Introduction

Timothy S. Huebner

Controversy and the Court have always gone hand in hand. The late David O'Brien, a renowned political scientist, titled his classic text *Storm Center: The Supreme Court in American Politics* for a reason. That book, a staple of the undergraduate curriculum for more than three and a half decades, reminded readers that because the Court draws the most tempestuous constitutional questions to its docket, some degree of turmoil—rather than tranquility—has resulted from its decisions from the beginning. The whole of Supreme Court history teaches us that disagreements among the justices often reflect larger societal rifts on the hard questions confronting the country. And sometimes even unanimous agreement among the justices, as in *Brown v. Board of Education*, sparks wide scale public opposition and disagreement. Thankfully, the Court's legitimacy does not rest on the outcome of any one decision or on the decisions delivered in any single Term. Instead, the Court's authority has developed over time, relying as it does on Americans' civic knowledge, on the people's commitment to the Constitution, and on our shared understanding of the Court's role within the American constitutional order. In polarized times such as these, studying Supreme Court history can provide perspective, including the ability to understand the shifts that have recently altered the constitutional landscape.

This issue of the journal certainly offers plenty of perspective. Rachel Shelden shows that the justices and public perception of their work are *less* political today than they were than during the 19th century. Her terrific essay explores not only the presidential campaign of 1848, in which two sitting justices were potential candidates, but also the fluid relationship between the justices and the political realm during the 19th century. It is worth noting that the idea of a professionalized Court—with federal judicial experience as a virtual prerequisite for appointment as a justice—is a relatively recent phenomenon. Shelden is an associate professor of history at Penn State and the Director of the George and Ann Richards Civil War Center.

As Justice Ketanji Brown Jackson serves her inaugural term on the Court, two essays offer insights into the Black freedom struggle, including the role of African American advocates and litigants. John G. Browning's fascinating article offers a look at the first Black lawyer to argue a case before the Court, Everett J. Waring of Baltimore. Waring participated in *Jones v. United States*, a

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little known 1890 case involving Black labor, murder, and the constitutional status of the Caribbean island of Navassa. Browning, a partner at Spencer Fane in Plano, Texas, is Distinguished Jurist in Residence and Professor of Law at Faulkner University and has served as an appellate justice on the Texas Fifth District Court of Appeals. Charles Sheehan, meanwhile, presents a sweeping account of the quest to desegregate public accommodations in the nation's capital. Sheehan focuses on *D.C. v. Thompson Restaurant*, a case in which Mary Church Terrell figured prominently. Born in 1863, the year of the Emancipation Proclamation, Terrell died in 1954, a year after winning the *Thompson* case and the same year as *Brown v. Board of Education*. Her remarkable life spanned decades of important change in the constitutional status of African Americans. Sheehan served as an attorney in the Department of Justice.

Finally, Andrew Meck's article sheds light on the always relevant question of the definition and limits associated with privacy. Providing appropriate doses of historical background and doctrinal analysis, Meck explores the 1985 landmark case, *New Jersey v. T.L.O.*, which involved the application of the Fourth Amendment to school officials' searches for drugs. Meck, who received his J.D. in 2021 from George Washington University Law School, notes the decision's significant impact on shaping policy on school searches not only for drugs but also for weapons.

Our ongoing efforts to publish the most engaging scholarship on the history of the Supreme Court involve the labor of many, including the members of our Board of Editors. I am grateful to all of them. Our Board not only helps us to solicit submissions, it also assists with other tasks, such as reviewing books. In this issue, long time Board member Grier Stephenson, Charles A. Dana Professor of Government, Emeritus at Franklin and Marshall College, gives us another edition of "The Judicial Bookshelf," in which he surveys a number of recent and important works, and fellow Board member Paul Kens, Professor of Political Science at Texas State University, offers a featured review of Helen Knowles's new book on *West Coast Hotel v. Parrish*. (Knowles, incidentally, is also a member of our Board.) Finally, earlier this year we learned of the retirement from our Board of Craig Joyce, Hunton Andrews Kurth Professor of Law at the University of Houston. I am especially grateful for his long service. Prof. Todd Peppers, Fowler Professor in Public Affairs at Roanoke College and a frequent contributor to the journal, has filled this vacancy, and I look forward to working with him. I think I speak for all members of the Board in inviting you to enjoy this thoughtful collection of articles and reviews. Thanks for reading.

Anatomy of a Presidential Campaign from the Supreme Court Bench: John McLean, Levi Woodbury, and the Election of 1848

Rachel A. Shelden

Imagine *The Washington Post* headline: "In the next presidential election, the most promising candidates for a nomination include Elena Kagan for the Democrats and Samuel Alito for the Republicans." The idea sounds preposterous today, and yet, in the 1848 election, two associate justices of the Supreme Court, representing different partisan constituencies, were front-runners for a presidential nomination: John McLean of Ohio and Levi Woodbury of New Hampshire. Nor was their experience unique: in the first one hundred years of the nation, nearly a quarter of Supreme Court justices considered or were considered for a presidential run, with candidates from every major political party.

These presidential campaigns did not represent judicial corruption, nor were they simply about ambition or vanity; judges ran for president because enough Americans believed they would be good candidates. Political leaders, partisan newspapers, and even other judges advocated for the benefits of particular justices as presidential nominees. In fact, the idea of a Supreme Court justice becoming president seemed completely unremarkable to politicos; political supporters treated judges the same way they did governors, congressmen, or cabinet members who ran for office. Party leaders traded daily letters analyzing, promoting, or detracting from the candidacies of these men with only an occasional reference to their positions on the Bench. A few noted modest hesitation about a judge's impartiality, but the vast majority of partisans expressed no concern about the idea of a Supreme Court justice as a presidential candidate.

