation of de facto schools). *But see Taylor v. Bd. of Educ.*, 294 F.2d 36, 45–47 (2d Cir. 1961), *cert. denied* 360 U.S. 940 (1961) (affirming that gerrymandered district lines in a northern school district prompted the need for a desegregation plan). The Court did not identify northern school segregation as such until 1973, after *Lemon. Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208–09 (1973); *see also* LEO PFEFFER, GOD, CAESAR, AND THE CONSTITUTION 254 (1975) [hereinafter GOD, CAESAR (describing that the *Keyes* Court ruled the line between de jure and de facto segregation was quite indistinct); *see also* Robert L. Carter, *De Facto School Segregation: An Examination of the Legal and Constitutional Questions Presented*, 16 W. RSRV. L. REV. 502, 517 (1965) ("If, in [a de jure or de facto segregation] case, however, a denial of equal educational opportunity ensues, the method pursuant to which that unconstitutional result is reached would appear to be unimportant.").

[66] SOKOL, ALL EYES ARE UPON US,77.

[67] *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971).

[68] SOKOL, ALL EYES ARE UPON US, 73.

[69] *Ibid.*; DELMONT, WHY BUSING FAILED, 20-23; Brian Purnell & Jeanne Theoharis, *Introduction: Histories of Racism and Resistance, Seen and Unseen: How and Why to Think about the Jim Crow North*, *in* THE STRANGE CAREERS OF THE JIM CROW NORTH: SEGREGATION OUTSIDE OF THE SOUTH 7 (Brian Purnell & Jeanne Theoharis, with Komozi Woodard eds., 2019).

[70] Lemon Oral Argument, at 00:50–31:23.

[71] Three years after *Lemon*, when striking down an attempt to desegregate northern schools through interdistrict busing, the Court formally accepted northern colorblind defenses. *Milliken v. Bradley*, 418 U.S. 717, 745, 752–53 (1974). A northern suburban district could argue their district lines, unlike those of the South, had been drawn without malice; the Court thus held that since the suburbs were not actively hurting Detroit's students, they could not be forced to help them, either. *Ibid.* 744–47. Instead of extending its 1969 demand in Mississippi that "every school district is to terminate dual school systems at once," *Milliken* protected the parental choice of fleeing to the suburbs to avoid integrated schools, although such parental choice maintained segregation. *Alexander v. Holmes Cnty. Bd. of Educ.*, 396 U.S. 19, 29 (1969); Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1092–93 (2014).

[72] For a discussion of the problem with such a colorblind approach, *see, e.g.*, Justin Driver, *Recognizing Race*, 112 COLUM. L. REV. 404, 457 (2012) (describing courts must approach racial matters with nuance, reflection, and explanation, a practice not common historically).

[73] SOKOL, ALL EYES ARE UPON US, 71. The Court did not rule on a school case outside the South until 1973, after *Lemon. Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208–09 (1973).

[74] *Beam in Our Own Eye*, N.Y. TIMES (Jan. 21, 1957), 24 (emphasis added).

[75] *E.g.*, SOKOL, ALL EYES ARE UPON US, 71.

[76] *Lemon v. Kurtzman*, 310 F. Supp. 35, 43 (1969); *id.* 53 (Hastie dissenting) (indicating even the dissenting judge believed there was no Equal Protection Clause standing).

[77] Appellants' Brief, 54–55.

[78] *E.g.*, Jeffries & Ryan, *The Political History of the Establishment Clause*, 281–82; Erica Frankenberg & Kendra Taylor, *De Facto Segregation: Tracing a Legal Basis for Contemporary Inequality*, 47 J.L. & EDUC. 189, 193–95 (2018); 2 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 893 (1974).

[79] DAVISON M. DOUGLAS, JIM CROW MOVES NORTH: THE BATTLE OVER NORTHERN SCHOOL SEGREGATION, 1865–1954, at 79–80, 94, 100–01 (2005); ROGER LANE, WILLIAM DORSEY'S PHILADELPHIA & OURS 154 (1991).

[80] *Lemon v. Kurtzman*, 310 F. Supp. 35, 41 (1969).

[81] *Ibid.* 42–43; *Flast v. Cohen*, 392 U.S. 83, 103, 105–06 (1968).

[82] *Ibid.* 102–03. In *Flast*, taxpayers satisfied both elements because they alleged the federal government was exceeding congressional taxing and spending powers at the First Amendment's expense. *Id.* 103.

[83] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[84] 310 F. Supp. at 42–43.

[85] *Ibid.*

[86] *Id.* 42.

[87] *Id.* 42–43.

[88] *Id.*; *see also* Gary Orfield, Plessy *Parallels: Back to Traditional Assumptions*, *in* GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION 58 (1996) (describing desegregation enforcement as mainly in the South).

[89] For cases later cabining *Flast*, *see, e.g.*, *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464 (1982); *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007). Thirteen years after *Lemon*, in *Allen v. Wright* the Court emphasized respondents' claim of injury as to their children's diminished ability to receive an education in a racially integrated school because of federal tax exemptions granted to some racially discriminatory private schools was a judicially cognizable injury. *Allen v. Wright*, 468 U.S. 737, 756–60 (1984). Yet, the Court ultimately decided the injury was not traceable to the government conduct challenged as unlawful. *Ibid.* Based on this injury being viewed as concrete and particular in *Allen*,

although under a different standing test than in *Flast*, it becomes even more illogical for the *Lemon* Court to have found Lemon lacked a personal stake in the segregation claim. After all, in *Allen* the parents similarly had not experienced their children's rejection from discriminatory private schools. 468 U.S. at 762–64.

[90] *Coffey, et al. v. State Educ. Fin. Comm.*, 296 F. Supp. 1389 (1969); Appellants' Brief, 48 n.20.

[91] 296 F. Supp. at 1392 (quoting *Griffin v. State Bd. of Educ.*, 239 F. Supp. 560, 565 (E.D. Va. 1965)); *see also Lee v. Macon Cnty. Bd. of Educ.*, 231 F. Supp. 743, 754 (M.D. Ala. 1964) (describing tuition grant programs as "unconstitutional where they are designed to further or have the effect of furthering said segregation in the public schools"); *Poindexter v. Louisiana Fin. Assistance Comm'n*, 275 F. Supp. 833, 845 (1967), *aff'd* 389 U.S. 571 (1968) (per curiam) ("The inevitable effect of the tuition grants was the establishment and maintenance of a state-supported system of segregated schools for white children, making the state a party to organized private discrimination.").

[92] 296 F. Supp. at 1392.

[93] *Ibid.*

[94] *Id.*; *Lemon v. Kurtzman*, 310 F. Supp. 35, 42 (E.D. Pa. 1969).

[95] Douglas, Jim Crow Moves North 79-80, 94, 100-01; Roger Lane, William Dorsey's Philadelphia & Ours 154.

[96] Douglas, Jim Crow Moves North, 100–01.

[97] 2 W.E.B. DuBois, The Philadelphia Negro (The Oxford W.E.B. DuBois) 63 (Henry Louis Gates, Jr. ed., 1st ed. 2014) ("[The 1881] enactment was for some time evaded, and even now some discrimination is practiced quietly in the matter of admission and transfers.").

[98] Douglas, Jim Crow Moves North, 00–01.

[99] *Ibid.* 140–41.

[100] *Id.*

[101] *Id.* 142.

[102] *Id.* In Philadelphia, while elementary schools were segregated, high schools were integrated; other Pennsylvania communities maintained segregation across schooling levels. *Id.* 149.

[103] *Id.* 142–43, 143 n.39.

[104] W.E.B. Du Bois blamed the Philadelphia NAACP for failing to resist Philadelphia school segregation. W.E.B. Du Bois, *Postscript*, The Crisis 53 (Feb. 1934).

[105] Douglas, Jim Crow Moves North, 261 (describing official segregation plans in York and Chester).

[106] Mark Newman, Desegregating Dixie: The Catholic Church in the South and Desegregation, 1945–1992, at 205–07 (2018).

[107] *Ibid.* 205.

[108] *Id.*

[109] *Id.* 272.

[110] *Id.*

[111] *Id.*

[112] Stephen Kotok et al., Is Opportunity Knocking or Slipping Away? Racial Diversity and Segregation in Pennsylvania, The C.R. Project 1 (2015). In 1961, Pennsylvania empowered the PHRC to stop school boards' maintenance of racially imbalanced schools. Pennsylvania Fair Educational Opportunities Act, No. 341, 1961 Pa. Laws 776 (codified as amended at 24 Pa. Stat. Ann. §§ 5001–10 (West 2016)); *Penn. Human Relations Comm'n v. Chester Sch. Dist.*, 427 Pa. 157, 166 (1967) (describing the PHRC's authority to act against de facto segregation).

[113] Douglas, Jim Crow Moves North, 272. The PHRC never addressed segregation in Philadelphia, the state's "great center of minority enrollment and population," and while the state supreme court held educational remedies were necessary in segregated schools, significant desegregation never resulted. Kotok et al., Is Opportunity Knocking or Slipping Away?, vi.; *Sch. Dist. of Philadelphia v. Penn. Human Relations Comm'n* 6 Pa. Commw. 281, 287–88 (1972) (explaining metropolitan areas like Philadelphia could only practically integrate if they could include surrounding suburban districts in their desegregation plans, which the Court soon foreclosed); *see, e.g.*, 427 Pa. at 165–66 ("Chester need abandon neighborhood schools but only that complete inaction under the circumstances of this case amounts to a denial of these advantages."); *Penn. Human Relations Comm'n v. Sch. Dist. of Philadelphia*, 480 Pa. 398, 403–10 (1978) (describing Philadelphia and Pittsburgh school segregation throughout the 1970s).

[114] Leo Pfeffer, Creeds in Competition: A Creative Force in American Culture 81 (1958). Shortly after *Brown*, Pfeffer even described Protestants, Catholics, and Jews as united in a shared "commit[ment] to effectuation of the decisions of the United States Supreme Court requiring racial integration in the public schools." *Id.* 133.

[115] Charles T. Clotfelter, After Brown: The Rise and Retreat of School Desegregation 106–07 (2004).

[116] Newman, Desegregating Dixie, 205–07, 272.

[117] *Ibid.*

[118] Philip Jacobson, *The Nonsectarian Public Parochial School*, The Christian Century 769, 771–72 (June 4, 1969).

[119] John M. Cronin, *Catholic Schools, Refuge for Whites?: Shared Time Urged to Prevent Unwanted Segregation in Parochial Schools*, Commonweal (Oct. 7, 1966).

[120] *Ibid.* ("Philadelphia, although high in non-public school enrollment, does not equal the percentage of Pittsburgh, for example, where 46 per cent of the

elementary school students attended non-public schools in 1960 and where three of the senior high schools in 1966 were predominantly Negro.").

[121] *See, e.g.*, Gary Orfield, *Segregated Housing and School Resegregation*, *in* ORFIELD & EATON, 303–30.

[122] *Shelley v. Kramer*, 334 U.S. 1, 19–23 (1948).

[123] DOUGLAS, JIM CROW MOVES NORTH, 267.

[124] *Ibid.* 268.

[125] *Id.* 267.

[126] *E.g.*, Chase M. Billingham, *Within-District Racial Segregation and the Elusiveness of White Student Return to Urban Public Schools*, 54 URB. EDUC. 151, 156 (2019).

[127] 403 U.S. 602, 610 (1971).

[128] NEWMAN, DESEGREGATING DIXIE, 211.

[129] *Ibid.*

[130] *Id.*

[131] *Id.* 207.

[132] *Id.* 207, 216.

[133] DOUGLAS, JIM CROW MOVES NORTH, 261, 265–66.

[134] *Ibid.*

[135] *Id.* 265.

[136] Laurence Glasco, *Double Burden: The Black Experience in Pittsburgh*, *in* CITY AT THE POINT: ESSAYS ON THE SOCIAL HISTORY OF PITTSBURGH 90 (Samuel P. Hays ed., 1989).

[137] DOUGLAS, JIM CROW MOVES NORTH, 266.

[138] Jacobson, *The Nonsectarian Public Parochial School*, 771.

[139] *Ibid.*771–72.

[140] *Black Catholics in Philadelphia and The Journal*, CATH. HIST. RSCH. CTR. OF THE ARCHDIOCESE OF PHILADELPHIA (Feb. 24, 2011), https://chrc-phila.org/black-catholics-in-philadelphia-and-the-journal/.

[141] *See, e.g.*, ALBERT J. RABOTEAU, CANAAN LAND: A RELIGIOUS HISTORY OF AFRICAN AMERICANS 92–93 (2001); MATTHEW J. CRESSLER, AUTHENTICALLY BLACK AND TRULY CATHOLIC: THE RISE OF BLACK CATHOLICISM IN THE GREAT MIGRATION 159–63 (2017).

[142] THREE CATHOLIC AFRO-AMERICAN CONGRESSES 68 (photo. reprt. 1978) (1893).

[143] RABOTEAU, CANAAN LAND, 92.

[144] Appellants' Brief, 49 ("[N]on-Catholic church-related schools are virtually 100% white.").

[145] *Ibid.* 49–50. Six percent of Philadelphian parochial schoolchildren were Black. *Id.* 49–50, 50 n.21.

[146] *Id.* 50.

[147] *E.g.*, Kriston McIntosh et al., *Examining the Black–white wealth gap*, BROOKINGS INST. (Feb. 27, 2020), https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/; Richard J. Murnane & Sean F. Reardon, *Long-Term Trends in Private School Enrollments by Family Income*, 4 AM. EDUC. RSCH. ASS'N 1, 5 (2018).

[148] *Ibid.*

[149] U.S. BUREAU OF THE CENSUS, PRIVATE SCHOOL ENROLLMENT, TUITION, AND ENROLLMENT TRENDS: OCTOBER 1979, CURRENT POPULATION REPORTS, SERIES P-23, No. 121, 7 (1982).

[150] Jacobson, *The Nonsectarian Public Parochial School*, 772.

[151] Milton Friedman, *The Role of Government in Education*, in ECONOMICS AND THE PUBLIC INTEREST 129 (Robert A. Solo ed., 1955).

[152] *Ibid.* 131 n.2.

[153] James Hardman, Jr., *Virginia on the Cusp of Change*, *in* HISTORIANS IN SERVICE OF A BETTER SOUTH 80 (Robert J. Norrell & Andrew H. Myers eds., 2017); *see also* Gary Orfield, *Turning Back to Segregation*, *in* ORFIELD & EATON, 9.

[154] *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (recognizing parents' rights to choose between private and public schools); *see also Wisconsin v. Yoder*, 406 U.S. 205, 233–36 (1972) (recognizing, shortly after *Lemon*, Amish plaintiff-parents' interests in controlling their children's education); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("The liberty interest . . . of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.").

[155] *See also* CLOTFELTER, AFTER BROWN, 114 (describing "religious content and practice" in private schools "[c]ast[s] further doubt on a simplistic racial motive for private school enrollment").

[156] Lemon Oral Argument, 1:44:48–2:12:10.

[157] GOD, CAESAR, 248; *see also* LEO PFEFFER, RELIGION, STATE AND THE BURGER COURT 16 (1984) [hereinafter RELIGION, STATE] ("[T]oo often parents are taking their children out of public schools or initially sending them to religious schools not so much that they fear God but that they fear blacks even more.").

[158] GOD, CAESAR, 244.

[159] RELIGION, STATE, 17.

[160] *See* James, *Opt-Out Education*, 1127–28. The right to religious equality is of less issue because "[t]he right to the equal protection of the laws is not denied when it is apparent that the same law or course of procedure is applicable to every other person in the State under similar circumstances and conditions." 268 U.S. at 529 (references omitted).

[161] TOMAS MONARREZ ET AL., WHEN IS A SCHOOL SEGREGATED?: MAKING SENSE OF SEGREGATION 65 YEARS AFTER BROWN V. BOARD OF EDUCATION 4, 14, 17, 19–20, URB. INST. (Sept. 2019), https://www.urban.org/sites/default/files/publication/101101/when_is_a_school_segregated_making_sense_of_segregation_65_years_after_brown_v._board_of_education_0.pdf. Data come from the 2015 National Center for Education Statistics' Common

Core of Data School Universe Survey, which presents all public schools' enrollment by race and ethnicity, and the 2015 Private School Universe Survey Data, which includes such data for 75% of U.S. private schools. *Ibid.* at 4, 14. *See also* Erwin Chemerinsky, *Remedying Separate and Unequal: Is It Possible to Create Equal Educational Opportunity?*, *in* THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY 254 (Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson, eds.) (2015) ("[D]isproportionately more white children than minority children attend private schools with more resources . . . .").

[162] TOMAS MONARREZ, WHEN IS A SCHOOL SEGREGATED?, vi.

[163] *Ibid.*

[164] NAT'L CTR. FOR EDUC. STAT., U.S., DEP'T OF EDUC., SCHOOL CHOICE IN THE UNITED STATES: 2019, at 11 (Sept. 2019), https://nces.ed.gov/pubs2019/2019106.pdf.

[165] *Ibid.* 30.

[166] *Id.* 21.

[167] Julia Donheiser, *Chalkbeat Explains: When Can Private Schools Discriminate Against Students?*, CHALKBEAT (Aug. 10, 2017), https://www.chalkbeat.org/2017/8/10/21107283/chalkbeat-explains-when-can-private-schools-discriminate-against-students.

[168] *E.g.*, *Green v. Kennedy*, 309 F. Supp. 1127, 1130 (D.D.C 1970), *aff'd sub nom.* Cannon v. Green, 398 U.S. 956 (1970); *Green v. Connally*, 330 F. Supp. 1150 (1971), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971); Rev. Rul. 71-447, 1971–2 C.B. 202.