The sheer ordinariness of running a Supreme Court justice for president was representative of how Americans understood

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the role of judges—and especially federal judges—in the nineteenth century. During that era, judicial positions were inherently politicized and were even thought by many to be mostly interchangeable with political positions in other branches of government. Before joining the Supreme Court, judges spent their careers hopping between judicial, legislative, and executive positions—it was not unusual for a justice to have served as a state legislator, state court judge, congressman, and cabinet member before becoming a Supreme Court nominee. A few were even nominated for or elected to other political positions while serving as justices. Presidential nominations to the Supreme Court were also made with partisan support in mind, and an expectation of continued allyship from the Bench.

The 1848 presidential campaigns of Levi Woodbury and John McLean were emblematic of this intimate relationship between politics and the Court. While both justices were touted as potential nominees, in some ways, these two men could not have been more different. McLean had been a justice since 1829, while Woodbury had only replaced Joseph Story in 1845. Woodbury had remained a staunch Jacksonian and would become a front-runner for the Democratic Party nomination in 1848. McLean, however, had moved more fluidly through the changing partisan landscape and was a candidate for both the Whig and Free Soil nominations. At the same time, both had lengthy experiences in state and federal political and judicial offices. Woodbury and McLean also were ambitious in the ways that other nineteenth-century Americans were, like their contemporaries and fellow failed presidential candidates Henry Clay, Daniel Webster, Stephen Douglas, Winfield Scott, and John C. Calhoun.

Woodbury's and McLean's 1848 campaigns—and those of other justices of the era—help reconfigure our understanding of the relationship between the Supreme Court and American politics in the nineteenth century. Judges were expected to deliberate with a sense of independence on the Bench, but that did not preclude a close relationship to the political world. To the contrary, justices could and did operate as political actors.

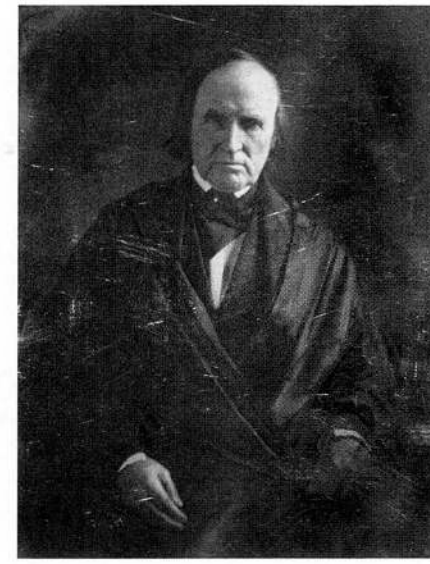
The 1848 Presidential Contest

Jockeying for the 1848 presidential nominations began almost immediately after the dust settled on the 1844 election. Within months of taking office in March 1845, the new President, James K. Polk, had finalized the annexation of Texas and plunged the United States into a war with Mexico, making the costly military campaign and its consequences the center of partisan wrangling. On one side, the Democrats largely supported the war, insisting on the benefits of expanding the country westward for White Americans. They were opposed both by Whigs and members of the Liberty Party, many of whom believed the conflict was unconstitutional. As a cross-sectional party, Whigs feared the war would inevitably lead to territorial expansion, and conflict over slavery could only portend intraparty conflict. Liberty men, who opposed slavery's expansion, generally agreed with the Whigs about the war, though their supporters were primarily situated in the North.[1]

Shortly after the war with Mexico began, the Whigs' worst fears were realized when a group of northern Democrats introduced a fateful amendment to a House appropriations bill that would bar slavery from any territory acquired in the conflict. First proposed in the waning hours of the 1846 congressional session, the Wilmot Proviso soon became a flashpoint for national conflict over the issue of slavery, as Southerners furiously proclaimed their rights were under attack and northern legislatures instructed their congressmen to vote for the amendment going forward. Slavery, the Wilmot Proviso, and war with Mexico would become critical issues in the 1848 election.[2] As one

newspaperman explained in 1847, "the next session of Congress will force forward the Slavery Question in such a shape, that it will override every other Consideration in the Presidential Canvass."[3]

In addition to the question of slavery in the territories, the Fugitive Slave Law had also become a key source of anger around the country. By the mid-1840s, many northern states had passed "personal liberty laws," designed to counteract efforts to recapture enslaved people who had escaped into free territory, typically by granting accused fugitives a right to a jury trial, and in some cases providing a lawyer l. In response, slaveholders had begun demanding a new federal fugitive slave act to guarantee their "property rights." The federal judiciary played a key role in this conflict, as northern judges enforced the Fugitive Slave Law in their circuits, even as they were roundly criticized by antislavery activists.[4]



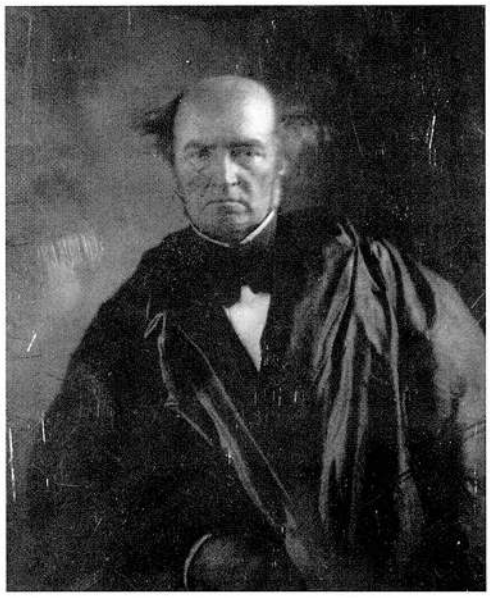
John McLean of Ohio was appointed to the Court in 1829 by John Quincy Adams and served until 1861. Justice McLean was a candidate for both the Whig Party and Free Soil Party in the 1848 presidential election.