[169] 42 U.S.C. § 2000d-1.

[170] SUITTS, OVERTURNING BROWN 62–63; Babcock, *School Tax Status*.

[171] *E.g.*, SUITTS, OVERTURNING BROWN 94.

[172] *E.g.*, Michelle Meredith, *Orange County Boy Turned Away From School Over Dreadlocks*, WESH2 (Aug. 14, 2018), https://www.wesh.com/article/student-sent-home-over-dreadlock-controversy/22719530#; BAYLISS FIDDIMAN & JESSICA YIN, THE DANGER PRIVATE SCHOOL VOUCHER PROGRAMS POSE TO CIVIL RIGHTS, CTR. FOR AM. PROGRESS (May 13, 2019), https://cdn.americanprogress.org/content/uploads/2019/05/10124230/Vouchers-and-Civil-Rights2.pdf?_ga=2.258647370.1183674250.1614972663-1588369712.1614805162.

[173] *Alexander v. Sandoval*, 532 U.S. 275, 285 (2001).

Justice Thurgood Marshall's Last Stand

Daniel Kiel

In the thirty years since he retired from public life in 1991, Thurgood Marshall has remained an inspiration to advocates of all sorts. Generations of aspiring lawyers, at home and abroad, have cited Marshall's work as the reason to pursue a career in law.[1] The exaltation of Marshall has transcended beyond the legal profession as his name graces schools, scholarship programs, libraries, and an airport in recognition of his public service transforming the national understanding of citizenship. Marshall's continued resonance results, in part, from the fact that the work of his career remains unfinished. The nation continues to confront both the broadest questions about building a citizenry within a diverse nation as well as narrower legal questions about individual rights and constitutional interpretation that animated Marshall's legal and judicial work. But for at least one person, the outcome Marshall argued for during his final Term on the Court was finally realized three decades later.

In 1991, Pervis Payne's fate rested in the hands of the Supreme Court. The justices considered whether Payne's death sentence should be vacated due to alleged constitutional violations at his trial. Though a majority decided against Payne, Justice Marshall used his final written opinion as a member of the Supreme Court, a dissent in *Payne v. Tennessee*,[2] to argue that Payne's sentence should be invalidated and to warn of the direction of the Court. In the years that followed, Payne and his lawyers continued to fight for his death sentence to be removed, either by proving his claimed innocence or by challenging his eligibility for execution.[3] In July 2021, Payne's attorney Kelley Henry stood in a trial court in Shelby County, Tennessee, advocating—as Marshall had thirty years prior—that Payne should be spared execution. By November, her work had succeeded. Using a newly-enacted state law, Henry presented evidence that Payne suffered from an intellectual disability and was thus constitutionally ineligible for the death penalty. And, after the state district attorney's office conducted an evaluation, the state announced its intention to remove

DOI: 10.1111/jsch.12300

Baltimore Boy Finishes Law

Thurgood Marshall, of Baltimore, was the only honor graduate of the Howard University Law School for the year 1933 being cum laude. He was graduated one of the eight out of the sixteen students of the class of 1933 who were graduated Friday at the school commencement. Mr. Marshall is a graduate of Lincoln University, the son of Mr. and Mrs. Wm. Marshall, and attended the Douglass High School of this city. His brother, Dr. W. Aubrey Marshall, is a practising physician here.

Thurgood Marshall

After graduating from Howard University School of Law in 1933, Thurgood Marshall developed a law practice challenging the convictions of Black defendants, particularly those sentenced to death. It was often the only work he could get.

Payne's death sentence.[4] "What a difference it makes to be able to wake up in the morning and not have to feel like you have to fight for your life," Henry told reporters after the sentence was officially removed.[5]

Thurgood Marshall would have been proud. His dissent in *Payne*'s case had warned of the consequences if the legal system abdicated its responsibility as "protector of the powerless."[6] While the decades since have at times confirmed Marshall's concerns, the 2021 outcome in the Payne case provided a result for a single individual consistent with what Marshall had argued for on behalf of Payne so many years earlier. The resolution of Payne's case provides an opportunity to look back on Marshall's final dissent, the case that prompted it, and its legacy for Pervis Payne and the nation.

Victim Impact and the Road to *Payne v. Tennessee*

In 1987, the Supreme Court encountered the case of John Booth, a Maryland defendant convicted of murder and sentenced to death. Pursuant to a Maryland statute, the jury in Booth's case was provided a presentence report for the trial's sentencing phase that included a mandatory victim impact statement.[7] That statement included comments from interviews with the victims' family about the character of the victims and the impact of their deaths on the surviving members of the family.[8] For example, the victims' adult children testified that they had trouble sleeping and were struggling with their mental health.[9] Booth objected to the introduction of this evidence on the ground that it injected an arbitrary factor into sentencing, but the Maryland courts rejected his plea. He took his case to the U.S. Supreme Court, presenting the question of whether the Eighth Amendment prohibited the use of victim impact statements in assessing the death penalty.[10]

In a five-to-four decision written by Justice Lewis Powell (and joined by Justice Marshall), the Court declared the Maryland statute invalid and vacated Booth's sentence. "One can understand the grief and anger of the family caused by the brutal murders in this case," Justice Powell's opinion declared. "But the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant."[11] The Court recognized a danger in admitting the subjective experiences and feelings of victims' families because they could insert emotion, caprice, and arbitrariness into the most grave decision a jury could face.

Rather, the Court ruled the jury should not be distracted from its constitutionally required task of "determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime."[12] The introduction of victim impact statements was deemed unconstitutional.

The same year *Booth* was decided, Pervis Payne was arrested in connection with a brutal double homicide in Millington, Tennessee. Though Payne maintained his innocence throughout, he was convicted of two counts of first-degree murder in the stabbing deaths of Charisse Christopher and her two-year-old daughter, Lacie, as well as assault with intent to kill Lacie's three-year-old brother Nicholas, who survived.[13] During the trial, the state presented the testimony of Christopher's mother, the grandmother of the two children, who testified as to how Nicholas had been affected by the murders of his mother and sister.[14] "He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie," she said. In addition, during closing arguments, the prosecutor invoked Nicholas's experience in appealing to the jury for a conviction and death sentence: "He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict, you will provide the answer."[15]

Though not formally presented like the victim impact statements in the presentence report in *Booth*, the grandmother's testimony seemed to run afoul of that case's interpretation of the Eighth Amendment, which put victim impact statements outside the range of admissible testimony due to their potential for adding improper evidence into the jury's deliberations. Similarly, the prosecutor's statements imploring the jury to act on behalf of a victim seemed to conflict with another recent case, *South Carolina v. Gathers*,[16] that had expanded *Booth*'s restrictions to prosecutor's statements.

However, on direct appeal, the Tennessee Supreme Court rejected Payne's claims that his death sentence should be set aside on this basis.[17] That court determined that the prosecutor's argument did not lead to a diversion from the jury's appointed task, but rather was "relevant to this defendant's personal responsibility and moral guilt."[18] The court considered it "an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims."[19] The court thus rejected the Supreme Court's reading of the Eighth Amendment in *Booth* and *Gathers*, at least as applied to the arguments made in *Payne*'s case. In any event, even if the evidence *did* violate the Constitution, the Tennessee court considered the evidence amassed against Payne sufficient to make the statements a harmless error. According to the court, there was plenty to support the imposition of the death penalty even without the victim impact statements.[20]

Payne sought review at the Supreme Court, but when the justices granted certiorari, they added a portentous question. The parties were asked to brief whether *Booth* and *Gathers* ought to be overruled, though that question was not raised either in Payne's petition or the state's response.[21] Over a dissent on the cert grant by Justice John Paul Stevens, joined by Justice Marshall and Justice Harry Blackmun, the case was set for oral argument in April 1991, only two months later.[22] Though unknown at the time, the expedited schedule would allow *Payne* to be the final case decided in Justice Marshall's final Term.

The Career of a Death Penalty Abolitionist

Justice Marshall's final case at the Supreme Court had similarities to his first. A

half century before *Payne* reached the high court, Marshall had stood before the nine justices to argue on behalf of three Black soldiers who had been convicted of rape on their Louisiana base and sentenced to death. As in *Payne*, the question in *Adams v. United States* was somewhat technical—was the soldiers' base properly considered federal land at the time of the crime—but the core effort remained to prevent an execution. In 1943, *Adams* provided Marshall his first victory before the Supreme Court, as he convinced the justices that the land had not been properly federalized. The defendants' convictions and sentences were dismissed.[23]

Much of Marshall's early practice involved cases like *Adams* because in his first decade out of law school, challenging the convictions of Black defendants, particularly those sentenced to death, was among the only work he could get.[24] But aside from practicality, Marshall had seen the power of a Black lawyer representing a Black defendant facing the ultimate punishment and understood that such work might be the only way to thwart injustice, particularly in the Jim Crow South. As a law student at Howard, Marshall had been added to the legal team representing George Crawford, a Black man accused of killing two white women in Virginia in the early 1930s. Crawford's defense was led by Marshall's mentor and the dean of Howard Law School, Charles Hamilton Houston. In Houston, Marshall found a model as a lawyer as social engineer, and in Crawford's trial, Marshall observed a potential outlet for the storytelling and debating prowess that took him to the top of his law school class. Crawford was ultimately convicted, but was spared the death penalty. Marshall looked back on this outcome as a victory, quipping about all-white Virginia juries in cases with Black defendants that "normally they were hanging them."[25]

Once in practice on his own, Marshall represented a number of Black defendants facing the potential of a death sentence, with mixed results. In 1935 and 1936, he kept a series of defendants from being sentenced to death in the criminal courts of his home state of Maryland.[26] In several of the cases, the defendants were convicted of lesser crimes and received brief sentences, results that could count as victories at the time. But Marshall did not succeed in every case. In Prince George's County in southern Maryland's tobacco country, one of Marshall's clients pleaded guilty to charges of robbery and murder and was sentenced to death notwithstanding Marshall's pleas for leniency. On April 19, 1935, Marshall's client, James A. Gross, was hanged.[27] Few, if any, Supreme Court justices brought the experience of having a client put to death with them to the Court. For Marshall, he reflected years later that "When the time of execution came up, I felt so bad about it—that maybe I was responsible."[28] He resolved to witness the execution, but ultimately "chickened out."[29]

As Marshall's reputation grew and he became a fixture before the Supreme Court, he continued to represent clients facing the death penalty.[30] When the cases reached the high court, he was arguing not only on behalf of individual defendants but for broader constitutional rulings that would have more wide-ranging effects. For example, he appealed the case of W.D. Lyons to the Supreme Court. Lyons had been convicted of a triple murder after "confessing" under intense pressure from authorities in Oklahoma. During interrogation, Lyons was kept isolated for long periods of time, beaten savagely, and had human bones dumped into his lap while being told they were the remains of the murder victims. At the 1941 trial, Marshall succeeded in the sense that though Lyons was convicted of the murders, he was only sentenced to life imprisonment. However, after a failed appeal at the Oklahoma Supreme Court, Marshall appealed to the U.S. Supreme Court on the grounds that the forced confessions ought to have been excluded from the trial altogether.

In the 1940s, Marshall appealed the case of W.D. Lyons (pictured at center), who had been convicted of a triple murder after Oklahoma authorities beat a "confession" out of him during interrogation.

In *Lyons v. Oklahoma*,[31] the justices disagreed. Marshall had argued that because Lyons' initial confession had been wrongfully obtained, any subsequent confession would be tainted and should be excluded, but the justices held that if a latter confession was obtained properly, it could be admitted as evidence of guilt. He achieved a better result in the case of Eddie Patton, in which Marshall successfully argued that the systematic exclusion of African Americans from a jury could violate the Equal Protection Clause of the Fourteenth Amendment and invalidate a death penalty.[32]

Once *on* the Court, Marshall drew from his experiences in practice to become the Court's most persistent and passionate advocate for an end to the death penalty. His opinions over his 24-term tenure consistently highlighted the flaws of a system that meted out an irrevocable punishment, including the risk of error, the failure to deter, the impropriety of retributive motivations, the prevalence of disparities based on race and socioeconomic status, and Marshall's belief that public opinion would reject the death penalty if more Americans knew more about the practice. In addition to his many opinions in capital cases, Marshall also dissented when the Court refused to hear such cases, filing over 250 dissents from the Court's denial of certiorari in capital cases, including 150 with written opinions.[33]

As he had when representing clients, Justice Marshall meticulously focused on the details of each individual case to demonstrate why a death sentence was inappropriate, but on the bench, he was further able to articulate a coherent and comprehensive rebuke of the practice writ large that placed each case into a broader pursuit of justice.[34] The two most significant death penalty cases during Marshall's tenure occurred during his first decade on the Court, when the justices first declared the practice unconstitutional in 1972, then reinstated it as a permissible punishment four years later. Marshall's opinions in *Furman v. Georgia*[35] and *Gregg v. Georgia*[36] capture the justice's personal passion for this topic. Indeed, on the evening following the Court's announcement in *Gregg* reinstating the death penalty, Marshall suffered a mild heart attack.[37]

Marshall's *Furman* concurrence provides the most comprehensive articulation of his death penalty position. In *Furman*, five justices wrote separate opinions determining that several states' imposition of the death penalty violated the Eighth Amendment, each positing distinct reasons and denying the case any controlling opinion. For Marshall, though, the case provided an opportunity to trace the history of the Eighth Amendment and of capital punishment and to evaluate the potential justifications for its continued existence. Recognizing that striking down a punishment that was allowed in many states required strong justification, Marshall methodically confronted each possible purpose for maintaining the death penalty and concluded that "the point has now been reached at which deference to legislatures is tantamount to abdication of our judicial roles as factfinders, judges, and ultimate arbiters of the Constitution" and that "there is no rational basis for concluding that capital punishment is not excessive."[38]

In addition to rejecting the validity of retribution as a valid legislative purpose ("the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance"[39]) and demonstrating that the threat of execution is no greater a deterrent than the threat of life imprisonment, Marshall asserted that if more Americans knew more about the actual workings of the capital punishment system, they would reject it as morally reprehensible.[40] Marshall, of course, knew a great deal about how that system functioned, based on his work in courtrooms beginning during his time assisting Charles Hamilton Houston in law school. He understood it was "not foolproof" because "no matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real."[41]

But Marshall went further in arguing that citizens would be appalled by the death penalty in practice by highlighting its discriminatory imposition. He provided statistics on the racial disparities involved and insisted that the nation's lack of knowledge about the actual workings of the system was obscured due to the fact that the punishment was disproportionately borne by the most vulnerable members of society:

> It is the poor and the members of minority groups who are least able to voice their complaints about capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern might develop. Ignorance is perpetuated and apathy soon becomes its mate, and we have today's situation.[42]

He closed his opinion with patriotism and pride at the Court's work in finding the death penalty a violation of the Eighth Amendment. "This is a country which stands tallest in troubled times, a country that clings to fundamental principles, cherishes our constitutional heritage, and rejects simple solutions that compromise the values that lie at the roots of our democratic system," he wrote.[43] The Court's decision was "a major milestone in the long road up from barbarism" and was an example of the Court's "highest tribute."[44] Given this, Marshall's briefer opinion in dissent four years later exudes agony. In *Gregg*, the Court examined Georgia's revised death penalty system, which included a bifurcated sentencing trial and provided for automatic appeal in capital cases.[45] A seven-to-two Court concluded

that, when carefully employed, the death penalty could exist without being considered excessive, cruel, and unusual. In his dissent, Justice Marshall reiterated his belief that a fully informed public would disapprove of the death penalty and again rejected the sentiment in the majority opinion that retribution could justify a state's decision to adopt the death penalty. "The mere fact that the community demands the murderer's life in return for the evil he has done cannot sustain the death penalty," Marshall wrote.[46] To him, such a punishment denied the wrongdoer's dignity and worth, and thus debased the very concept at the core of the Eighth Amendment.

The remaining years of Justice Marshall's tenure on the Court saw him return to these themes, consistently highlighting both the practical and moral flaws of the capital punishment system. Not all of his opinions came in dissent—for example, he wrote the Court's majority opinion in *Caldwell v. Mississippi*,[47] in which a prosecutor's effort to minimize jurors' responsibility if they were to return a death sentence was held to violate the Eighth Amendment. But the vast majority of Justice Marshall's work in death penalty cases was in dissent.[48]

The Court's movement away from what Marshall perceived as a triumph in *Furman* coincided with a political movement to shift emphasis from the protection of the rights of the accused or convicted to the rights of victims. This included President Ronald Reagan's proclamation of National Crime Victims' Rights Week in 1981 and also led to the passage of state and federal laws and the adoption of victims' bills of rights in every state.[49] Part of this movement pushed for greater visibility of victims during criminal trials, such as through the use of the victim impact statements rejected by the Court in *Booth*, but returned to the docket in the case of Pervis Payne.

Abandoning *Booth*

Based on his experiences with *Furman* and its abandonment four years later in *Gregg*, Thurgood Marshall was familiar with the potential for backsliding on issues related to capital punishment. Thus, even though the Court had determined that victim impact statements were not permissible in 1987 in *Booth*, the Court's granting of certiorari in *Payne*—along with the request for briefing on whether *Booth* should be reversed—only four years later hinted that some of Marshall's colleagues thought it wise to reconsider that result. In the interim, Justices David Souter and Anthony Kennedy had replaced Justices Brennan and Powell, both of whom had voted in Booth's favor in the five-to-four case. In *Payne*, a six-to-three Court reached the opposite decision, Chief Justice William H. Rehnquist authoring an opinion that overruled *Booth* and *Gathers*.[50]

In *Booth*, the Court had expressed concern that the admission of victim impact statements could distort the sentencing of defendants facing the death penalty and enable jurors to act on emotion and sympathy for the victim rather than the blameworthiness of the defendant in sentencing. But, Rehnquist argued, this did not require a per se exclusion of all evidence of the impact of a defendant's crimes on the victim or the victim's family. The rule in *Booth*, Rehnquist concluded, "unfairly weighted the scales in a capital trial," by allowing defendants to produce virtually any mitigating evidence while prohibiting the state from offering any glimpse of the life lost.[51] Rather than introducing arbitrariness into the proceedings, victim impact statements represented just another form of evidence that might inform the sentencing authority. Further, if particular evidence went too far to the point of rendering a sentence fundamentally unfair, defendants could find recourse in due process protections—there was no need for *Booth*'s per se exclusion.[52]

Justice Thurgood Marshall was greeted with applause as he arrived at a press conference to announce his retirement on June 28, 1991—the day following the release of the *Payne* decision. Marshall's final dissent held that Pervis Payne's sentence should be invalidated.

Justice Sandra Day O'Connor authored a concurring opinion in *Payne*, emphasizing that the particular statements made in his trial could not have inflamed the jury's passions any more than the other evidence produced at trial, which included detailed facts of a brutal murder.[53] Meanwhile, Justice Souter also wrote a concurring opinion, joined by Justice Kennedy. The opinion for the Court's two newest Justices acknowledged that victim impact statements *could* be so inflammatory as to impermissibly influence the jury, but emphasized that *Booth's* rule of exclusion set up an unworkable standard since it would be difficult to determine what evidence about the victim might run afoul of *Booth*'s prohibition and impossible to segregate permissible from impermissible information about the harm to the victim.[54]

Looking at the same landscape, Justice Stevens took the opposite conclusion. In his dissent, Justice Stevens implored the Court to maintain *Booth's* prohibition because while victim impact statements might be harmless, even duplicative, in many cases, in the cases where it *did* make a difference, its only effect would be to add evidence "irrelevant to the defendants' moral culpability" and thus make a death sentence arbitrary.[55] In any event, Stevens argued in dissent, joined by Justice Harry Blackmun, that there was no need to overrule *Booth* in Payne's case since the Tennessee Supreme Court had considered the evidence harmless even under *Booth*. "Today is a sad day for a great institution," Stevens concluded, noting that it seemed to be the pressure of public opinion that had informed the Court's eagerness to discard *Booth*.[56]

But Justice Marshall was even more damning in his own dissent, which was also joined by Justice Blackmun. "Power, not reason, is the new currency of this Court's decision making," he began.[57] "Neither the law nor the facts supporting *Booth* and *Gathers* underwent any change in the last four years. Only the personnel of this Court did."[58] This opening revealed that in his final dissent, Marshall was concerned not only with the impact of this decision on Pervis Payne but with the future of the Court's work.

Marshall had projected this frustration during the oral argument in the *Payne* case. In an exchange with Tennessee Attorney General Charles Burson, Marshall pondered "What happened to the old-time theory that the crime was against the State and not the individual?"[59] Marshall was attempting to make the point that in the American system, it was the state and not the victim that criminal cases were being brought on behalf of—while certainly not disinterested, victims were not parties to criminal cases. When Burson noted that Nicholas Christopher, the child of the murder victim, was a citizen of Tennessee, Marshall quipped "Will any other member [of Tennessee] come in and talk?"[60] Through his questions, Marshall suggested that the victim impact evidence was unnecessary to the state's case; in his dissent, he reiterated the points the Court had made in *Booth* that the evidence would always have a "prejudicial effect because of its inherent capacity to draw the jury's attention away from the character of the defendant and the circumstances of the crime to such illicit considerations as the eloquence with which family members express their grief and the status of the victim in the community."[61]

Marshall knew, and had expressed throughout his career, that these "illicit considerations" were part of the broader flaws in the criminal justice system that increased the potential for error and perpetuated its racial and socioeconomic disparities. Pervis Payne, after all, was an African American convicted of murdering two white people, represented at trial by an appointed public defender. He was precisely the type of "forlorn" defendant Marshall had alluded to in his *Furman* concurrence as being most susceptible to a death sentence. But Marshall did not use his final dissent as a chance to reiterate these points—rather, he used the majority of his opinion to strike out at the Court for its quick reversal of precedent without compelling justification.

Protecting Stare Decisis

Thurgood Marshall was an unlikely champion of stare decisis, the principle that the Court follow its own settled decisions. After all, Marshall's storied career as a lawyer had been highlighted by convincing the Court to discard prior interpretations of constitutional principles. Most notably, Marshall had led the team that had worked to overturn the constitutionality of racial segregation—separate, but equal—blessed by the Court in *Plessy v. Ferguson*.[62] Had the Court adhered to its prior opinion, it might never have reached the conclusion in *Brown v. Board of Education* that the Equal Protection Clause prohibited racial segregation in schools.[63]

This disconnect was not lost on Marshall's colleagues in *Payne*. In support of the principle that the Court has never felt entirely constrained to follow precedent, Chief Justice Rehnquist cited *Smith v. Allwright*, a 1944 case argued by Marshall that found Texas's racially exclusive Democratic primaries unconstitutional.[64] In his own *Payne* concurrence, Justice Antonin Scalia went a step further, citing Marshall's own opinions and arguing that "The response to Justice Marshall's strenuous defense of the virtues of stare decisis can be found in the writings of Justice Marshall himself."[65] Even in *Furman*, the decision Marshall proudly held up as an important step up from barbarism, Marshall had asserted that "The fact . . . that the Court, or individual Justices, may have in the past expressed an opinion that the death penalty is constitutional is not now binding on us."[66] There, Marshall was urging the Court to interpret the Eighth Amendment in a new way. Yet, in *Payne*, the binding nature of the Court's prior Eighth Amendment holdings in *Booth* and *Gathers* was precisely what Marshall most passionately argued for.

Noting that the Court departing from precedent should be a "matter of great moment and consequence," Justice Marshall argued that such departures should occur

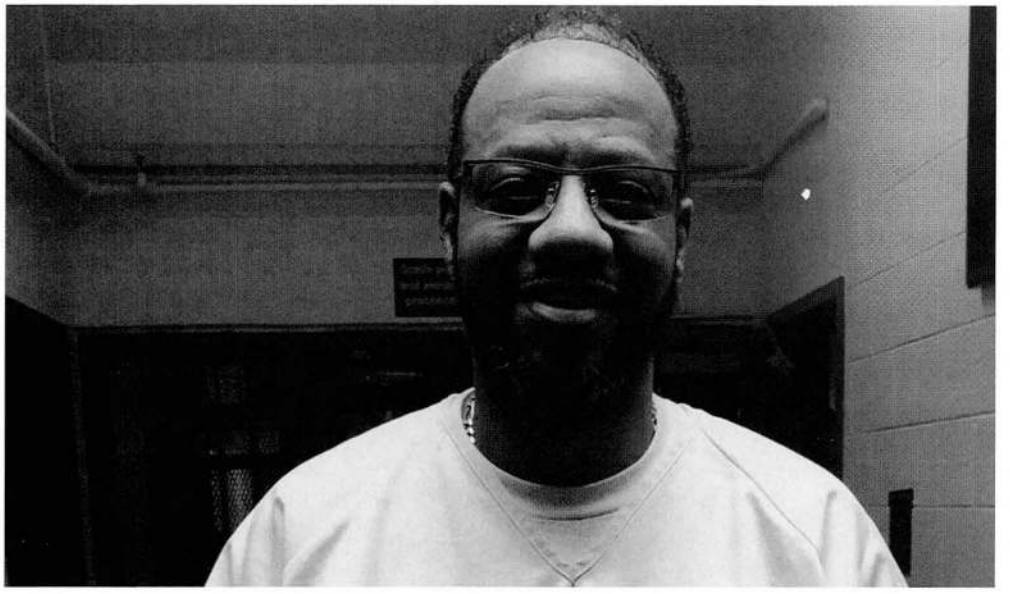
only with "special justification."[67] Finding no such justification, such as subsequent developments that undermine a prior decision's rationale (as Marshall might have argued was the case with *Plessy*) or a finding that an existing rule could not be coherently applied, Marshall accused the majority of overruling simply because *Booth* and *Gathers* had been closely and recently decided. Rehnquist's majority opinion had argued that considerations in favor of stare decisis seemed less compelling for cases "decided by the narrowest margins, over spirited dissents."[68] Marshall did not mince words about why he felt the Court now reached a different decision: "It takes little real detective work to discern just what *has* changed since this Court decided both *Booth* and *Gathers*: this Court's own personnel."[69]

To Marshall, this failure to abide by precedent was "astonishing." It put at risk "the continued vitality of literally scores of decisions," which survived based on "nothing more than the proclivities of the individuals who *now* comprise a majority of this Court."[70] Among the cases Marshall listed as being vulnerable were those allowing affirmative action and protecting the right to reproductive choice, as well as others protecting defendants from double jeopardy and the execution of those deemed insane.[71] He imagined a future in which the Court would be regularly called on to overrule itself:

> Carried to its logical conclusion, the majority's debilitated conception of *stare decisis* would destroy the Court's very capacity to resolve authoritatively the abiding conflicts between those with power and those without. If this Court shows so little respect for its own precedents, it can hardly expect them to be treated more respectfully by the state actors whom these decisions are supposed to bind. By signaling its willingness to give fresh consideration to any constitutional liberty recognized by a 5-4 vote over 'spirited dissen[t],' the majority invites state actors to renew the very policies deemed unconstitutional in the hope that this Court may now reverse course, even if it has only recently reaffirmed the constitutional liberty in question.[72]

Where Chief Justice Rehnquist had cited one of Marshall's victories before the Court for the principle that stare decisis was not an inviolable principle, in his own dissent, Marshall referenced another one of his cases to argue that a Court unwilling to stand by its own decisions was a threat to *all* individual rights. Pointing to *Cooper v. Aaron*, the 1958 case that affirmed the historic *Brown* decision in the face of open defiance by the state of Arkansas in desegregating Little Rock's Central High School, Marshall noted of *Payne* that "It is hard to imagine a more complete abdication of this Court's historic commitment to defending the supremacy of its own pronouncements on issues of constitutional liberty."[73] Marshall painted the picture of a Court that must overrule prior precedent when the circumstances were compelling, but that *must not* simply due to the closeness of a prior decision or the change in personnel on the Court. Marshall must have known that his own retirement, which he announced the same day as the opinion announcement in *Payne*, would only contribute to the risk he identified in his dissent.

In the final paragraph of his judicial career, Thurgood Marshall lamented the course he saw the institution he had dedicated his life to taking. *Payne* "is but a preview of an even broader and more far-reaching assault upon this Court's precedents," he declared.[74] Payne's case was about a single defendant and a narrow issue, but the stakes Marshall saw were massive: "Cast aside today are those condemned to face society's ultimate penalty. Tomorrow's victims may be minorities, women, or the indigent."[75] The Court



Pervis Payne in Riverbend Maximum Security institution in Tennessee. He was on death row for 33 years while his lawyers argued that because he suffered from an intellectual disability he was constitutionally ineligible for the death penalty.

would squander its legitimacy as a "protector of the powerless,"[76] an authority few had done more to establish than had Thurgood Marshall. Yet, in the spring of 1991, on the eve of his retirement, Justice Marshall had lost, and Pervis Payne remained on death row.

Evolving Standards

As Justice Marshall well knew, the Supreme Court's reconsideration of prior precedent could work in a variety of ways. Though he lamented the abandonment of *Booth*'s rule of exclusion in his *Payne* dissent, he understood that evolving standards of decency should inform the Court's consideration of the death penalty and that sometimes, that would work toward a result he supported. Indeed, in *Furman*, he had invoked his hypothesis that an informed public would reject the nation's systems of capital punishment as morally reprehensible, and that such a consensus should compel the Court to find the practice "cruel and unusual." Consistent with this call to ensure that the nation's laws be interpreted consistently with contemporary understandings of right and wrong, the Supreme Court continued to refine its application of the Eighth Amendment to the death penalty even as Pervis Payne remained on death row.

One area of consideration that would eventually intersect back with Payne was how the Eighth Amendment applied to the prospect of executing individuals who were judged insane or who suffered from intellectual disabilities. In 1986, Justice Marshall wrote the majority opinion in *Ford v. Wainwright*, in which the Court considered whether it was constitutional to execute an individual who, despite being competent to stand trial, had subsequently developed mental disorders that led psychiatrists to declare him insane.[77] During his incarceration on death row, Alvin Ford began to develop intricate delusions regarding a conspiracy being plotted against him and his family by the Ku Klux Klan, among others. Upon evaluation, a series of psychiatrists determined that Ford had no understanding of why he was being executed and could offer no assistance to lawyers who were attempting to fight his

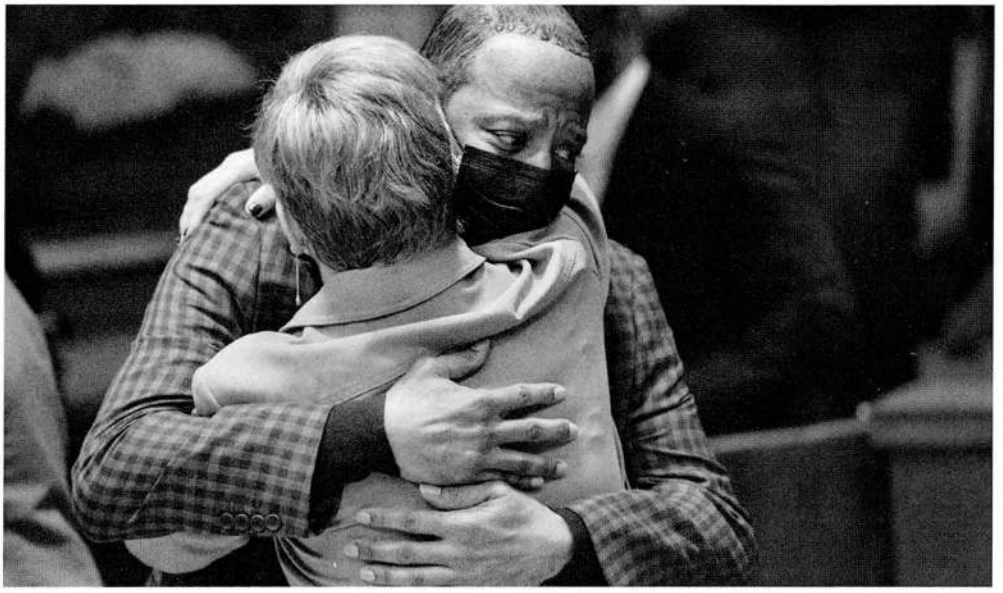
death sentence. Unmoved, the governor of Florida rejected a petition that Ford was not competent to be executed and set an execution date, setting off the events that led to Ford's case reaching the Supreme Court.

As he had in *Furman*, Justice Marshall began with a history lesson, tracing the application of the death penalty to those declared insane and noting that no state continued to allow such executions.[78] Given this consensus, Marshall and the Court held that the Eighth Amendment did not allow such executions as a way "to protect the dignity of society itself from the barbarity of exacting mindless vengeance."[79] Though the victory was not as vast as the short-lived triumph in *Furman*, Marshall had carved a small number of cases out of the nation's death penalty practice, an outcome that saved Alvin Ford from being executed, though he died of a respiratory illness in prison at the age of 37 in 1991.[80]

However, Marshall was on the losing side in a related case three years after *Ford v. Wainwright*, when the Court considered whether the death penalty could constitutionally be applied to an individual suffering from an intellectual disability. Unlike the issue of sanity at issue in *Ford v. Wainwright*, which had developed acutely and after the defendant's conviction and sentencing, the Court in *Penry v. Lynaugh* dealt with a defendant, Johnny Paul Penry, who had an extraordinarily low IQ that contributed to a form of mental retardation (now referred to as intellectual disability) that limited his mental age to that of a seven-year-old and his social maturity to that of a ten-year-old.[81] Despite this, Penry had been judged competent to stand trial and the jury had rejected his insanity defense. He was convicted of murder and sentenced to death. When the case reached a splintered Supreme Court, Justice O'Connor distinguished Penry's case from Ford's, declaring that the national consensus that made the execution of individuals deemed insane unconstitutional did not yet exist for individuals with intellectual disabilities.[82] Though O'Connor acknowledged that mental capacity was a factor that could lessen a defendant's culpability and thus their eligibility for the death penalty, she found no bar in the Eighth Amendment that precluded the execution of all individuals with intellectual disabilities.[83] Despite this, the Court held that Texas's jury instructions with regard to intellectual disability were insufficient in Penry's case, and his sentence was invalidated.[84]

Though they reached different results, both *Ford* and *Penry* accepted that societal opinions about the death penalty were relevant to whether the imposition of capital punishment in particular circumstances constituted cruel and unusual punishment. This "evolving standards" framework left open the possibility that a later Court might arrive at different outcomes on similar questions. This was what Justice Marshall had assailed the Court for doing in *Payne*, though he did so because he saw no change that would merit such a reversal. However, these evolving standards of decency ultimately led to a reversal of the *Penry* outcome on the application of the death penalty to individuals with intellectual disabilities—a result Justice Marshall, who joined a dissent in *Penry*, would have welcomed.