Many of these fugitive slave cases had political importance beyond their decisions; state and federal politicians often served as the lawyers in such high-profile cases and the outcomes quickly became national news. But one case, in particular, was front-of-mind during the lead-up to the 1848 election: *Jones v. Van Zandt*. At issue in *Van Zandt* was the fate of an Ohio abolitionist who had picked up nine enslaved escapees traveling through Ohio who purportedly belonged to Wharton Jones of Kentucky. Jones had sent two slave hunters to Ohio to recapture the fugitives and arrest Van Zandt. The bounty hunters had some success but were unable to locate all nine escapees and so Jones sued Van Zandt for monetary damages.[5]

John McLean first heard the case in Ohio while riding circuit—the nineteenth-century requirement that Supreme Court justices serve concurrently as federal circuit court judges. Circuit service meant spending much of the year riding from town to town to hold federal court in conjunction with a federal district judge (who was also an acting circuit judge in these cases). McLean had been a longtime opponent of slavery, but he felt duty bound to follow the fugitive slave law, given its sanction in Article IV, Section 2 of the Constitution. In his 1843 circuit decision in *Van Zandt*, he ruled in favor of Jones, the enslaver.[6]

Soon after, the case was appealed to the Supreme Court and in 1847, the newest justice, Levi Woodbury, issued the Court's decision. The Court upheld the ruling against Van Zandt, though Woodbury's opinion differed from McLean's in tone and approach. While McLean had been careful to note that "the Constitution treats slaves as persons" and "nowhere speaks of slavery as property," Woodbury erred in the other direction, repeatedly referring to enslaved people as "property" and chastising Van Zandt's lawyers for raising questions about the constitutionality of slavery and recapture. *Van Zandt* and the future of the fugitive slave law would undoubtedly feature in the campaign.[7]

Although conflict over slavery in the campaign was certain, when the



Levi Woodbury of New Hampshire was appointed to the Court in 1845 by James K. Polk. Justice Woodbury campaigned to be the candidate for the Democratic Party in the 1848 presidential election.

presidential nomination season began there were no clear front-runners. Polk initially had declared his intention to only serve one term and so Democrats began the canvass with a handful of strong candidates, including Woodbury, Pennsylvanians James Buchanan and Vice President George Dallas, Robert J. Walker of Mississippi, and the eventual nominee, Michigan Senator Lewis Cass. Aside from Walker, most of the candidates were Northerners; since Polk hailed from Tennessee, many believed the free states deserved the nomination in 1848. Even Southerners seemed to expect a northern nominee, though with some reservations: "The North *is* entitled to give the democratic party the next candidate, if the North can give us one faithful to democratic views of the Constitution, and therefore just to the South and her institutions," wrote one Georgia newspaper.[8]

Many Whigs also expected a Northern nominee, at least initially.[9] After yet another failed campaign by Kentuckian Henry Clay in 1844, Northern Whigs were ready to suggest a candidate from their section. McLean fit that bill, as did perennial candidate Daniel Webster of Massachusetts. Yet, once the United States began to claim success during the U. S. Mexican War, some thought a military leader was a better bet—they looked to General Winfield Scott (a Virginian sympathetic to Northerners) and, the eventual nominee, Major General Zachary Taylor, a slaveholder who had no experience in politics.

At the same time, both Whigs and Democrats were divided. Antislavery factions had developed in both camps in key states, and the fledgling Liberty Party looked to capitalize on these fractures. Whigs in Massachusetts, for example, had split into "Cotton" and "Conscience" wings, with the latter skeptical of any southern candidate. Meanwhile, in New York, Democrats were divided over both slavery and a series of state-wide concerns. The two factions were known as the "Barnburners"—radicals who were sympathetic to antislavery activity and opposed corporations—and the "Hunkers"—who tended to support President Polk and were more sympathetic to proslavery designs. The New York divisions promised to come to a head at the Democratic National and Convention, when the party considered which delegates to seat. And so, as the campaign developed over the course of 1846 and 1847, antislavery men paid close attention to potential nominees for the other two parties, considering their options if both settled on pro-slavery or Southern candidates.[10]

The contest for partisan presidential nominations was also guaranteed to unfold in the same chaotic fashion that it had for several decades, regardless of which candidates were in the field. Nineteenth-century politics were notoriously fluid and federal, differing greatly from our modern election structure. Politicians of the 1840s did not expect that their parties would be permanent—most political leaders of that era

had seen old parties die out and new parties born not just on the federal level, but on the state and local level as well. Political actors shifting from one party to another was not necessarily unprincipled, in large part because the two-party system was not fully engrained in their political consciousness. As a result, many politicians moved seamlessly between different parties—or collected endorsements from more than one party—as they adjusted to the political realities of the moment.[11]

These shifting political allegiances were possible, in part, because much of the political infrastructure ran through states and localities. There were no state primaries as one might find today; instead, candidate selections were made at national party nominating conventions by delegates who had been chosen in state and local conventions. Candidates, then, had to develop relationships with the local and state delegates who were likely to be made national delegates. Once chosen, some state delegations voted to endorse one candidate over another, while others refrained from any official support, leaving individual delegates to vote for their preferred nominee—though in the intensity of the national convention, allegiances could change quickly, particularly if it became clear that a preferred candidate could not command a majority. The eventual victor at the convention was never a foregone conclusion.