In her *Penry* decision, Justice O'Connor noted that a national consensus against the execution of those with intellectual disabilities might someday emerge.[85] By 2002, a Court majority that included Justice O'Connor found that such a consensus had arrived. In *Atkins v. Virginia*, the Court was confronted with another defendant with limited intellectual capacity, but noted that "much has changed" since *Penry*.[86] Acknowledging that up to twenty states had either already passed statutes prohibiting the execution of individuals with intellectual disabilities or were considering such laws, Justice Stevens wrote for a six-to-three Court that this movement evinced a national



Attorney Kelley Henry of Federal Public Defenders hugged her client on receiving the news in 2022 that Payne would be eligible for parole in five years.

consensus against the practice and that executing such individuals could serve neither a deterrent nor retributive purpose.[87] Further, in a passage that Justice Marshall would have appreciated, Justice Stevens asserted that these defendants "face a special risk of wrongful execution."[88] This was due to an increased potential for false confessions as well as the defendants' diminished capacity to assist in their own defense or make a good impression on jurors.[89] Thus, just as Marshall had in *Ford*, the *Atkins* decision used the Eighth Amendment to carve a class of defendants out of eligibility for the death penalty.

In essence, *Atkins* partially proved Marshall's hypothesis about the death penalty correct. Marshall had asserted throughout his career that if the public were better informed about capital punishment, they would find it morally reprehensible. Much of the legislative movement that supported the emerging national consensus identified in *Atkins* had developed due to a highly publicized execution of an individual with intellectual disabilities in Georgia, Jerome Bowden.[90] Bowden, whose IQ was only 65, was executed despite widespread public protests that the execution of someone who could not understand the nature of his crime was immoral. As the public came to better understand the details of cases like Bowden's, sentiment turned against the application of the death penalty in such circumstances. Within two years of Bowden's execution, Georgia had prohibited administering the death penalty on individuals with intellectual disabilities, a result echoed in several other states.[91] In *Atkins*, the Court followed suit.

However, *Atkins* did not immediately end the threat of execution for *all* individuals on death row who might have claims of intellectual disability. Defendants still had to establish their intellectual disability in court. Though in the years that followed many would do so,[92] the path for Pervis Payne to offer this proof was unusually complex. Still, *Atkins*, a case that overturned prior precedent (*Penry*) just as *Payne* had overturned *Booth* to Marshall's chagrin, opened the door for Payne's ultimate success.

Payne's Labyrinth

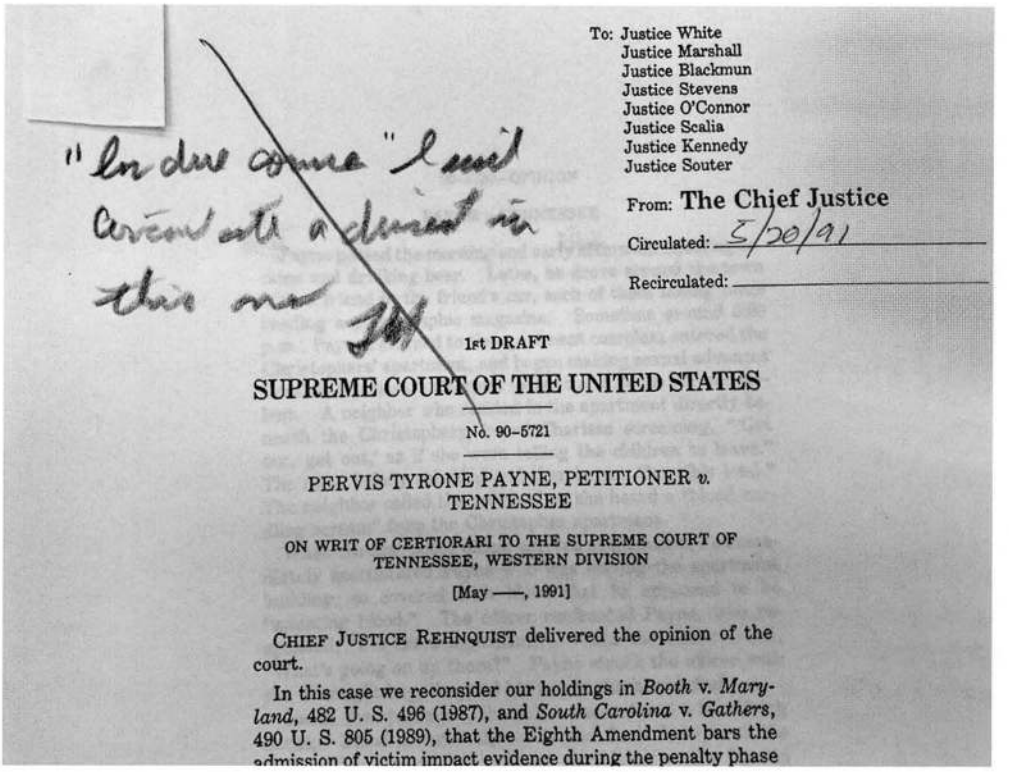
During the sentencing phase of his 1988 trial, the very same phase in which the victim impact statements that took his case to the Supreme Court were made, Payne presented the testimony of Dr. John T. Hutson, a clinical psychologist who testified that Payne's low IQ score made him "mentally handicapped."[93] However, at the time of Payne's trial, there was no constitutional prohibition of sentencing individuals with intellectual disabilities to death. However, in 1990, Tennessee was among the first states to pass statutes prohibiting such sentences, an early participant in the consensus-building wave referenced in *Atkins*.[94] This change was only forward-looking, however, so it did not aid Payne.[95]

Payne, of course, was pursuing other avenues to invalidate his death sentence. Not only was he challenging the victim impact statements all the way to the Supreme Court, but he also continued to claim his innocence and sought evidence that would clear his name amidst other post-conviction efforts.[96] Even after *Atkins*, then-existing standards for judging intellectual disability would likely have precluded Payne from having his death sentence revoked, so he continued to pursue evidence of innocence that would reverse his conviction, rather than merely see his sentence commuted to life imprisonment. A decade after *Atkins*, further evolution of the understanding of intellectual disability and the appropriate ways of determining who should legally be considered intellectually disabled seemed to provide a renewed opportunity for Payne.[97] But every effort he made to present his evidence was rebuffed due to procedural barriers in both Tennessee and federal courts.[98]

Even as the Tennessee Supreme Court declined to intervene and allow Payne to present his evidence of intellectual disability, it acknowledged that the state had "no business executing persons who are intellectually disabled."[99] The court seemed to be charging the legislature to come up with a way to prevent that from happening, but no action was taken, and in early 2020, the state set December 3 as Payne's execution date.[100] A COVID-19-related delay provided a reprieve, but entering 2021, Tennessee still had no mechanism for Payne or others similarly situated to obtain a hearing on whether they suffered from intellectual disabilities that would make them constitutionally ineligible to be put to death. Even among a class of defendants that had been carved out for Eighth Amendment protection from execution, Payne seemed fated to be executed without ever presenting his claim.

Just as Justice Marshall had failed to convince his colleagues with his final dissent that Payne's sentence was infected by inadmissible victim impact statements, the opening provided by *Atkins* did not seem like it would save Payne. But just as Thurgood Marshall never gave up in his quest to reveal the legal and moral bankruptcy of the death penalty, Payne's legal team was not going to give up either.

For five years after the Tennessee Supreme Court's prod to the state's General Assembly to create a procedure for individuals condemned to death *prior* to the state's 1990 intellectual disability statute to seek a determination of their eligibility to be executed, the legislature did nothing.[101] But in early 2021, with Payne eligible to have a new execution date set, the legislature considered just such a bill. Payne's attorney Kelley Henry was among several witnesses who testified as to the need for a defendant who had been sentenced to death and who had not yet had their colorable claim of an intellectual disability adjudicated on the merits to petition for such a determination. The bill was passed by a bipartisan majority and took effect on May 11, 2021.[102] The following day, Henry filed a petition on Payne's behalf.[103]



"In due course" I will circulate a dissent in this one

To: Justice White
Justice Marshall
Justice Blackmun
Justice Stevens
Justice O'Connor
Justice Scalia
Justice Kennedy
Justice Souter

From: The Chief Justice

Circulated: 5/20/91

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 90-5721

PERVIS TYRONE PAYNE, PETITIONER v.
TENNESSEE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE, WESTERN DIVISION

[May —, 1991]

CHIEF JUSTICE REHNQUIST delivered the opinion of the court.

In this case we reconsider our holdings in *Booth* v. *Maryland*, 482 U. S. 496 (1987), and *South Carolina* v. *Gathers*, 490 U. S. 805 (1989), that the Eighth Amendment bars the admission of victim impact evidence during the penalty phase

"'In due course,' I will circulate a dissent in this one," scribbled Marshall on the draft of the *Payne* decision circulated on May 20, 1991.

Six months later, after several hearings and an evaluation of Payne by the state, his death sentence was withdrawn since the state's expert "could not say Payne's intellectual functioning is outside the range for intellectual disability."[104] Payne was "completely shocked" and "very grateful," according to Henry.[105] But, like the justice whose final case had been Payne's, Henry was not yet satisfied for her client. "This matter will now come to a close in a very short period of time," she said. "We, however, will not stop until we have uncovered the proof which will exonerate Pervis and release him from prison."[106] In 1991, Justice Marshall had sought to see Pervis Payne's death sentence removed; thirty years later, within a death penalty landscape that had shifted substantially, that outcome was ultimately achieved.

Conclusion

As a death penalty abolitionist, Thurgood Marshall was concerned about each person sentenced to be killed at the hands of the state and also about the stain on a society of allowing a flawed, discriminatory practice to persist. As a lawyer and judge, Marshall considered the Constitution and the Supreme Court's interpretation of it to be the greatest protector for the nation's powerless. In his final dissent, Marshall tied these principles together on behalf of broad worries about the future of the Court, a narrow evidentiary point about victim impact evidence, and a human being facing the ultimate punishment. Three decades later, the worries about the Court's future remain part of a continuing dialogue about the Court's role in society, and the narrow evidentiary point he lost in *Payne*

has remained settled within the Court's death penalty jurisprudence. But the human being, Pervis Payne, no longer faces the ultimate punishment.

Daniel Kiel is FedEx Professor of Law, The University of Memphis Cecil C. Humphreys School of Law.

NOTES

[1] See, e.g., Kamala Harris, **The Truths We Hold** (2018).

[2] *Payne v. Tennessee*, 501 U.S. 808 (1991).

[3] See, e.g., *State v. Payne*, 791 S.W.2d 10 (Tenn. 1990) (initial post-conviction review); *Payne v. Tennessee*, 501 U.S. 808 (1991) (victim impact statement challenge); *Payne v. State*, 1998 WL 12670 (Tenn. Crim. App. Jan. 15, 1998) (denying post-conviction and error coram nobis relief); *Payne v. Bell*, 418 F.3d 644 (6th Cir. 2005) (denying habeas relief); *Payne v. State*, 2007 WL 4258178 (Tenn. Crim. Appl. Dec. 5, 2007) (denying DNA testing).

[4] Katherine Burgess, "Shelby County District Attorney abandons pursuit of death penalty in Pervis Payne case," The Commercial Appeal, Nov. 18, 2021. Available at: https://www.commercialappeal.com/story/news/2021/11/18/tennessee-death-row-inmate-pervis-payne-avoid-execution/8673793002/

[5] Samantha Max, "Pervis Payne is taken off death row," NPR, Nov. 26, 2021. Available at: https://www.npr.org/2021/11/26/1059317212/pervis-payne-is-taken-off-of-death-row

[6] *Payne v. Tennessee*, 501 U.S. 808, 856 (1991) (Marshall, dissenting).

[7] *Booth v. Maryland*, 482 U.S. 496, 498–99 (1987).

[8] Ibid.

[9] *Id.* at 499–500.

[10] *Id.* at 502.

[11] *Id.* at 508.

[12] *Id.* at 507.

[13] *Payne v. Tennessee*, 501 U.S. 808, 811 (1991).

[14] *Ibid.* at 814–15

[15] *Id.* at 815.

[16] 490 U.S. 805 (1989).

[17] *State v. Payne*, 791 S.W.2d 10 (1990).

[18] *Ibid.* at 19.

[19] *Id.* at 19.

[20] *Id.* at 19.

[21] *Payne v. Tennessee*, 498 U.S. 1076 (1991) (granting cert).

[22] Ibid.

[23] *Adams v. United States*, 319 U.S. 312 (1943).

[24] See generally, Larry S. Gibson, Young Thurgood: The Making of a Supreme Court Justice, 201–14.

[25] Juan Williams, Thurgood Marshall: American Revolutionary, 59.

[26] Gibson, **Young Thurgood**, 209–212.

[27] *Ibid.*, 204-07.

[28] Randall Coyne, "Taking the Death Penalty Personally: Justice Thurgood Marshall," 47 *Okla. L. Rev.* 35, 38 (1994).

[29] Ibid.

[30] See generally, Gilbert King, **Devil in the Grove**.

[31] *Lyons v. Oklahoma*, 322 U.S. 596 (1944). See also *Taylor v. Alabama*, 355 U.S. 252 (1948) (rejecting claim that Alabama court should have allowed death row inmate to file error coram nobis petition on eve of execution date); *Watts v. Indiana*, 338 U.S. 49 (1949) (rejecting claim that involuntary confessions violated Fourteenth Amendment's Due Process Clause).

[32] *Patton v. Mississippi*, 332 U.S. 463 (1947).

[33] Coyne, "Taking the Death Penalty Personally," *citing* Michael D. Davis & Hunter R. Clark, **Thurgood Marshall: Warrior at the Bar, Rebel on the Bench**, 373 (1992) and William J. Brennan, Jr., "*A Tribute to Justice Thurgood Marshall*," 105 *Harv. L. Rev.* 23, 32 (1991).

[34] See *Furman v. Georgia*, 408 U.S. 238, 316 (1972) (Marshall, concurring) ("Candor compels me to confess that I am not oblivious to the fact that this is truly a matter of life and death. Not only does it involve the lives of these three petitioners, but those of the almost 600 other condemned men and women in this country currently awaiting execution. While this fact cannot affect our ultimate decision, it necessitates that the decision be free from any possibility of error.").

[35] *Furman v. Georgia*, 408 U.S. 238 (1972).

[36] *Gregg v. Georgia*, 428 U.S. 153 (1976).

[37] Coyne, "Taking the Death Penalty Personally."

[38] *Furman v. Georgia*, 408 U.S. 238, 359 (1972) (Marshall, concurring).

[39] *Ibid.* at 343.

[40] *Id.* at 363.

[41] *Id.* at 366–67.

[42] *Id.* at 366.

[43] *Id.* at 371.

[44] *Id.* at 371.

[45] *Gregg v. Georgia*, 428 U.S. 153 (1976).

[46] *Gregg v. Georgia*, 428 U.S. 153, 240–41 (1976) (Marshall, dissenting).

[47] *Caldwell v. Mississippi*, 472 U.S. 320 (1985). See also *McKoy v. North Carolina*, 494 U.S. 433 (1990) (rejecting North Carolina's unanimity requirement because it impermissibly limited jurors' consideration of mitigating evidence).

[48] See John D. Burrow, "The Most Unfortunate Decisions: Forging an Understanding of Justice Thurgood Marshall's Jurisprudence of Death," 6 *Howard Scroll Social Justice Law Review* 1, 47 (2004) (see Appendix I listing Justice Marshall's participation in death penalty cases throughout his career).

[49] Joe Frankel, "Payne, Victim Impact Statements, and Nearly Two Decades of Devolving Standards of De-

cency," 12 *N.Y. City L. Rev.* 87, 91–93 (2008). See also Lynne Henderson, "The Wrongs of Victim's Rights," 37 *Stan. L. Rev.* 937 (1985).

[50] *Payne v. State*, 501 U.S. 808, 830 (1991).

[51] *Ibid.* at 822. This point echoed similar sentiment from the Tennessee Supreme Court: "It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims." *Payne v. State*, 791 S.W.2d at 19.

[52] *Ibid.* at 825.

[53] *Id.* at 832 (O'Connor, concurring).

[54] *Id.* at 836, 839–40 (Souter, concurring).

[55] *Id.* at 866 (Stevens, dissenting).

[56] *Id.* at 867 (Stevens, dissenting).

[57] *Id.* at 844 (Marshall, dissenting).

[58] *Id.* at 844 (Marshall, dissenting).

[59] *Payne v. Tennessee*, Oral Argument Transcript, available at: https://www.oyez.org/cases/1990/90-5721

[60] Id.

[61] *Payne v. Tennessee*, 501 U.S. at 846 (Marshall, dissenting).

[62] *Plessy v. Ferguson*, 163 U.S. 537 (1896).

[63] Brown v. Board of Education, 347 U.S. 483 (1954).

[64] *Payne v. Tennessee*, 501 U.S. at 827 (citing *Smith v. Allwright*, 321 U.S. 649 (1944)).

[65] *Ibid.* at 833 (Scalia, concurring). Justice Scalia noted that leaving a decision in place solely because it once attracted five votes would enshrine power rather than reason as the governing principle of the Supreme Court. *Id.*

[66] *Furman v. Georgia*, at 329 (Marshall, concurring).

[67] *Payne v. Tennessee*, 501 U.S. at 848-49 (Marshall, dissenting).

[68] *Ibid.* at 828–29.

[69] *Id.* at 850–51 (Marshall, dissenting).

[70] *Id.* at 851 (Marshall, dissenting).

[71] *Id.* at 851–52 (Marshall, dissenting). In his dissent, Marshall specifically identified the following as being vulnerable to being overruled: *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990) (affirmative action in federal broadcast licenses); *Grady v. Corbin*, 495 U.S. 508 (1990) (double jeopardy); *Ford v. Wainwright*, 477 U.S. 399 (1986) (execution of those deemed insane); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion).

[72] *Id.* at 853–54 (Marshall, dissenting).

[73] *Id.* at 855 (Marshall, dissenting) (citing *Cooper v. Aaron*, 358 U.S. 1 (1958).

[74] *Id.* at 856 (Marshall, dissenting).

[75] *Id.* at 856 (Marshall, dissenting).

[76] *Id.* at 856 (Marshall, dissenting).

[77] *Ford v. Wainwright*, 477 U.S. 399 (1986).

[78] *Ibid.* at 408.

[79] *Id.* at 410. Though Marshall commanded a 5–4 majority for the holding that the execution of individuals deemed insane was unconstitutional, the Court splintered on the further question of what procedures for determining sanity were constitutional. See *Id.* at 418 (Powell, concurring in part and concurring in judgment).

[80] Associated Press, "Alvin Ford, 37, Dies; Stricken on Death Row," *New York Times*, March 9, 1991.

[81] *Penry v. Lynaugh*, 492 U.S. 302 (1989).

[82] *Ibid.* at 333–34 (noting that only one state had a statute prohibiting the execution of those with intellectual disabilities while no states permitted execution of those determined to be insane).

[83] *Id.* at 340.

[84] *Id.* at 328. Penry's case continued to circulate on the question of mental capacity until 2008, when Penry agreed to a plea deal that removed his death penalty, but would keep him in prison for life. Mike Tolson, "Deal keeps death row inmate Penry imprisoned for life," *Houston Chronicle*, Feb. 16, 2008.

[85] *Ibid.* at 340.

[86] *Atkins v. Virginia*, 536 U.S. 304, 314 (2002).

[87] *Ibid.* at 314–16.

[88] *Id.* at 321.

[89] *Id.* at 320-21.

[90] *Id.* at 313, n8.

[91] *Id.* at 314.

[92] Blume et al., "A Tale of Two (and Possibly Three) Atkins," 23 *William and Mary Bill of Rights Journal* 393, 396–97 (2014) (noting that approximately 7% of death row defendants sought review of their intellectual capacity after *Atkins* and of those, approximately 44% saw their death sentences removed due to intellectual disability).

[93] *Payne v. Tennessee*, 501 U.S. 808, 814 (1991).

[94] *Van Tran v. State*, 66 S.W.3d 790, 804–05 (Tenn. 2001).

[95] Daniel Kiel, "Avoiding Atkins: How Tennessee is on the Verge of Unconstitutionally Executing an Individual with Intellectual Disabilities," *Law & Inequality* (Inequality Inquiry) (2020). Available at: https://lawandinequality.org/2020/11/18/avoiding-atkins-how-tennessee-is-on-the-verge-of-unconstitutionally-executing-an-individual-with-intellectual-disabilities/

[96] See, e.g., *State v. Payne*, 791 S.W.2d 10 (Tenn. 1990) (initial post-conviction review); *Payne v. Tennessee*, 501 U.S. 808 (1991) (victim impact statement challenge); *Payne v. State*, 1998 WL 12670 (Tenn. Crim. App. Jan. 15, 1998) (denying post-conviction and error coram nobis relief); *Payne v. Bell*, 418 F.3d 644 (6th Cir. 2005) (denying habeas relief); *Payne v. State*, 2007 WL 4258178 (Tenn. Crim. Appl. Dec. 5, 2007) (denying DNA testing).

[97] See, e.g., *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011); *Hall v. Florida*, 572 U.S. 701 (2014).

[98] See *Payne v. State*, 493 S.W.3d 478 (Tenn. 2016) (denying request to reopen case based on new evidence of intellectual disability and denying error coram nobis request); Kiel, "Avoiding Atkins."

[99] *Payne v. State*, 493 S.W.3d at 486.

[100] *Tennessee v. Payne*, Nos. 87-04409 and 87-04419, Order (Tenn. Sup. Ct. Feb 24, 2020) (setting execution date).

[101] *Payne v. State*, 493 S.W.3d at 492.

[102] See *Tenn. Code. Ann.* §39-13-203(g) (2022).

[103] Adrian Sainz, "Expert to study mental disability claim of death row inmate," *Associated Press*, June 4, 2021. Available at: https://apnews.com/article/tn-state-wire-health-coronavirus-pandemic-6a455a55d73d7c98c537f2c00873512a

[104] Shelby County District Attorney, "DA Weirich Files Petition to Remove Payne Death Penalty," November 18, 2021. Available at: https://www.scdag.com/news-releases/da-weirich-files-petition-to-remove-payne-death-penalty

[105] Katherine Burgess, "Shelby County District Attorney abandons pursuit of death penalty in Pervis Payne case," *The Commercial Appeal*, Nov. 18, 2021. Available at: https://www.commercialappeal.com/story/news/2021/11/18/tennessee-death-row-inmate-pervis-payne-avoid-execution/8673793002/

[106] Ibid.

BOOK REVIEWS

The Yankee from Olympus Redivivus by Melvin I. Urofsky

Oliver Wendell Holmes: A Life in War, Law, and Ideas Stephen Budiansky New York: W. Norton, 2019. 579 pp. $29.95
Oliver Wendell Holmes: A Willing Servant to an Unknown God Catherine Pierce Wells New York: Cambridge University Press, 2020. 213 pp. $29.99
The Black Book of Justice Holmes: Text Transcript & Commentary Michael H. Hoeflich and Ross E. Davies, eds. Clark, N.J.: Talbot Publishing (an imprint of The Lawbook Exchange), 2021. 497 pp. $195.00

No member of the Supreme Court, or for that matter of any tribunal in the world, has had so much written about him as has Oliver Wendell Holmes Jr., who served on this nation's high court from 1902 until 1932. A quick search of the Library of Congress catalog has nearly 800 books listed either about Holmes or in which he figures prominently. All told, there are over 20,000 items in the catalog—from newspaper articles to pieces in scholarly journals dealing with Holmes. No other justice has been the subject of a Hollywood movie! And yet, every year more works appear that offer up new or additional facts and interpretations. Even conceding that Holmes may have been the most colorful justice in the Court's history, can there really be that much more new to say about him?

What makes Holmes so attractive to biographers? There is, of course, his military service during the Civil War, in which he was wounded three times, and led him to say that he, and others who had fought, had been "touched with fire." Memories of the war seemed ever-present on his mind and took overt form in his many talks and articles.

Then there is **The Common Law**, which Holmes published five days before his fortieth birthday in 1881, and whose first line, "The life of the law has not been logic; it has been experience," is known by every student of American legal history. The book was immediately hailed as a landmark in legal literature, and 140 years later is still considered the greatest work ever published on American law.[1]

Holmes served a half century as a judge: twenty years on the Massachusetts Supreme Judicial Court, and then three decades on the U.S. Supreme Court, and in that time left an impressive legacy of opinions, both for the Court and in dissent. In most scholarly polls, Holmes is nearly always ranked among the three most important justices in our history, joined by Chief Justice John Marshall and by his friend and long-time colleague, Louis D. Brandeis.

Moreover, the man could write! No one in the 230-plus years of the Court's history could write so well, and with such a flair. Every time I teach a course in constitutional law or history, the qualitative difference between Holmes and his colleagues jumps out at me. Unlike the deadly dull law journal opinions introduced by Felix Frankfurter, Holmes' opinions were short and to the point. Judge Learned Hand once declared that Holmes had a "matchless gift of compression."[2] He worked at a standing desk and said that as soon as his knees began to hurt, he knew the opinion was long enough.[3]

Finally, Holmes' impact on American jurisprudence, both legal and constitutional, cannot be ignored. **The Common Law** is

DOI: 10.1111/jsch.12301

the direct forebear of what Judge Richard Posner has called "the most influential school of twentieth-century American legal thought and practice," Legal Realism.[4] Entire volumes have been written, for example, on Holmes' free speech opinions.[5] His dissent in *Lochner v. New York* (1905)[6] changed the way justices saw their duty, and introduced the concept of judicial restraint, an idea praised by both liberals and conservatives, and ignored almost in equal measure when it suits them.

Like that of every great person, Holmes' reputation has risen and fallen and risen again over time. Even in his lifetime, Chief Justice William Howard Taft considered Holmes "a very poor constitutional lawyer . . . he lacks the experience of affairs in government that would keep him straight on constitutional questions." Taft often complained that Holmes was "so completely under the control of Brother Brandeis that it gives Brandeis two votes instead of one." While Holmes appreciated the efficiency that Taft brought to the Court, for the most part he considered the Chief Justice as little "more than first-rate second rate."[7]

More serious criticism about Holmes rose long after his death. Holmes was an unabashed Malthusian as well as a Social Darwinist, and he once said that law was only what a majority of the people were willing to fight for. In **The Common Law** he dismissed so-called God-given natural law and held that most law had its origins not in morality but in vengeance. Catholic scholars saw this rejection of "natural law" not only as dangerous but "alien," an open invitation to immorality and even fascism. "If totalitarianism ever becomes the form of American government," wrote the Jesuit scholar Paul Gregg, "its leaders, no doubt, will canonize as one of the patron saints Mr. Justice Holmes."[8]

Probably the most scathing criticism of Holmes arose from what many consider his most notorious decision, *Buck v. Bell* (1927).[9] In it Holmes, writing for a near-unanimous Court, upheld a Virginia statute authorizing the sterilization of the "feebleminded." His conclusion, that "three generations of imbeciles are enough," mistakenly assumed that Carrie Buck, her mother and her daughter, were all intellectually disabled, when in fact they were not.[10] Here, unlike in many of his opinions, Holmes did not display indifference and neutrality. He was, as were many progressives of the time, ardent supporters of eugenics. Not until the world saw what the Nazis had done in the name of eugenics did the movement lose all credibility.

In 1963, Yosal Rogat published "Mr. Justice Holmes: A Dissenting Opinion," a major revision of the Holmes image as civil libertarian, focusing on cases involving aliens and people of color.[11] In a separate essay the following year, Rogat took Holmes' alleged detachment and showed how it affected his jurisprudence.[12] The most extensive attack on Holmes can be found in Albert W. Altschuler, **Law Without Values** (2000), a stinging assault on Holmes' alleged lack of morals in his jurisprudence.[13] While it is true that in **The Common Law** Holmes did divorce so-called natural law or morality from the law created by experience, Altschuler took his criticism far beyond that. (While Budiansky cites Altschuler in his bibliography, he does not cite Rogat, whose articles are considered the leading scholarly critique of Holmes' jurisprudence.)

In many ways, Stephen Budiansky is out to do battle with these critics on behalf of a man he surely idolizes, and he approvingly quotes Dean Acheson: "I think the 'greatest' man I have ever known, that is, the essence of man living, man thinking, man baring himself to the lonely emptiness—or the reverse—of the universe was Holmes."[14]

Budianskys' book is an engaging read, and while many of the stories about Holmes can be found elsewhere, there were some new ones. For example, Holmes explained to his clerks how he fired off his decisions so

rapidly. Writing a Supreme Court opinion, he said, was "just like pissing; you apply a pressure, a very vague pressure, and out it comes."[15]

Budiansky tries to explain Holmes' life and jurisprudence based on his experiences, especially as part of the elite Brahmin group in which he grew up, as well as the time he spent as a Union soldier in the Civil War. Here again, while many of the stories are familiar, Budiansky has found new ones. By now any reader of biography knows that what a person becomes in life has direct roots in his or her experience growing up. But as Judge Posner has argued, once a person dons the black robes, the requirements of the law will take over.[16] This is certainly true of Holmes in many ways.

As volumes of his correspondence appeared, some of those who had lionized Holmes for his "liberal" opinions were aghast to discover that he had upheld free speech for socialists, governmental regulation of the economy, and the right to organize for labor unions not because he agreed with these positions or even sympathized with them, but that in fact he had contempt for them. He considered the Sherman Act "an imbecile statute . . . a humbug, based on economic ignorance and incompetence."[17] He had little faith in most reform legislation, but did not see it as a judge's responsibility to pass on the wisdom of such laws, telling Harold Laski that "if my fellow citizens want to go to Hell I will help them. It is my job."[18] One can seek in one opinion after another for some evidence of Brahmin sensibility or Civil War scars; one would find little.

An opinion in which Holmes did, in fact, let his own views prevail was the Virginia involuntary sterilization law, *Buck v. Bell* (1927), which subsequent generations have seen as a black mark on Holmes' record. Budiansky tries to explain it away by the fact that the justice did not know it was a collusive case, that the appeals process was a fraud, and that none of the Buck women were "feebleminded." "Had Holmes been aware of the collusive nature of the appeal," writes Budiansky, "he might well have taken a different view of the matter." Budiansky also blames Chief Justice Taft for egging Holmes on and even suggesting what became the infamous "three generations of imbeciles are enough."[19]

In this case, however, one can find evidence of Holmes the soldier, when he writes that "We have seen more than once that the public welfare may call upon the best citizens for their lives." But we also can see that in this case Holmes felt strongly about eugenics, and as he told Harold Laski, "At times I have gone too far in yielding my own views as to the reason for the decision."[20]

At the time, very few people protested the decision. Justice Pierce Butler dissented, but without opinion. Holmes said that "I bet you Butler is struggling with his conscience. . . . He knows the law is the way I have written it. But he is afraid of the Church. I'll lay you a bet that the Church beats the law."[21]

But Budiansky pays no attention to the fact that in 1927 the Court rarely overturned a state statute, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment had not yet been adopted to protect individual liberties. Not until Justice William O. Douglas' path-breaking opinion in *Skinner v. Oklahoma* (1942) did the Court overturn a state sterilization statute.[22]

All in all, while this book is full of anecdotes and gives the reader a good portrait of Holmes, both on and off the bench, one finds the analysis of Holmes' jurisprudence quite thin. He writes that "Holmes's record as a trial judge during his twenty years on the Massachusetts high court has tended to be overlooked,"[23] but that is hardly the case. G. Edward White, in his magisterial **Justice Oliver Wendell Holmes: Law and the Inner Self** (1993), not only pays a good deal of attention to the years on the state court but does so with attention to how Holmes' jurisprudence developed there.[24]

Budiansky does, however, make a very important point about Holmes' experience on the state court. At that time, besides the full court hearing appeals, individual justices also presided over a heavy caseload of trials, involving everything from divorce to murder to fraud to collapsing warehouses. They also heard many cases from the business world, ranging from insurance to trademarks to bankruptcy, as well as new issues that grew out of the nation's rapid industrialization.

As Budiansky notes, these cases gave Holmes an important grasp of real-world problems. He quotes Brandeis as saying that "It's perfectly amazing that a man who has had no practical experience to speak of . . . should be so frequently right as to matters that have significance only in their application." Brandeis might also have noted that Holmes—studiously—did not read newspapers. Twenty years on the Massachusetts court had, however, given him an extensive schooling in the practical matters of the world.[25]

One thing Budiansky and White agree on is that Holmes' life did affect his writings on the Court, and that is also the view of Professor Catharine Pierce Wells, whose biography has the intriguing subtitle of "A Willing Servant to an Unknown God."

Wells divides her book into two parts. The first, entitled "The Soldier's Faith," begins with Holmes 1884 Memorial Day speech in Keene, New Hampshire. That speech, more than anything else Holmes wrote, spoke of the glory of those who fought in the war, those who "in our youth our hearts were touched with fire."[26] She then goes on to review his time in the war and his return to Boston, entitling the last chapter of this section "For the Puritan Still Lives in New England, Thank God!"

Part II, "The Journey to the Pole," starts with the 1897 Brown University Commencement talk. Holmes had read and been impressed by Fridtjof Nansen's **Farthest North**, an account of his attempt, beginning in June 1893, to reach the North Pole. In his talk at Brown, Holmes compared Nansen's journey with his own exploration of the law and noted that "there were few of the charts and lights for which one longed when I began."[27] The rest of Part II deals with that journey, from Harvard Law School through **The Common Law** and his years on the bench. Wells also spends a good deal of time on Holmes as a philosopher, his friendship with William James, and his participation in the Metaphysical Club.[28] In this I think she is right since Holmes more often than not described himself as a philosopher rather than as a jurisprude. In a letter to Ralph Waldo Emerson, he wrote that "it seems to me that I have learned . . . that the law opens a way to philosophy."[29]

While there are stories, Wells is primarily concerned with ideas and trying to establish the three that mattered most to Holmes, namely, pragmatism, a commitment to empirical science, and Ralph Waldo Emerson's Transcendentalism. The problem, she found, is that these ideas often contradicted each other.

For example, he reduced law to power, knowledge to belief, and debunked natural law. Instead of identifying law with morality, he saw its source as the power to punish. The foundation of law is the fact that his fellow citizens "tell me that I must do and abstain from doing various things or they will put the screws to me."[30]

On the other hand, he had a "speculative reach" that sought hidden meanings and "echoes of the divine" in human experience. He nearly always capitalized the Universe or the Law, and closed one of his most famous essays, "The Path of the Law," with a rather mystical suggestion:

> The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but

> connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of universal law.[31]

Wells gives a fine and interesting reading to Holmes' war experience, his growth in the law, and above all, his philosophical musings, in both formal writings and correspondence, and then does an even more nuanced examination of the contradictions in his beliefs. By the time I got to the last chapter, I was ready to see how she would tie all these strands and contradictions together to explain his jurisprudence.