All candidates also relied on newspaper endorsements, largely because the act of voting itself typically required such papers. There were no standardized ballots in the 1840s; instead, voters cut out "tickets" from their local newspaper with the candidates they endorsed and brought them to the polling place. Because newspapers were overtly partisan, voters knew which paper to turn to for an appropriate ticket to match their preference. When the 1848 nominating season began, each of the candidates for the Democratic, Whig, and Free Soil parties took measure of the various hoops they would have to jump through to win the nomination.[12]

The Supreme Court Candidates

Levi Woodbury was known as a loyal Jackson man—allies called him the "north star," the "wheel-horse," or "the rock" of the Democratic Party.[13] The junior-most justice during the 1848 campaign, Woodbury had made his political bones as a state legislator and then a state judge. He had also moved through various political positions in New Hampshire, from state senator to associate justice on the state's highest court, then Governor and Speaker of the New Hampshire House. Like many of his contemporaries, Woodbury saw judicial and political positions as interchangeable. Both offered political opportunities, and any judicial position could easily be left for a better political one. In Woodbury's case, after successfully serving Democratic interests in the Senate, he was rewarded by both Jackson and Van Buren, who included him in their cabinets (as Secretary of the Navy and Secretary of the Treasury). While in Washington, Woodbury found that he preferred the federal political spotlight to prominent state positions—he turned down an appointment as chief justice of the New Hampshire superior court to return to the Senate—in part because he saw that he could wield more power in the capital.[14]

Woodbury first tested the presidential waters in 1844, on the heels of a successful stint in the Senate. The nomination even looked promising with key New Hampshirites in important positions at the Democratic National and Convention. But James Polk would become the surprise nominee and Woodbury turned his attentions elsewhere. Just a few months after Polk took office, Woodbury's friend, New Hampshire Congressman Edmund Burke, pushed for Woodbury as the next judicial nominee.[15] Woodbury's political chops were the key

selling point; other potential nominees from the region were not as faithful in their Democratic partisanship. And so, in September 1845, Burke got his wish and Woodbury took his place on the Court as the newest justice.[16]

Like Woodbury, McLean had served in a variety of political and judicial positions before his nomination to the Supreme Court. He had successfully run the Ohio newspaper the *Western Star* and served in the U.S. House of Representatives as a Democratic-Republican in the early 1810s before resigning to become a judge on Ohio's highest court. But in contrast with Woodbury, McLean was now the longest serving justice on the Supreme Court, having joined the Bench in 1829. And unlike his judicial colleague, McLean had not been a loyal partisan; he served as Postmaster General in John Quincy Adams's cabinet but had supported Adams' bitterest rival, Andrew Jackson, in the 1828 election. By the 1848 campaign, McLean had been a longtime presidential candidate from his position on the Court, having considered nominations from both the Democratic and Whig parties, but also the Anti-Masonic party.

While McLean's shifting partisan allegiances may look cynical to modern eyes, the judge was a potential nominee for a variety of different parties because he was, in one way or another, representative of their goals. Since parties in the nineteenth century were fluid, moving from one political organization to another was not necessarily an indication of abandoning former political positions.[17] Jeffersonian principles had initially drawn him to the Democratic Party, while his concerns about patronage led him to flirt with an Anti-Masonic nomination. He was also a nationalist, who approved of the Whigs' financial policies in the 1840s. And he was fundamentally opposed to slavery, which would make him appealing to political antislavery men. As McLean told one ally, "my opinions on all the leading questions of the day are the same now that they have ever been. When in political office or out of it they have been openly avowed."[18] In the context of nineteenth-century party politics, all of these constituencies were interested in McLean because they believed he represented their goals.

Ideology was nothing, however, if the candidate had no chance to win. And in 1848, allies of both Woodbury and McLean believed these judges were the most *available* man for their party's nomination. Availability—what we might think of as electability, or the person who could command the largest number of votes and would be most likely to succeed if nominated—was a tricky thing to measure in the nineteenth century. But it was an obsession of partisan wire-pullers who wanted to ensure that their nominee could compete on a national scale. The easiest way to discredit a rival for a nomination was to suggest that he was "not available."[19] One of the important ways that many politicos promoted their candidates' availability in the nineteenth century was to emphasize their political experience. And because judicial nominations were inherently tied to politics, a candidate's background as a judge directly reflected on his experience; allies of Woodbury and McLean focused on their successes in both the political and judicial arenas. The fact that Woodbury and McLean were justices on the Supreme Court was not a hindrance—it was a selling point.

Woodbury's friends noted that he would "be the most acceptable to the party at large," as the "polar star amid the glorious constellation of the New England Democracy."[20] No candidate was "so likely to secure the spontaneous suffrage of the American people for the Presidency as Judge Woodbury," wrote one Southern newspaper.[21] As the *New-Hampshire Gazette* explained, "Our object is to *elect a democratic President*. To do this, we must select a suitable candidate"—an *available* candidate like Woodbury. "We believe him to be so on account of his eminent talents, his great political experience his devotion to the cause of freedom," the

A divisive issue in the 1848 campaign was the enforcement by judges in northern circuits of "personal liberty laws," designed to counteract efforts to recapture enslaved people who had escaped into free territory. Slaveholders then began demanding a new federal fugitive slave act to guarantee their "property rights." Peter John Lee, a free Black man from New York, is depicted being kidnapped and sold into slavery in 1836.

paper explained. "In short, all his public acts in the Senate, in the Cabinet and on the Bench are fresh in the memory of our readers, and all mark him as an able statesman, an eminent judge, a faithful democrat and an honest, fearless and upright man."[22]

As in Woodbury's case, Whig supporters insisted that McLean was both available and the best possible candidate. One newspaper explained that McLean's "high qualifications, his pure, moral and religious life, the manner in which he has discharged the high trusts confided to him, his intimate knowledge of the constitution and laws of the Union..." made him the obvious choice.[23] Another ally insisted that McLean "will present more elements of availability than any other man."[24] A Whig meeting in Tennessee resolved that a ticket with "McLean, as a candidate for the Presidency, success, in our judgment, is inevitable."[25] Others argued that McLean was "the only person upon whom the Whigs can unite."[26]