Wisely, she does not attempt to analyze dozens of cases across his half-century on the bench, but her choice of cases is at times puzzling. She chooses two opinions from his tenure on the Massachusetts court, *Lamson v. American Axe and Tool* (1900)[32] and *Vegelahn v. Guntner* (1896).[33] Holmes' dissent in the latter case, in which he found peaceful picketing in a labor dispute lawful, is perhaps his best-known state opinion, and is generally considered one factor, but not necessarily the most important one, in Theodore Roosevelt's decision to name Holmes to the Supreme Court. In his opinion, Holmes very carefully laid out the facts and found that in the lop-sided imbalance between employer and employee, peaceful picketing should surely be allowed to workers.

Lamson is a little-known case in which Holmes upheld the common law doctrine of assumption of risk, in which an employer is not liable for injury to a worker if the latter was aware of, and accepted, the risk involved in the position. Wells believes that in *Lamson* we see Holmes' views on judging clearly displayed: a rejection of a mechanical mode of decision-making, a belief substantive contemporary policy rather than outmoded forms of logic comprise the common law, and perhaps most importantly, judges are not free from constraint. Although the assumption of risk would soon be discarded in labor relations law, it was still in effect, and in an opinion less than a page long, Holmes ruled that the facts fully supported the employer in this case.

In both cases, Wells lauds Holmes for acting on his belief that judicial opinions should be transparent, that is, the reasons for the decision should be clear to the reader, and not be hidden behind a veil of legal obfuscation. This trait would surely be one of the things that made Holmes so attractive to progressives.

Of the cases she has chosen from the Supreme Court, two are no surprise. She sees his dissent in *Northern Securities Co. v. United States* (1904) as a statement of judicial independence.[34] Theodore Roosevelt had launched his reputation as a "trust-buster" with a Sherman Act case against the railroad interests of J.P. Morgan and James J. Hill, who had combined some 9,000 miles of track, nearly all of which went west from Chicago.

The majority, speaking through Justice John Marshall Harlan, upheld the government's case by a 5–4 vote, but Holmes, although he recognized it would incur Roosevelt's ire, dissented. If one read the Sherman Act literally, then "every" sales agreement between any buyer and seller would technically violate the law since it foreclosed any other buyer or seller from that transaction. Instead, Holmes suggested what became known as the "rule of reason," in which only those contracts, combinations, or conspiracies that "unreasonably" restrained trade would be punished, a rule adopted by the entire Court in 1911.[35]

Roosevelt proved smart enough not to make a public issue of his anger, exclaiming in private that he could "carve a Justice out of a banana with more backbone than that." Two years later, the president wrote that "from his antecedents, Holmes should have been an ideal man on the bench. As a matter of fact he has been a bitter disappointment."[36]

The other case, *Lochner v. New York* (1905),[37] laid the basis for what is known as judicial restraint. In his dissent, Holmes argued that courts had no business judging the wisdom of measures passed by either state legislatures or Congress. The only question was whether the power existed, and if so then courts should uphold the constitutionality of the statute. Here one can go back to **The Common Law** where Holmes believed that the law should not be disruptive but should defer to the custom and convenience of everyday life.

I think Wells shows more awareness than Budiansky of how judicial restraint plays out when she looks at *Buck v. Bell*. Although she agrees that the case is an egregious abuse of personal autonomy and that Holmes did not know the true facts of the case, she argues that Holmes found it an easy case. "Just as the Constitution allowed the state of New York to make its own decisions about the maximum hours for bakers, it permitted the state of Virginia to curtail the ability of Carrie Buck to have children."[38]

She then notes that "a modern reader is struck by the fact that Holmes could not see significant issues of personal autonomy present in the case." While conceding that few judges at the time would have ruled differently, she chastises him for the immoderate tone of his opinion; the "three generations of imbeciles" is "not just insensitive; it is cruel, almost monstrous."[39] Historians, however, have to be careful, not so much of indicating their own views, but of confusing current attitudes ("a modern reader") with prevailing sentiments of the past.

Like Rogat, she also criticizes Holmes for two opinions regarding African-Americans under the Civil War amendments. In *Giles v. Harris* (1903),[40] Holmes spoke for the majority in rejecting what was clearly a violation of the Fifteenth Amendment, in which thousands of Black men in Alabama were prevented from registering to vote. Holmes recognized this but went on to say that there was no practicable—what we would now call judicially manageable—way for the courts to provide relief, thus ducking the charges of blatant discrimination.

Holmes was not happy about the decision—some newspapers had portrayed him as "a second Taney"—but he saw it as his duty to protect the Court from giving relief that was beyond its power.[41]

In *Bailey v. Alabama* (1911),[42] Justice Charles Evans Hughes spoke for a 7–2 majority, striking down a peonage law that led to labor on a chain gang as a restriction of personal rights and a violation of the Thirteenth Amendment. Here Holmes' dissent seems stilted, a rumination on the sacredness of the written terms of a contract and what appears to be a knowing blindness to racial relations in the Deep South.

While today we recall the Holmes dissents in *Northern Securities* and *Lochner*, and still shudder at *Buck v. Bell*, we more or less ignore *Giles* and *Bailey*, placing them where they deserve, in the shadow of *Plessy v. Ferguson*.[43] But where are the cases that make up Holmes' great legacy, the First Amendment speech cases: the fight with Brandeis to uphold protective legislation and the great dissent in *United States v. Schwimmer* (1929).[44] In looking at Wells' index, there are no listings for the First Amendment, free speech, Brandeis, *Adkins v. Children's Hospital*,[45] or any of a half dozen other cases that we still study. It is unclear who the "Unknown God" is, nor why Holmes was a "willing servant." After reading this book, one might well question why Holmes is considered a great jurist, and one of the three most important persons to have served on the high court.

Both of these books have interesting materials—Budiansky's stories and Wells' analysis of Holmes' life—but in the end, they add only marginally to our understanding of and knowledge of Holmes. He remains the fascinating "Yankee from Olympus," and I have no doubt that in the years to come there

will be still other works exploring his life and thought.

* * * * * *

The Black Book of Justice Holmes is a horse of another color. It is not the sort of book any but a devoted Holmesian or a research library would own, but it is one of the best pieces of work I have seen in a long time. In it, Holmes entered lists of books he had read for more than a half-century, starting in 1876 and continuing until his death in 1935. But as Ross E. Davies points out, it is not a complete list, because we know from some of his correspondence that there are other books he read, as well as from court opinions that there are books he cited and with which he was clearly familiar.

Holmes' handwriting is difficult, especially since he seemed determined to cram as much writing as he could into every available blank space. As someone who spent years deciphering Louis Brandeis' writing, I would not say that Holmes makes Brandeis' scribblings clear, but I admire the hard work by the transcribers—Michael H. Hoeflich, Steven A. Epstein, Ashley Akers, and Will Admusson—and the fine job they did.

But the **Black Book** is not just a list of books. In 1876 his friend Henry Adams published **Essays in Anglo-Saxon Law**. The first professor of medieval history at Harvard, Adams included in his volume an essay on Anglo-Saxon law courts, as well as research from three of his students, Henry Cabot Lodge, Ernest Young, and J. Laurence Laughlin. Holmes read the book twice, making copious notes, and then shortly after the book came out, Adams gave Holmes all of his German books on legal history.

After he finished editing a new edition of James Kent's **Commentaries on American Law**, Holmes had begun to study early law. He had a working knowledge of Greek, Latin, German, and French, and his research led him particularly into French and German sources. Even before he saw the Adams book, Holmes had written his first article on "Primitive Notions in Modern Law."[46] The books he received from Adams, as well as sources cited in the various essays, sent him off on a four-year search that would eventually lead to **The Common Law**.

If one wants to see how well one can trace the origins of a specific work, they can do no better than to read Steven A. Epstein's essay, "The Black Book and PreModern Law."[47] The first part of the **Black Book** is devoted to notes Holmes took on dozens of books, many in French and German. According to Epstein, professor emeritus of history at the University of Kansas, it was Holmes' intent from the beginning to write about the common law, but to do so he first had to master what had come before, and this included not just early English law, but Salic Frankish law, the medieval French penal code, Roman law, and others.

Epstein notes that during this period of intense reading and note-taking, Holmes was also developing a philosophy. He read Immanuel Kant's **The Critique of Pure Reason** and became impressed with the attention to detail that he found in German historians such as Carl Georg Bruns and Bernhard Windscheid. It is clear that, thanks to Adams, Holmes was able to delve into the most up-to-date German scholarship of the latter nineteenth century. The first fruits of this research appeared in an article on possession,[48] which Epstein then traces to an early version of one of the Lowell Lectures in 1879, and then to a chapter in **The Common Law**. We need not go into all the details, but Epstein does a masterful job of picking out the main themes that Holmes developed and tracing them back to the research that he had done in his readings.

During this research, Holmes laid down the basis for his lifelong emphasis on experience, and it is worth quoting here:

> Experience meant for Holmes this entire mental process by which one grasped the philosophy of law. In a broader context experience meant the evolutionary process by which institutions competed, failed or succeeded. Holmes presciently understood that evolution worked on groups rather than individuals, and human institutions were simply bundles of experiences, not simply rules so often defining them in modern institutional theories of law, political science, or economics. For Holmes experience was just as good as instinct and logic. No one could study Roman or English Common law and come away with any other conclusion than that the life of the law was not (solely) logic but experience. Holmes in the **Black Book** was beginning the process of pulling together all his reading and experiences to the subject of the common law, which he had discovered was in need of a good book.[49]

After the great effort expended in the Lowell Lectures and the publication of **The Common Law** in 1881, the notes in the **Black Book** display a dwindling in academic reading and "a research agenda in tatters." He did list ten topics for essays, and some of them actually became speeches or law review articles, but research and note-taking tapered off, and finally disappeared after 1897. As Ross Davies reminds us in his essay, Holmes only wrote one book in his life—but what a book—**The Common Law**. The others that bear his name are collections of speeches and essays. He never even wrote a second edition of **The Common Law**.

The rest of the **Black Book** is devoted to lists of books that Holmes read, and as Davies points out, "Holmes was an omnivorous cosmopolitan who routinely read dozens of books per year, ranging from popular American fiction to dense works of Continental legal and historical scholarship. . . . [He] read widely, in and outside the law, from the serious to the frivolous."[50] One of the first items listed in 1881 was **The Memoirs of Jacques Casanova**, yes, that Casanova who, among other things, was a lawyer. Interspersed among the racier tales were some of the most perceptive observations of society and human affairs in late eighteenth-century Europe.

Holmes was a lover of detective stories, and the **Black Book** lists, over a long period of time, Holmes read dozens of mysteries ranging from Agatha Christie's Miss Marple and Hercule Poirot to Arthur Conan Doyle's adventures of Sherlock Holmes. Our Holmes apparently first sampled these stories in 1893, and then "read all of the Holmes stories in 1932."[51] Other mystery writers included Dashiell Hammett, John Dickson Carr, Dorothy Sayers, and Ellery Queen, to name just a few.

Poetry, history, law—about the only thing Holmes would not read were nonfiction analyses of industrial conditions heavily laden with facts. "Brandeis the other day drove a harpoon into my midriff with reference to my summer occupations," Holmes complained to Sir Frederick Pollock. "He said you talk about improving your mind, you only exercise it on the subjects with which you are familiar. Why don't you try something new, study some domain of fact." Brandeis wanted Holmes to study factory reports and then take a trip to the Lawrence mills to get a sense of what these facts meant in terms of human lives. Although Holmes dutifully carried a few volumes with him to his summer home at Beverly Farms in 1919, he could not really get into them and resented the time taken away from his Greek poets. The next summer he gratefully confessed, "In consideration of my age and moral infirmities, [Brandeis] absolved me from facts for the vacation and allowed me my customary sport with ideas."[52] Brandeis

did, however, occasionally give books to the older justice that he knew Holmes would like. "No Keynes for me just now," Holmes told Felix Frankfurter. "Brandeis has put me on to a book about Crete and I am absorbed."[53]

Holmes loved his summers at Beverly Farms when he was freed from having to write opinions and could read to his heart's content. There were always some serious books on economics, sociology, science, and law. But after plowing through these, he would happily turn to lighter themes, He reread Plato's **Republic** and Homer's **Odyssey** in the original Greek; finished Dante, preferring the **Paradiso**; read through the **Oxford Book of French Verse;** Spinoza's **Ethics;** Henry James' **The Ambassadors**; and after some English friends encouraged him, gave Jane Austen another try, although he found her "a bore."[54] And, of course, there were the mysteries.

As Ross Davies notes in his perceptive essay in the book, Holmes read widely over the course of his life, and some of his reading made it into his court opinions, such as the famous line in his dissent in *Lochner v. New York* (1905) that the "Fourteenth Amendment does not enact Mr. Herbert Spencer's **Social Statics**."[55] None of his readings, however, ever appeared verbatim in anything he wrote. "For Holmes, the works he read were not sources of bricks or words to be assembled en bloc, with the mortar of his own words connecting and stabilizing them. They seem to have been, at most, sources of raw ingredients from which he would formulate, mix, and bake his own distinctive expressions."[56]

Let me finish with a sampling of books Holmes listed in the **Black Book**. It is not representative, because it would be impossible in a limited space to do justice to the wide variety of his interests. But a sampling will whet the appetite.

Agatha Christie, **Murder in Three Acts**

Harold Nicolson, **Public Faces**

Herbert Hoover, **The Challenge to Liberty**

Rafael Sabatini, **Venetian Masque**

W.H. Auden, **The Dance of Death**

Bertrand Russell, **Freedom and Organization**

John Dickson Carr, **The Blind Prophet**

James Hilton, **Goodbye Mr. Chips**

H.G. Wells, **Experiment in Autobiography**

P.G. Wodehouse, **If I Were You**

Leslie Charteris, **The Saint Intervenes**

A.E. Housman, **The Name and Nature of Poetry**

George Santayana, **Some Turns of Thought in Modern Philosophy**

Sax Rohmer, **The Daughter of Fu Manchu**

Morris R. Cohen, **Law and the Social Order**

Edgar Allen Poe, **Murders in the Rue Morgue**

Saki, **Chronicles of Clovis**

Kenneth Grahame, **The Wind in the Willows**

Lytton Strachey, **Characters and Commentaries**

Anthony Trollope, **Barchester Towers**

Ellery Queen, **The Siamese Twin Mystery**

Don Marquis, **Archy's Life of Mehitabel**

Felix Salten, **Bambi**

Shakespeare, **King Lear**

Dashiell Hammett, **The Thin Man**

F. Yeats-Brown, **The Lives of a Bengal Lancer**

T.S. Eliot, **The Use of Poetry**

Charles Dickens, **American Notes**

Lawrence Sterne, **Tristam Shandy**

G.K. Chesterton, **The Innocence of Father Brown**

Dorothy Sayers, **The Nine Tailors**

Georges Simenon, **The Shadow in the Courtyard**

Balzac, **Cousin Bette**

Samuel Eliot Morison, **Builders of the Bay Colony**

Walter Lippman, **The Method of Freedom**

Walter Scott, **Quentin Durward**

Darwin Teilhet, **The Talking Sparrow Murders**

Willa Cather, **Death Comes to the Archbishop**

Mark Twain, **A Connecticut Yankee in the Court of King Arthur**

Samuel Butler, **The Way of All Flesh**

D.H. Lawrence, **Lady Chatterley's Lover**

Virginia Woolf, **Mrs. Galloway**

Philip Schuyler Allen, **Medieval Latin Lyrics**

Hillaire Belloc, **A Conversation with a Cat and Others**

John Maynard Keynes, **Essays in Persuasion**

J.W.N. Sullivan, **Beethoven: His Spiritual Development**

Oswald Spengler, **The Decline of the West**

Bram Stoker, **Dracula**

Carl Becker, **The Heavenly City of the Eighteenth-Century Philosophers**

George Bernard Shaw, **The Adventure of the Black Girl in Her Search for God**

Philip MacDonald, **Rope to Spare**

And the list goes on, with dozens, even hundreds of mysteries interspersed with serious works as well as light-hearted humor, poetry, and commentary on current events. Not only could the man write, but he could surely read as well!

Melvin I. Urofsky is the former Editor of the *Journal of Supreme Court History* and the author of numerous books about the history of the Supreme Court.

ENDNOTES

[1] The best edition is the one annotated by Mark A. DeWolfe Howe (Harvard University Press, 1963).

[2] Cited in Budiansky, 11.

[3] Story told to me by the late Professor Milton Handler, who while a clerk to Harlan Fiske Stone had been sent to deliver a draft opinion to Holmes.

[4] Budiansky, 11.

[5] See, for example, Richard Polenberg, **Fighting Faiths** (Viking, 1987), and Thomas Healy, **The Great Dissent** (Henry Holt, 2013), both dealing with Holmes' dissent in *Abrams v. United States*, 250 U.S. 616 (1919).

[6] 198 U.S. 45 (1905).

[7] Budiansky, 405, 409.

[8] Paul Gregg, "The Pragmatism of Mr. Justice Holmes," 31 *Georgetown Law Journal* 262, 294 (1943).

[9] 274 U.S. 200 (1927).

[10] Paul Lombardo, **Three Generations, No Imbeciles: Eugenics, the Supreme Court, and Buck v. Bell** (Johns Hopkins University Press, 2008).

[11] Yosal Rogat, "Mr. Justice Holmes: A Dissenting Opinion," 15 *Stanford Law Review* 254 (1963).

[12] Yosal Rogat, "The Judge as Spectator," 31 *University of Chicago Law Review* 213 (1964).

[13] Albert W. Altschuler, ***Law Without Values: The Life, Work, and Legacy of Justice Holmes*** (University of Chicago Press, 2000).

[14] Acheson to Michael Janeway, 24 May 1960, quoted in Budiansky, 19.

[15] *Ibid.*, 10.

[16] See Richard A. Posner, "Judicial Biography,"70 *New York University Law Review* 502 (1995).

[17] Quoted in Melvin Urofsky and Paul Finkelman, **A March of Liberty**, 2:607 (3rd ed., Oxford University Press, 2011).

[18] Holmes to Harold Laski, 4 March 1920, in Mark A. DeWolfe Howe, ed., **The Holmes-Laski Letters** (2 vols, Harvard University Press, 1953), 1: 248–49.

[19] Budiansky, 428–30.

[20] Holmes to Harold Laski, 29 April 1927, in *ibid.*, 431.

[21] "Daniel J. Danelski," "Pierce Butler," in Melvin I. Urofsky, ed., **Biographical Encyclopedia of the Supreme Court** (CQ Press, 2006), 107–108.

[22] 316 U.S. 535 (1942).

[23] Budiansky, 184–85.

[24] G. Edward White, **Justice Oliver Wendell Holmes: Law and the Inner Self** (Oxford University Press, 1993), chs. 6 and 8. See also Mark Tushnet, "The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court," 63 *Virginia Law Review* 975 (1977).

[25] Budiansky, 185.

[26] Wells, 11–14. This talk, which Wells terms "beautiful," is different in tone from the more famous "The Soldier's Faith," which Holmes gave at Harvard the following year upon receiving an honorary degree.

[27] *Ibid.*, 105–108.

[28] Louis Menand, **The Metaphysical Club: A Story of Ideas in America** (Farrar, Straus and Giroux, 2001).

[29] Holmes to Emerson, 16 April 1876, cited in Wells, 148.

[30] Wells, 4.

[31] Holmes, "The Path of the Law," 10 *Harvard Law Review* 457, 478 (1897), cited in Wells, 4.

[32] 177 Mass. 144 (1900).

[33] 167 Mass. 92 (1896).

[34] 193 U.S. 197 (1904).

[35] *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

[36] Wells, 182.

[37] 198 U.S. 45 (1905).

[38] Wells, 185.

[39] *Ibid.*, 185, 186.

[40] 189 U.S. 475 (1903).

[41] Wells, 190.

[42] 219 U.S. 219 (1911).

[43] 163 U.S. 537 (1896).

[44] 274 U.S. 644 (1929).

[45] 261 U.S. 525 (1923).

[46] 11 *American Law Review* 641 (1877).

[47] The **Black Book**, pp. xxv–l. Since these are large-size pages, it may help the reader to know the essay runs 21,000 words.

[48] 12 *American Law Review* 688 (1878).

[49] Epstein, p. xliv.

[50] Ross E. Davies, "'The true reason appears from the old books': The Reading and Writing of a Common-Law Judge," in **Black Book**, li–lxii, at lii, lvii.

[51] For more on this, see Ross E. Davies and Michael H. Hoeflich, eds., **Holmes Reads Holmes: Reflections on the Real-Life Links between the Jurist and the Detective** (Talbot Publishing, 2020). The first Sherlock Holmes story, "A Study in Scarlet," was published in November 1887. The first collection of twelve stories, **The Adventures of Sherlock Holmes**, appeared in the United States in 1892. Holmes' friend and colleague, Louis D. Brandeis, also enjoyed Sherlock Holmes, and told a reporter that he used the same methods as the great detective and hoped that maybe someday he would solve a murder.

[52] Holmes to Pollock, 26 May 1919, Mark A. DeWolfe Howe, **The Holmes-Pollock Letters** (2 vols., Harvard University Press, 1961), 2:13; Holmes to Laski, 11 June 1920, **Holmes-Laski Letters,** 1:268.

[53] Holmes to Frankfurter, 20 February 1922, in Robert M. Mennel and Christine L. Compston, eds., **Holmes & Frankfurter: Their Correspondence, 1912–1934** (University Press of New England, 1996), 136.

[54] Buddiansky, 331–33, also includes Holmes' comments on some of these works.

[55] 198 U.S. 45, 75 (Holmes, J., dissenting).

[56] Davies, "The true reason . . . ," lix.

Sorting Holmes' Haystack

Ross E. Davies

My colleagues who transcribed Oliver Wendell Holmes' **Black Book** took on an extraordinarily difficult — and interesting — task.

Holograph transcription is pretty nearly always hard, because pretty nearly everyone's handwriting has its quirks and blots and illegible squiggly bits. But Holmes' handwritten reading notes and lists of books in the **Black Book** presented three significant extra challenges. First, his handwriting was both bad and inconsistent: It was not good when he first put pen to paper in the **Black Book** (circa 1880-81) and during the 50-plus years that he continued to scribble there, it became increasingly cramped, interlineated, abbreviation-riddled, and intermittently illegible. Second, Holmes read widely in English, French, German, and Latin. Most of his notes and reading list entries were in English, but not all of them. There are passages and snippets of French, German, and Latin sprinkled throughout. So, this Holmes transcription was sure to be quite a chore, based on the handwriting itself and on the language skills required.

But it was the third extra challenge that was the most extraordinary and the most difficult. As anyone who has undertaken a transcription knows, familiarity with the main subjects about which the author writes is the most important tool of the transcriber when dealing with a difficult passage. In other words, the more intellectual common ground the transcriber has with the writer, the more effective the transcriber will be when deciphering cryptic handwriting. Intellectual common ground is the great aide when transcription is at its most sophisticated — when the transcriber must get inside the head of the writer by recourse to substantive expertise, biographical familiarity, contextual inference, and even inspiration drawn from familiarity borne of long association, on paper if not in person.

But what transcriber can do that kind of work when the writer's interests and choices of reading material knew no bounds? That was Holmes, perhaps the most voraciously cosmopolitan reader in American legal history. (Well, almost no bounds. One of Holmes' law clerks reported that, "There was nothing that did not interest him except athletics."[57])

To give a sense of the nature of this third challenge faced by the **Black Book** transcribers, two pages from the **Black Book** are reproduced after this little essay. (They are published here with the kind permission of the Harvard Law School Library, Historical & Special Collections.) Those pages have been selected for their relative legibility and the overall completeness and clarity of the entries, because the focus here is on Holmes' reading range — not his often-abominable penmanship and not his occasional shifts into languages other than English — and also because readers might enjoy doing a little transcribing of their own.

Those two pages were written 40 years apart. Page 149 has the 1893 list of books and page 39 has the second half of the list for 1933 (the first half is on page 73). The pagination is strange because Holmes did not fill the pages of the **Black Book** in order, but instead seems to have moved around, using up available space willy-nilly. Within each yearly reading list, however, Holmes does seem to have recorded the books in the order in which he read them. And within each of those years — like all the others between, before, and after them — the volume and variety of his range was mighty impressive.

Consider, for example, the way he began his reading year in 1893, and the way he ended his reading year in 1933:

Transcription of the first few entries on the reading list for 1893 [supplemented by fuller citations and brief descriptions in brackets]:

Schaffle, Quintessence of Socialism [**The Quintessence of Socialism**, by the German political scientist Albert Schäffle, was published in 1875 and first appeared in an English translation in 1890. It was one of the earliest critiques of socialism to argue that is incompatible with democracy.]

Conan Doyle, Study in Scarlet &c. &c. [Arthur Conan Doyle's novel **A Study in Scarlet** (1887) was his first Sherlock Holmes story, and by the time Holmes put it on his reading list with "&c." in early 1893, Doyle had written a second novel (*The* **Sign of Four**) and a collection of short stories (**The Adventures of Sherlock Holmes**).]

Karl Marx, Kapital, vol, I & II [When Holmes read Karl Marx's socialist classic in 1893, only the first two of what would eventually be four volumes had been published. Holmes's 1906 reading list includes an entry — "(K. Marx) Capital 2d time, find. May 27" — indicating his continued interest in Marx.]

Miss Austen {Emma, &c. Pride & Prejudice Mansfield Park} aloud [Holmes' spouse, Fanny Holmes, often read to him in the evening. This entry suggests that they went through most or all of Jane Austen's great works published between 1811 and 1817.]

Bourget, Cosmopolis [Paul Bourget's novel **Cosmopolis** was published in French in 1892 and in English translation in 1893.]

Taussig. Tariff Hist. of U.S. [**The Tariff History of the United States** (1888), by F.W. Taussig, a Harvard University professor of economics specializing in trade theory, was widely read and influential in its day, and remains in print today.]

So, during the first few weeks of 1893, Holmes — at the time a middle-aged state supreme court justice, still fairly new to the bench — read in rapid succession a scholarly critique of socialism, a bunch of light fiction bestsellers in a then-new detective adventure fiction genre, the first two volumes of a major work by a great socialist theorist, a bunch of classic works of serious English literature, a brand-new French psychological novel, and a scholarly history of U.S. trade law and policy. What did you read in January this year?

Now skip ahead four decades to the end of Holmes' reading for 1933 — by which time he was an aged retired federal supreme court justice in failing health.

Transcription of the last few entries on the reading list for 1933 [this time without supplementation]:

Don Marquis – Archy's Life of Mehitabel

Ralph Roeder – The Man of the Renaissance

Edgar Wallace & Robt. Curtis – The Green Pack

Felix Salten – Bambi

Logan Pearsall Smith – On Reading Shakespeare

It turns out to look very much like more of the same kind of reading Holmes was doing in 1893 — not the same authors or topics by any stretch, but the same range of interest and same manifest curiosity: an anthology of popular poetical social commentary, followed by a sweeping historical examination of the Renaissance, followed by the novelization of a recent theatrical hit, followed by a classic anthropomorphic cautionary tale, followed by an anthology of Shakespearean literary criticism. (And then the first work on Holmes' 1934 reading list was **King Lear**.)

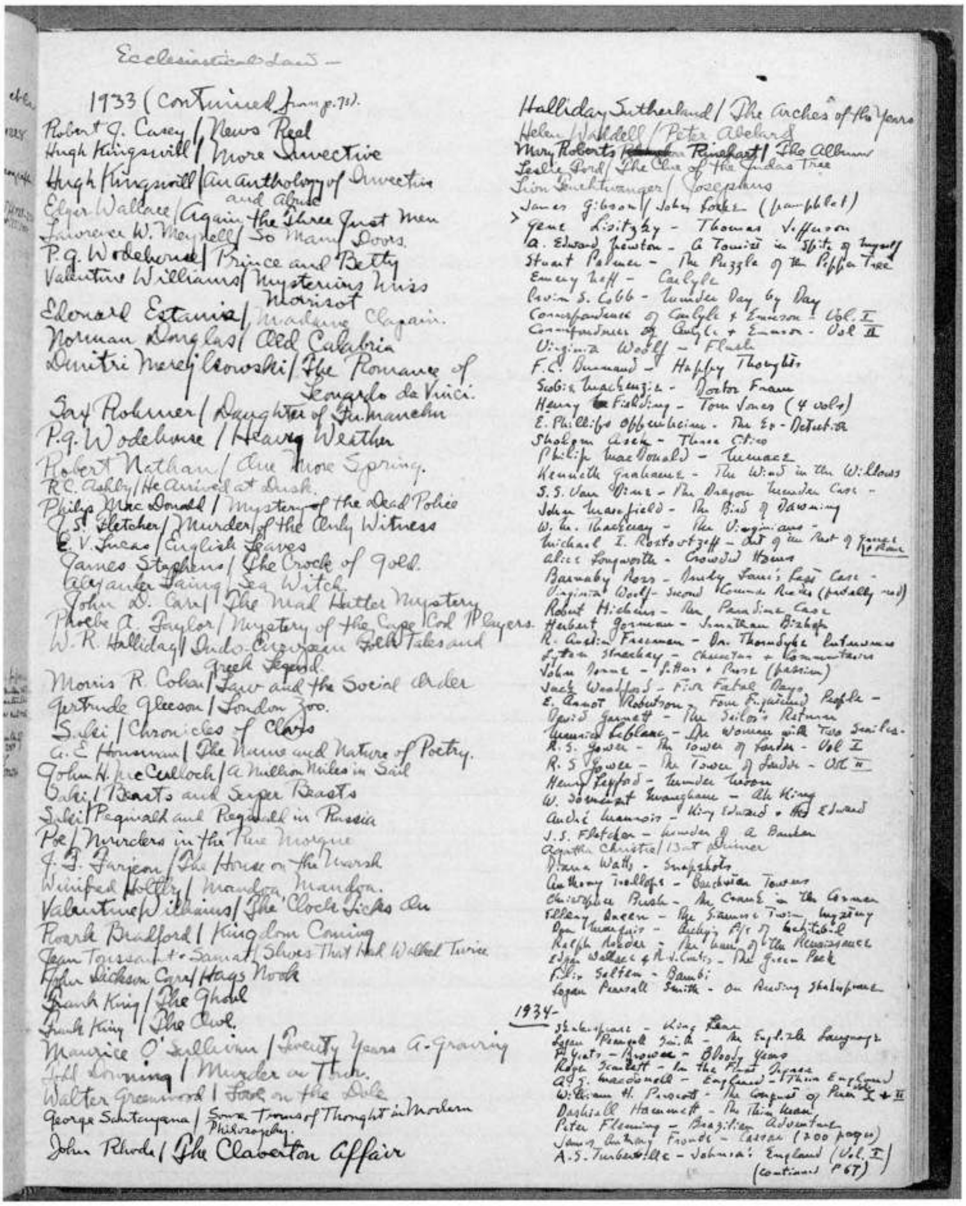
When aided by transcriptions of **Black Book** entries, it is not difficult to figure out the full citations to the books Holmes read. But without the transcriptions, it ranges from occasionally easy to often difficult to sometimes nearly impossible. The consequences for Holmes scholarship are obvious: equipped with transcribed entries from Holmes' **Black Book** lists as starting points, generations of Holmes scholars, beginning with those studying him now, will be able to explore Holmes' life, his work, and his world in ways that were previously beyond our reach. That is why every Holmes scholar owes (or soon will owe)

a debt of gratitude to the transcribers of the **Black Book** — Michael H. Hoeflich, Steven A. Epstein, Ashley Akers, and Will Admusson.

Finally, knowing that a transcription of this sort is inevitably susceptible to improvement, the editors have invited readers to flag our mistakes and missed opportunities by emailing holmesblackbook@gmail.com.

ENDNOTE

[57] Donald Hiss, quoted in G. Edward White, **Justice Oliver Wendell Holmes: Law and the Inner Self** 469 (New York, NY: Oxford University Press, 1993). Perhaps this explains Chief Justice William Howard Taft's assignment of the opinion of the Court in *Federal Baseball Club v. National League*, 259 U.S. 200 (1922), to Holmes. It was the one sure way to avoid the embarrassment of a baseball fanwork in the **U.S. Reports**. Cf. *Flood v. Kuhn*, 407 U.S. 258 (1972).