Part of a justice's availability also stemmed from geography. Like other candidates, members of the Supreme Court were considered representative of their home regions. This was true not despite their positions on the Bench, but rather because of them. During the nineteenth century, presidents nominated justices from particular regions; when a justice left the Bench (for any reason), he was replaced with another from his circuit. In fact, the specific purpose of circuit riding was to tie the federal judiciary to the local interests of different states and regions of the country. As a result, a justice was automatically associated with his region. So, Woodbury was thought of as a Northerner and New Englander, while McLean was widely considered a Westerner, which in those days typically meant from west of the Appalachians.[27] In essence, there was no tangible difference between a northern Senator and a northern justice or a western cabinet member and a western member of

the Court for a party looking to capitalize on regional support.[28]

Newspapers reflected on Woodbury's geographic popularity, insisting that he could obtain "the support of all the democratic delegates from New England," in addition to the delegation from New York and "his nomination would be most favorably received in most of the Southern Atlantic states."[29] Indeed, although Woodbury was a Northerner, many Southerners believed he was the perfect kind of loyal Democrat. As one paper explained, in the South he was believed to have "as firm a 'Southern heart'" as noted proslavery radical John C. Calhoun.[30] In South Carolina, supporters argued that Woodbury was "a man as true as steel to the rights of the States and the rights of the South."[31] One Georgia man explained, "I have always admired the sternness of Mr. Woodbury in advocating the rights of the South, and believe there is no firmer or purer man."[32] Colleagues recognized the benefits of a Northern man that appealed to slaveholders: one Polk ally noted that the Democrats "must have a Northern Candidate, and no man is so strong as Woodbury, with the South, and therefore he must be our candidate."[33]

While most could see that Southerners supported the judge, questions remained about other parts of the country, particularly the West. A state like Ohio, for example, could have a significant impact on the Convention. Here Woodbury's success might have to take McLean into account: Cass's allies argued that if McLean captured the Whig nomination, only the Michigan Democrat could beat the Whigs in Ohio. Woodbury's friends disputed this and some even wagered a bet that Cass would not win the Buckeye State (a proposal no Cass men would accept).[34] But much of this was speculation; one ally of Illinois Democrat Stephen Douglas explained that some believed "Cass can carry Ohio, and that no other Democrat *can* carry it; but others write that Woodbury can get 10,000 more votes than Cass. In such a state of contradiction, no one knows what to believe."[35]

As these concerns about Ohio indicate, Woodbury's detractors typically did not oppose his candidacy with concerns about judicial propriety. Instead, Woodbury's critics pointed to his political positions or insisted he was not the most available candidate. "He has no hold on the popular favor," wrote one Alabamian to John Calhoun. "If you encourage Mr. Woodbury's pretensions you may take my word, that you will only receive in return defeat."[36] Others criticized his sympathy with the South; "if there be a man in the United States utterly heartless on the subject of slavery, it is Levi Woodbury," wrote one paper. "We know of no opinion on record of any slaveholding court, so inhumane in tone and language, as the opinion of Judge Woodbury, declared in the Van Zandt case."[37]

McLean's geographic strengths were also important. Proponents of his candidacy were insistent that "McLean can command more votes in the west than any other man."[38] But it was not just the West that found the judge an acceptable candidate. With a ticket that featured McLean at the top and an Upper South man for vice president, success was assured. One Southerner told McLean's wife that the judge's name was "heard in the south on the lips of the good, virtuous, and influential, when speaking of the Presidency, as one who if placed there...would tend to the honor, prosperity, and happiness of his country."[39]

Like Woodbury, the combination of McLean's political and judicial experience was a selling point for many supporters; one paper noted that during McLean's time in Congress and the Cabinet "all his powers were developed on a broad and liberal scale, and the result is at once an eminent jurist, an accomplished statesman, and a practical, intelligent businessman."[40] Another McLean ally argued that the judge was "the most proper person, to be at the head of a

John McLean and our Country.

AN ODE—BY JAMES KILBOURNE, ESQ.

Tune,—Sourings are cold.—Famous Scuball—or other airs of like measure.

To raise from dishonor, now shading our land,
By weak, wicked Rulers, a traitorous band,
And save our lov'd country from ruin, in train,
We'll go, all as one, for the GREAT JOHN MCLEAN!

A pupil at school, under tutelage care,
His progress gave evidence, Genius was there;
And many remark'd, they could see very plain,
A mind for great action, in YOUNG JOHN MCLEAN!

Advancing in science, he came to the Bar,—
For Counsel, and Pleading, an eminent "*star*."
From slanderous charges, intending deep stain,
A pure Judge* was clear'd, by the GOOD JOHN MCLEAN!

Not only the Judge was triumphantly clear'd,—
The keenest chastisement in words ever heard,
Was put on his slanderers, writhing with pain,—
The lash being appli'd by the JUST JOHN MCLEAN!

When War's gloomy wings o'er our country were thrown, †
A member of Congress, distinguish'd he shone:
Amid his five colleagues, ‡ Whig "died in the grain,"—
Strong, bright and belov'd, stood the TRUE JOHN MCLEAN!

Elected again, with the same five, he went,
In Congress to serve, and our Rights represent:
His State then, in purity, Justice to gain,
A *Judge, as Supreme*, made the PURE JOHN MCLEAN.

For years he continu'd, enlighten'd and just,
Performing the parts of this high, honor'd trust:
His country, then claiming his service again,
The Land Office gave to the WISE JOHN MCLEAN!

Progressing once more, by the National will,
The Post Office fill'd, with great honor and skill.
Thence, call'd by his country, advancing again,
The *High Bench of Justice now hails* JOHN MCLEAN!

To fill out the fame of this *Great* and *Good* man,
And *build up our country*,—the only true plan
Is seen in the course of Progression, again,—
A President making of GREAT JOHN MCLEAN!

Extension of *slavery*, may *threaten* and *lower:*
O'er regions *now free*, there exists not the power
To fix, but for crime, on a Freeman the chain:
So, firmly pronounces, the GREAT JUDGE MCLEAN!