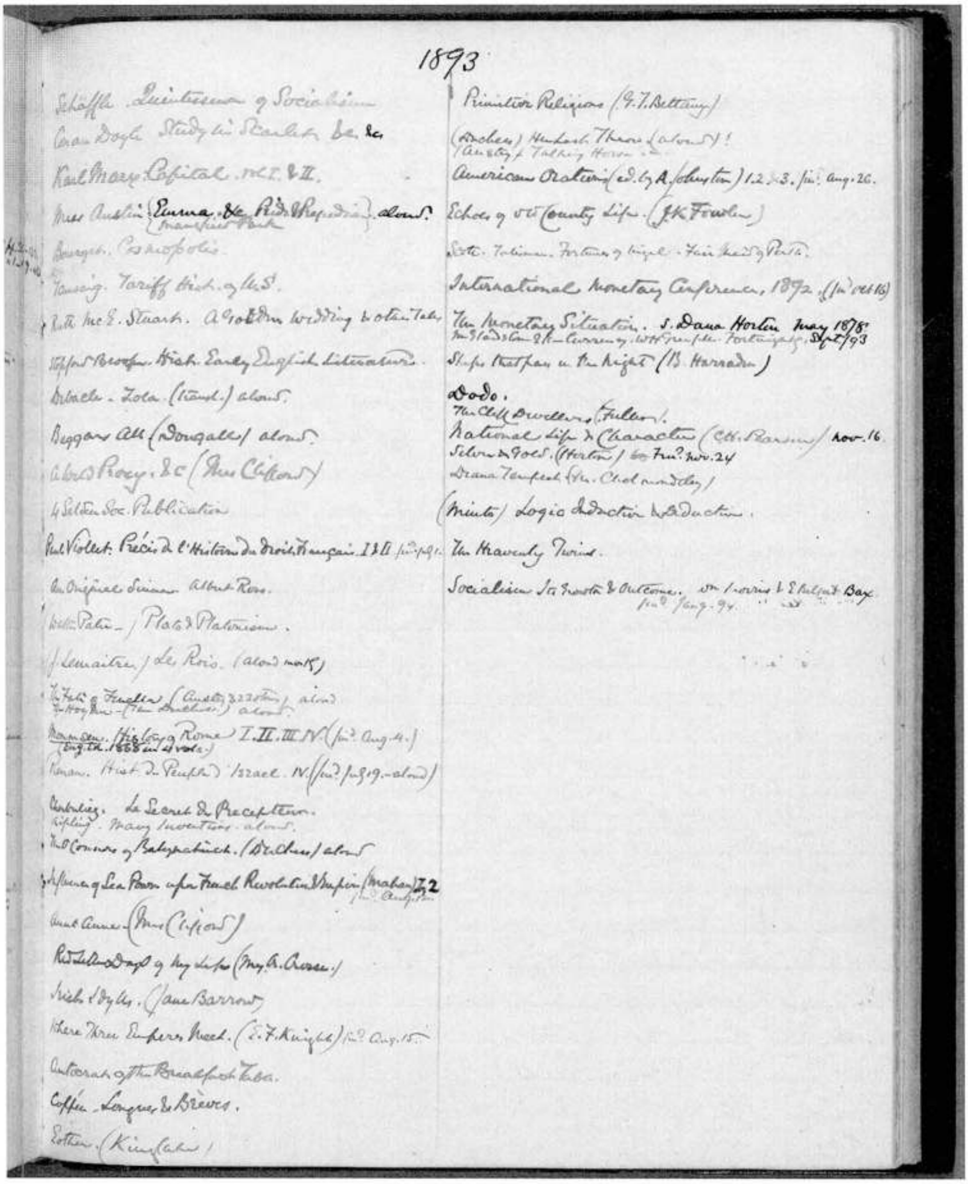


Ecclesiastical Law —

1933 (Continued from p. 71).
Robert J. Casey / News Reel
Hugh Kingsmill / More Invective
Hugh Kingsmill / An Anthology of Invective and Abuse
Edgar Wallace / Again the Three Just Men
Lawrence W. Meynell / So Many Doors.
P. G. Wodehouse / Prince and Betty
Valentine Williams / Mysterious Miss Marisot
Edouard Estaunié / Madame Clapain.
Norman Douglas / Old Calabria
Dmitri Merejkowski / The Romance of Leonardo da Vinci.
Sax Rohmer / Daughter of Fu Manchu
P. G. Wodehouse / Heavy Weather
Robert Nathan / One More Spring.
R. C. Ashby / He Arrived at Dusk.
Philip MacDonald / Mystery of the Dead Police
J. S. Fletcher / Murder of the Only Witness
E. V. Lucas / English Leaves
James Stephens / The Crock of Gold.
Alexander Laing / Sea Witch
John D. Carr / The Mad Hatter Mystery
Phoebe A. Taylor / Mystery of the Cape Cod Players.
W. R. Halliday / Indo-European Folk Tales and Greek Legend.
Morris R. Cohen / Law and the Social Order
Gertrude Gleeson / London Zoo.
Saki / Chronicles of Clovis
A. E. Housman / The Name and Nature of Poetry.
John H. McCulloch / A Million Miles in Sail
Saki / Beasts and Super Beasts
Saki / Reginald and Reginald in Russia
Poe / Murders in the Rue Morgue
J. J. Farjeon / The House on the Marsh
Winifred Holtby / Mandoa, Mandoa.
Valentine Williams / The Clock Ticks On
Roark Bradford / Kingdom Coming
Jean Toussaint-Samat / Shoes That Had Walked Twice
John Dickson Carr / Hag's Nook
Frank King / The Ghoul
Frank King / The Owl.
Maurice O'Sullivan / Twenty Years A-Growing
Todd Downing / Murder on Tour.
Walter Greenwood / Love on the Dole
George Santayana / Some Turns of Thought in Modern Philosophy.
John Rhode / The Claverton Affair

Halliday Sutherland / The Arches of the Years
Helen Waddell / Peter Abelard
Mary Roberts Rinehart / The Album
Leslie Ford / The Clue of the Judas Tree
Lion Feuchtwanger / Josephus
James Gibson / John Locke (pamphlet)
> Gene Lisitzky - Thomas Jefferson
A. Edward Newton - A Tourist in Spite of Myself
Stuart Palmer - The Puzzle of the Pepper Tree
Emery Neff - Carlyle
Irvin S. Cobb - Murder Day by Day
Correspondence of Carlyle & Emerson - Vol. I
Correspondence of Carlyle & Emerson - Vol II
Virginia Woolf - Flush
F. C. Burnand - Happy Thoughts
Scobie Mackenzie - Doctor Fraser
Henry Fielding - Tom Jones (4 vols)
E. Phillips Oppenheim - The Ex-Detective
Sholem Asch - Three Cities
Philip MacDonald - Menace
Kenneth Grahame - The Wind in the Willows
S. S. Van Dine - The Dragon Murder Case -
John Masefield - The Bird of Dawning
W. M. Thackeray - The Virginians -
Michael I. Rostovtzeff - Out of the Past of Greece & Rome
Alice Longworth - Crowded Hours
Barnaby Ross - Drury Lane's Last Case -
Virginia Woolf - Second Common Reader (partially read)
Robert Hichens - The Paradine Case
Herbert Gorman - Jonathan Bishop
R. Austin Freeman - Dr. Thorndyke Intervenes
Lytton Strachey - Characters & Commentaries
John Donne - Letters & Prose (passim)
Jack Woodford - Five Fatal Days
E. Arnot Robertson - Four Frightened People -
David Garnett - The Sailor's Return
Maurice Leblanc - The Woman with Two Smiles.
R. S. Gower - The Tower of London - Vol I
R. S. Gower - The Tower of London - Vol II
Henry Pepford - Murder Woon
W. Somerset Maugham - Ah King
André Maurois - King Edward & His Edward
J. S. Fletcher - Murder of a Banker
Agatha Christie / Lord Edgware Dies
Diana Watts - Snapshots
Anthony Trollope - Barchester Towers
Christopher Bush - The Case in the Corner
Ellery Queen - The Siamese Twin Mystery
Don Marquis - Archy's Life of Mehitabel
Ralph Roeder - The Man of the Renaissance
Edgar Wallace & R. Curtis - The Green Pack
Felix Salten - Bambi
Logan Pearsall Smith - On Reading Shakespeare

1934 -
Shakespeare - King Lear
Logan Pearsall Smith - The English Language
F. Yeats-Brown - Bloody Years
Roger Scarlett - In the First Degree
A. G. Macdonell - England, Their England
William H. Prescott - The Conquest of Peru Vols. I + II
Dashiell Hammett - The Thin Man
Peter Fleming - Brazilian Adventure
James Anthony Froude - Caesar (700 pages)
A. S. Turberville - Johnson's England (Vol. I)
(continued P 67)



1893

Schäffle. Quintessence of Socialism
Conan Doyle. Study in Scarlet. &c. &c.
Karl Marx. Capital. vol. I. & II.
Miss Austin. {Emma. &c. Pride & Prejudice} aloud. (Mansfield Park)
Bourget. Cosmopolis.
Taussig. Tariff Hist. of U.S.
Ruth McE. Stuart. A Golden Wedding & other Tales
Stopford Brooke. Hist. Early English Literature.
Debacle. Zola. (transl.) aloud.
Beggars All (Dougall) aloud.
Albert Roey. &c (Mrs Clifford)
4 Selden Soc. Publication
Paul Viollet. Précis de l'Histoire du Droit Français. I & II fin. pp 91.
An Original Sinner. Albert Ross.
Walter Pater. / Plato & Platonism.
J. Lemaitre / Les Rois. (aloud mostly)
The Fate of Fenella (Authors 22 others) aloud
The Hoyden (The Duchess) aloud.
Mommsen. History of Rome I. II. III. IV. (fin. Aug. 4.) (Eng. tr. 1868 in 4 vols.)
Renan. Hist. du Peuple d'Israel. IV. (fin. p. 319. aloud)
Cherbuliez. Le Secret du Precepteur.
Kipling. Many Inventions. aloud.
Mr O'Connor of Ballykilbeg. (Butler) aloud
Influence of Sea Power upon French Revolution & Empire (Mahan) I. 2 fin. Aug.
Aunt Anne (Mrs Clifford)
Recollections & Days of my Life (Mrs A. Crosse)
Irish Idylls. (Jane Barlow)
Where Three Empires Meet. (E. F. Knight) fin. Aug. 15.
Autocrat of the Breakfast Table.
Coppée. Longues & Brèves.
Eothen. (Kinglake)

Primitive Religions (G. T. Bettany)
(Archer) Hedda Gabler (aloud)!
(Anstey) Talking Horse &c.
American Orations (ed. by A. Johnston) 1. 2. & 3. fin. Aug. 26.
Echoes of Old County Life. (J. K. Fowler)
Scott. Talisman. Fortunes of Nigel. Fair Maid of Perth.
International Monetary Conference, 1892. (fin. Oct. 16)
The Monetary Situation. S. Dana Horton May 1878.
Mr Gladstone & the Currency. W. H. Fremantle. Fortnightly. Sept/93
Ships that pass in the Night (B. Harraden)
Dodo.
The Cliff Dwellers. (Fuller).
National Life & Character (Ch. Pearson) Nov. 16
Silver & Gold. (Horton) fin. Nov. 24
Diana Tempest (Mrs. Cholmondeley)
(Minto) Logic Induction & Deduction.
The Heavenly Twins.
Socialism Its Growth & Outcome. Wm Morris & E. Belfort Bax fin. Jany. 94.

Contributors

Brett Bethune is a third-year student at Georgetown University Law Center.

James A. Feldman is an attorney in private practice specializing in Supreme Court litigation. Mr. Feldman was Assistant to the Solicitor General from 1989 to 2006, where he first came across Cornelius Jones's name while reading *Gibson v. Mississippi* in the course of researching a case.

Daniel Kiel is FedEx Professor of Law, The University of Memphis Cecil C. Humphreys School of Law. Ross Davies teaches law at Antonin Scalia School of Law.

Michael Nelson is the Fulmer Professor of Political Science at Rhodes College.

Melvin I. Urofsky is Editor Emeritus of the *Journal of Supreme Court History* and the author of numerous books about the history of the Supreme Court.

Catherine Ward is a third-year student at University of Virginia School of Law.

DOI: 10.1111/jsch.12297

Illustrations

Cover: Cornelius J. Jones, Photographs and Prints Division, Schomburg Center for Research in Black Culture, The New York Public Library
Page 100, Library of Congress
Page 103, Courtesy of the Mississippi Department of Archives and History.
Page 105, Photographs and Prints Division, Schomburg Center for Research in Black Culture, The New York Public Library
Page 107, National Archives, Letter from Edward D. White to James McKenney
Page 108, admissions record, National Archives
Page 109, *The Washington Bee*, December 21, 1895
Page 111, Collection of the Supreme Court of the United States
Page 117, Manuscripts, Archives and Rare Book Division, Schomburg Center for Research in Black Culture, The New York Public Library
Page 119, House of Representatives
Page 124, *New State Tribune,* April 1907.
Page 129, *Muskogee Daily Phoenix* (Muskogee, Oklahoma) · Thu, Aug 28, 1919 ·
Page 131, Photographs and Prints Division, Schomburg Center for Research in Black Culture, The New York Public Library
Page 144, UPI
Page 145, John Birch Society *Bulletin*
Page 147, Yale University
Page 150, Mark Killenbeck took this photograph on a trip to Florida
Page 152, John Birch Society
Page 164, 1970 AP Photo, Albany New York
Page 165, *The New York Times*
Page 167, Courtesy of University at Buffalo School of Law
Pages 171 and 172, Courtesy of Taylor Reverley
Page 174, Courtesy of Robert S. Oakes and Vic Boswell, National Geographic. Collection of the Supreme Court of the United States
Page 180, *Baltimore Sun*
Page 182, Library of Congress
Page 184, Courtesy of Robert S. Oakes and Vic Boswell, Collection of the Supreme Court of the United States
Page 187, Delaware County Historical Society
Page 198, Baltimore Sun
Page 201, Photo by Lois Long, Collection of the Supreme Court of the United States
Page 207, Photo courtesy of PervisPayne.Org.
Page 209, Courtesy of Brandon Dill/ Innocence Project
Pages 229 and 230, Harvard Law School Library, Historical & Special Collections

March, 22, 2022

To the Editor:

Re Courtney Chistensen's very interesting article on *Trop v. Dulles* and the related cases of *Perez v. Brownwell* and *Nishikawa v. Dulles* (Vol. 64, No. 3), which (to my surprise) quotes from my law clerk memos to Chief Justice Earl Warren, four comments:

(1) In 1967, the Supreme Court rejected its 1958 decision in *Perez*. The Court ruled 5 to 4 that the Fourteenth Amendment prohibits Congress from terminating United States citizenship. *Afroyim v. Rusk*, 387 U.S. 523 (1967).
(2) As for *Trop*, it later provoked this astonishing statement by Justice Scalia, "That case has caused more mischief to our jurisprudence, to our federal system, and to our society than any other that comes to mind." *Glossip v. Gross*, 576 U.S. 863, 899 (2015) (Scalia, J., with whom Thomas, J., joins, concurring). No doubt Scalia was bemoaning Chief Justice Warren's explicit statement that the Eighth Amendment "must draw its meaning from the evolving standards of

DOI: 10.1111/jsch.12298

Illustrations

Cover: Cornelius J. Jones, Photographs and Prints Division, Schomburg Center for Research in Black Culture, The New York Public Library
Page 100, Library of Congress
Page 103, Courtesy of the Mississippi Department of Archives and History.
Page 105, Photographs and Prints Division, Schomburg Center for Research in Black Culture, The New York Public Library
Page 107, National Archives, Letter from Edward D. White to James McKenney
Page 108, admissions record, National Archives
Page 109, *The Washington Bee*, December 21, 1895
Page 111, Collection of the Supreme Court of the United States
Page 117, Manuscripts, Archives and Rare Book Division, Schomburg Center for Research in Black Culture, The New York Public Library
Page 119, House of Representatives
Page 124, *New State Tribune,* April 1907.
Page 129, *Muskogee Daily Phoenix* (Muskogee, Oklahoma) · Thu, Aug 28, 1919 ·
Page 131, Photographs and Prints Division, Schomburg Center for Research in Black Culture, The New York Public Library
Page 144, UPI
Page 145, John Birch Society *Bulletin*
Page 147, Yale University
Page 150, Mark Killenbeck took this photograph on a trip to Florida
Page 152, John Birch Society
Page 164, 1970 AP Photo, Albany New York
Page 165, *The New York Times*
Page 167, Courtesy of University at Buffalo School of Law
Pages 171 and 172, Courtesy of Taylor Reverley
Page 174, Courtesy of Robert S. Oakes and Vic Boswell, National Geographic. Collection of the Supreme Court of the United States
Page 180, *Baltimore Sun*
Page 182, Library of Congress
Page 184, Courtesy of Robert S. Oakes and Vic Boswell, Collection of the Supreme Court of the United States
Page 187, Delaware County Historical Society
Page 198, Baltimore Sun
Page 201, Photo by Lois Long, Collection of the Supreme Court of the United States
Page 207, Photo courtesy of PervisPayne.Org.
Page 209, Courtesy of Brandon Dill/ Innocence Project
Pages 229 and 230, Harvard Law School Library, Historical & Special Collections

March, 22, 2022

To the Editor:

Re Courtney Chistensen's very interesting article on *Trop v. Dulles* and the related cases of *Perez v. Brownwell* and *Nishikawa v. Dulles* (Vol. 64, No. 3), which (to my surprise) quotes from my law clerk memos to Chief Justice Earl Warren, four comments:

(1) In 1967, the Supreme Court rejected its 1958 decision in *Perez*. The Court ruled 5 to 4 that the Fourteenth Amendment prohibits Congress from terminating United States citizenship. *Afroyim v. Rusk*, 387 U.S. 523 (1967).
(2) As for *Trop*, it later provoked this astonishing statement by Justice Scalia, "That case has caused more mischief to our jurisprudence, to our federal system, and to our society than any other that comes to mind." *Glossip v. Gross*, 576 U.S. 863, 899 (2015) (Scalia, J., with whom Thomas, J., joins, concurring). No doubt Scalia was bemoaning Chief Justice Warren's explicit statement that the Eighth Amendment "must draw its meaning from the evolving standards of

DOI: 10.1111/jsch.12298

decency that mark the progress of a maturing society," *Trop*, 376 U.S. at 101 (Warren, C.J, with whom Black, J. and Douglas, J., join, dissenting), a statement that explicitly rejected an originalist view of the Eighth Amendment.

Although scorning Warren's opinion with its reference to "evolving standards of decency," Justice Scalia had earlier acknowledged that "this Court has 'not confined the prohibition embodied in the Eighth Amendment to "barbarous" methods that were generally outlawed in the 18th Century,' but instead has interpreted the Amendment 'in a flexible and dynamic manner.'" *Stanford v. Kentucky*, 492 U.S. 361, 369 (1986)(quoting *Griggs v. Georgia*, 428 U.S. 153, 171 (1976). And, he interestingly added, "[O]ur job is to *identify* the 'evolving standards of decency.'" *Ibid.* at 378 (quoting Trop, 356 U.S. at 101 (emphasis in original)).

(3) The *Yale Law Journal* comment referred to in Ms. Chistensen's article, which first advanced the argument that taking away citizenship as punishment for a crime violated the Eighth Amendment, was written by then-second-year law student Stephen J. Pollak, who went on to become Advisor on National Capitol Affairs to President Johnson in 1967, Asst. Attorney General in charge of the Civil Rights Division in 1968, and thereafter a distinguished lawyer in the District of Columbia.

(4) Ms. Christensen's article frequently refers to *Trop* (and *Perez* and *Nishikawa*) as "denaturalization" cases, when in fact they are denationalization cases (involving loss of citizenship acquired at birth, not revocation of a fraudulently obtained naturalization certificate).[1]

Jon O. Newman, Senior Judge
Second Circuit Court of Appeals

ENDNOTE

[1] Of minor import, page 338 of the article misquotes the word "pasted" (from Warren's *Trop* dissent, 356 U.S. at 94) as "posted."