He goes for *Protection*, decided and true,
Retrenchment and *Lands to the States*, as their due,—
To *parry grim War,—hailing Peace, with her train*,
Firm Justice and Honor, will guide JOHN MCLEAN!

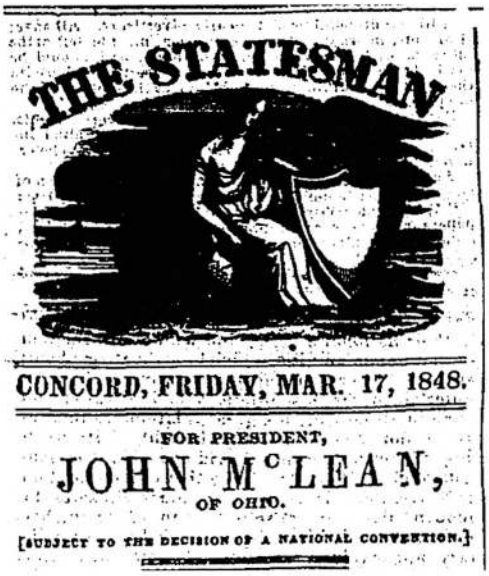
Then rouse for him, FREEMEN! through all this wide land,
United and *firm*, as the fam'd "SPARTAN BAND;"
To raise this Great Nation to glory again,
We'll go, as one man, for the GREAT JOHN MCLEAN!

---

* Judge Thompson, of the 2d Circuit, maliciously impeached.
† The war declared in 1812, with Great Britain.
‡ Kilbourne, Creighton, Alexander, Caldwell, and Beall.

The foregoing may be sung to the tune of "Lochinvar," by repeating the two last lines of each stanza, in the last strain of the music, as a chorus.

An ode to John McLean, written as an endorsement of his candidacy for president, hails the "Great Judge" for his antislavery stance.


THE STATESMAN

CONCORD, FRIDAY, MAR. 17, 1848.

FOR PRESIDENT,

JOHN M^C LEAN,

OF OHIO.

[SUBJECT TO THE DECISION OF A NATIONAL CONVENTION.]

Endorsement of McLean by the New Hampshire *Statesman*.

Government, like ours, founded on universal suffrage" because he had "been tried, as a representative, executive, and Judicial office," and had "displayed, the very best administrative talent, in each."[41]

McLean, too, faced detractors. Some abolitionists cringed at the idea of the judge as a candidate, arguing against both his principles and his availability. For example, antislavery leader John Greenleaf Whittier had no patience for McLean: "His range of vision is narrow. He is the slave of yesterday,– the victim of precedents," Whittier wrote. "There are ten hearts in the country that leap faster" at the names of others "to one that does so at that of McLean."[42] Others thought he was *too* sympathetic to abolition—one of Clay's lieutenants had become certain "that there is a good understanding between McLean & the Abolition leaders."[43] But not all opposition was about the issues; a long career in politics also meant that old grudges could resurface during election time, and at some point McLean had irritated Thurlow Weed, perhaps the most important political organizer in New York.[44]

While both McLean and Woodbury received extensive criticisms during their campaigns, only rarely did the role of judicial integrity come up, and usually to point out the other party's hypocrisy, or as a means of discrediting another contender.[45] Instead, candidates used other creative tactics to discredit Woodbury and McLean. In one such case, an opponent suggested that any candidate who did not receive the nomination of their own state should not be considered for the presidency.[46] But most critiques focused on the justices' potential to win and their political opinions, including their judicial decisions.

Woodbury's Campaign

Availability inevitably relied on perception—there was no nationwide polling in the nineteenth century—and to create an aura of success, candidates needed a strong network of political allies. Because partisan organizations at the state and local level were key to the success of any candidate, the judges followed the same approach to those of any other presidential campaign. Both men relied on their old political networks and family connections to help shepherd their nominations. They each had a handful of newspapermen and other local political insiders working on their behalf. And among the most important members of their networks were the judges and lawyers they knew from their federal circuit service. Because Supreme Court justices spent a significant portion of the year away from Washington, riding circuit, they had an intimate relationship with the folks they encountered there.

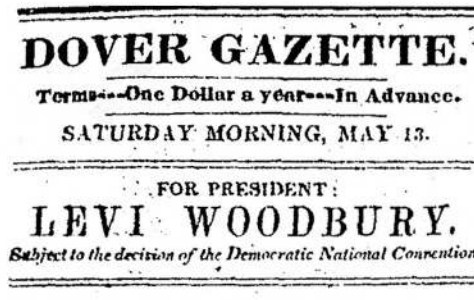
Throughout the campaign season, these lieutenants emphasized the political and judicial positions the judges had taken over the course of their careers. Like other political candidates, Woodbury and McLean needed wide understanding and acceptance of their political positions, including their

pre-judicial activities and speeches, but also their opinions on the Bench. While judicial opinions were not automatically assumed to be politically motivated, they were still fair game for evaluating a judge's political views and therefore could be used to support (or detract from) a nomination.

At the same time, the blurry line between politics and law meant that judges operated with some constraints in the political realm. Both McLean and Woodbury insisted that they were bound by their positions not to speak about new issues that might come before the Court. If a political or constitutional problem had already been considered by the justices or if an issue was not likely to turn into a federal case, McLean and Woodbury both considered themselves on firm ground to offer their insights. Political issues that might come before the Court in the future were trickier. Importantly, both of these men had a sense of propriety when it came to their judicial positions, and partisan managers both acknowledged and respected judges' boundaries.[47]

Emphasizing these boundaries, however, can also be misleading. It was not only justices who needed to follow certain rules of political etiquette; all presidential candidates were expected to let their allies do a majority of campaigning on their behalf.[48] As a result, other political officers came in for their share of criticism if they took to the campaign trail. Seeing the sitting Vice President "take the stump" could prompt opposing newspapers to note that all such etiquette had been discarded. As one joked, "the spectacle of a Vice President, Secretary of State, and a Judge of the Supreme Court, stumping through the country cannot but be eminently edifying." More seriously, the paper argued, "if a Vice President may so far forget the dignity of his position, why should a Secretary of State or a Judge feel under any restraint?"[49]

With these boundaries in mind, Woodbury and McLean both relied on the standard cogs of political organizing in the nineteenth century to bolster their campaigns: political lieutenants, newspapers, and state and local organizations. In New England, Woodbury's old Democratic political connections were central to his campaign. Some of the judge's closest confidants included his New Hampshire colleague Edmund Burke, antislavery Democrat Hannibal Hamlin of Maine, and Robert Rantoul, a prominent Massachusetts lawyer who could often be found in the justice's circuit courtroom while serving as district attorney for Massachusetts. While Burke and Hamlin had worked with the judge politically for many years, Rantoul had an even closer connection, having married one of Woodbury's distant relatives and become law partners with Levi's son, Charles.[50] In fact, family connections like Rantoul were important to Woodbury's potential success. The judge himself was married to Elizabeth Williams Clapp, the daughter of Asa Clapp, a prominent Maine Democrat. Elizabeth's brother, Asa William Henry Clapp, who served in Congress in the 1840s, was among Woodbury's closest confidants.


DOVER GAZETTE.

Terms---One Dollar a year---In Advance.

SATURDAY MORNING, MAY 13.

FOR PRESIDENT:

LEVI WOODBURY.

Subject to the decision of the Democratic National Convention

Candidates relied on newspaper endorsements as there were no standardized ballots in the 1840s. Voters cut out "tickets" from their local newspaper with the candidates they endorsed and brought them to the polling place. The *Dover Gazette* endorsed Woodbury.

Campaigning required interaction with local party leaders, not simply popular lieutenants, and here Woodbury relied on the political connections he made as a judge. Because circuit courts were expected to serve as places where a justice could engage with and represent the interests of his region, these

courtrooms—and the hotels where judges and lawyers boarded—also became critical organizing spaces. Woodbury's allies noted that, as a result of his circuit service in places like Maine, he had become "extensively known to the people, and greatly esteemed by them."[51]

With help from his circuit contacts and lieutenants the judge also received important newspapers' endorsements throughout New England, with New Hampshire papers almost universally touting his candidacy, along with many others in Massachusetts, Maine, and Vermont. Editors of these papers wielded important influence on the region's nominating conventions, on both the local and state level, and were able to translate their support into a measure of success: the Vermont, Maine, and Connecticut state conventions voted to officially support Woodbury at the Democratic National and Convention.[52]

When it came to his strength outside of New England, Woodbury relied on strategic relationships with men he had previously known in Washington. Here, too, familial connections could help. After many years of serving in the capital, Woodbury and his wife had become friends with the family of Francis P. Blair, another important leader of the Democratic Party in the 1830s and 1840s (and later the Republican Party). Though Levi and Francis did not always agree in politics, the two families were close enough that in 1846 Levi's daughter, Mary Elizabeth, married Francis's son, Montgomery. Now a member of the Woodbury family, Montgomery Blair advocated for his father-in-law in 1848, much to the chagrin of his brother Frank, who preferred Van Buren. Montgomery, Frank wrote to his father, "is a perfect *Woodburyite* but thank god he has stopped talking to me about him."[53] The Blairs held considerable political capital in Missouri, and perhaps because of Montgomery's influence, Woodbury was able to capture the support of two key St. Louis newspapers, in addition to some additional support in the neighboring state of Illinois.[54]

The South, however, quickly became the justice's primary region of support outside of New England. One of Woodbury's closest allies in the 1848 campaign was South Carolinian John C. Calhoun, whom the justice knew from their many years together in the capital. The old nullifier had been interested in Woodbury since the 1844 nomination season, convinced that the New Hampshire politician would make a good vice-presidential partner.[55] And though Woodbury had joined the Supreme Court after the 1844 election, Calhoun's regard for the New Hampshire Democrat had not waned. By late 1847, Calhoun had again turned to Woodbury, only this time for the first place on the ticket. "Woodbury would run best in the South," Calhoun told an ally in February 1848. "I think he would take the electoral vote in that quarter."[56]

Among Woodbury's selling points was the decision in *Van Zandt*. "I have heard, of late, indeed that Woodbury's decision in the Vanzandt case has gained for him the favor of Mr. Calhoun," remarked one McLean lieutenant.[57] Well aware of McLean's presidential prospects, Woodbury also may have used the case to try to cut the legs out from under his colleague. One of McLean's allies reported that Woodbury had reported "in mixed company" that the Ohio judge had "sent up to the Supreme Court in the [Van Zandt] case fifteen points favoring the abolition fanaticism."[58] Woodbury was scared enough of a McLean candidacy that he thought it important to discredit a fellow justice.

In addition to the *Van Zandt* case, Woodbury's views on the Wilmot Proviso—or rather his unwillingness to comment publicly on the matter—was a selling point for southern allies. In this case, the judicial etiquette of not commenting on a matter that might come before the Supreme Court worked to Woodbury's advantage. Along with Calhoun,

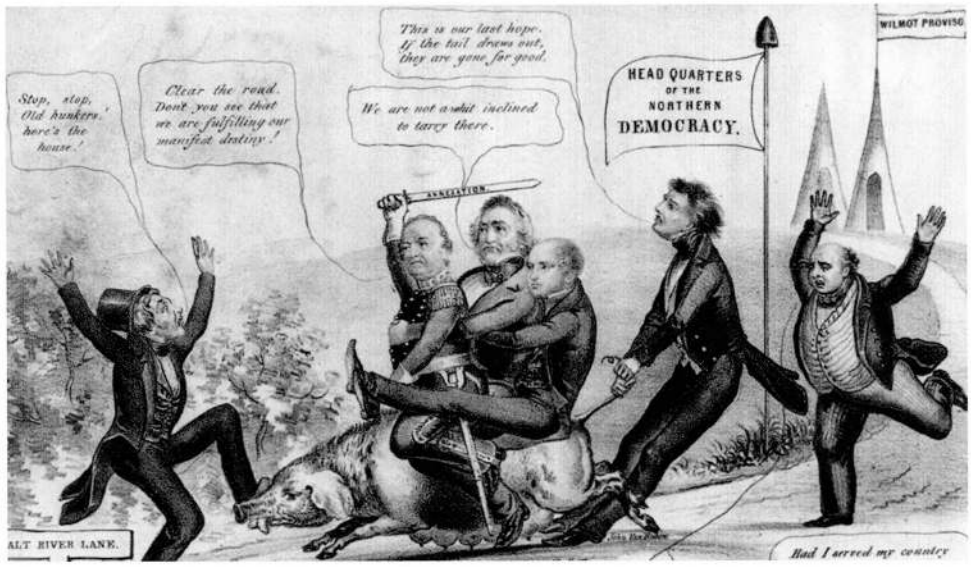
Woodbury had won the favor of two Alabamians: Senator Dixon H. Lewis and his protégé William Lowndes Yancey. Lewis was a neighbor and friend of Woodbury's son, Charles, and maintained close contact with the justice while in D.C. Perhaps because of this connection, Yancey also became a regular correspondent. Both Lewis and Yancey thought it likely that the 1848 nomination would go to a Northerner, and they believed other Northern options—Senators Cass, Buchanan, or even Vice President Dallas—were weak on slavery. When the Alabama state convention met in February 1848, Lewis and his allies pressed for what became known as the "Alabama Platform," which declared that the federal government must protect the rights of slaveholders in the federal territories—that no territorial legislature could bar slavery. Yancey reported to Lewis that because the Alabama delegates agreed to the Platform, and given the positions that Buchanan and Cass had taken on slavery in the territories previously, there was not "the remotest idea of any one but Woodbury" receiving Alabama's vote at the national Convention.[59] In the ensuing months, their organ, the *Montgomery Daily Advertiser*, regularly published columns arguing for the justice's nomination.[60]

At the same time, despite his decision in *Van Zandt* and his general silence on the Wilmot Proviso, Woodbury also seemed appealing to some antislavery men. Perhaps his two abolitionist brothers provided some credibility.[61] General dislike of Cass and Buchanan—who were nothing if not doughfaces—also opened the door for Woodbury as an alternative Northerner. In state conventions in Missouri and Illinois, for example, antislavery forces helped dilute Cass's support, effectively creating antislavery Woodbury delegates.[62] The justice's close antislavery allies like Hamlin, as well as family members through marriage Asa W.H. Clapp and Montgomery Blair (both of whom served as a delegate to the Democratic National and Convention) only solidified his alternative candidacy. So between antislavery advocates, on the one hand, and pro-slavery Southerners like Calhoun and Yancey, on the other hand, Woodbury had pulled a neat trick. "Levi must be a remarkable man if he can unite the support of the Wilmot Proviso party of the North & the ultra of the South," wrote one observer.[63]

McLean's Campaign

Like Woodbury, John McLean's network of supporters stemmed from his long experience in politics, both in Ohio and Washington, DC. For years, the judge had lived at boardinghouses in the city with other justices and members of Congress and the warm relationships the men made in these spaces gave McLean a clear set of supporters from election to election. Among the judge's boardinghouse friends were Milton Brown of Tennessee, and Pennsylvanians James Allison and Thaddeus Stevens.[64] Indiana Congressman Caleb Blood Smith and much of the Ohio delegation in Washington, including Elisha Whittlesey and Joshua Giddings, also served as key lieutenants.

Because of these relationships, McLean had also developed a degree of respect from areas in the Upper South, with Washington allies actively promoting his cause there. Since 1846, some McLean supporters had suggested a cross-sectional ticket, with either North Carolinian Willie P. Mangum or William Cabell Rives of Virginia as his running mate. McLean's lieutenants on the ground thought this was a promising approach: "There are hosts of individuals who will insist on yourself and Mr Rives or there will be no victory for our party, be assured," one wrote.[65] Early in the campaign, Maryland Whig Reverdy Johnson, who regularly argued cases in front of the Supreme Court and knew McLean intimately, was said to be supporting the justice.[66] Kentuckian Humphrey Marshall, another D.C.



This cartoon depicts the rivalry within the Democratic Party between "Barnburners," who promoted the anti-slavery Wilmot Proviso, and conservative Democrats, or "Hunkers." The Hunkers ride a giant pig away from the "Head Quarters of the Northern Democracy" and Wilmot Proviso flag while Barnburner John Van Buren tries to restrain them by holding its tail. Riding up front is former general Lewis Cass, an avid expansionist who brandishes an "Annexation" sword. Thomas Hart Benton is in the middle; Justice Woodbury rides in back.

associate, was similarly dedicated to the McLean cause. Marshall solicited multiple letters from McLean about his life and former political actions, hoping to spur support in the border regions.[67]

In selling McLean's candidacy to a broader public, Marshall also worked closely with James E. Harvey, a Washington correspondent for several newspapers. Along with J.C. Wright, the editor of the *Cincinnati Gazette*, and John Teesdale, the former editor of the *Ohio State Journal*, Harvey crisscrossed the Atlantic Seaboard and western states canvassing voters and placing pro-McLean editorials in various regional newspapers.[68] In 1847 and 1848, McLean exchanged letters daily (sometimes twice a day) with Teesdale, as the Ohioan updated McLean on the western circuit while the justice reported developments in Washington, DC.

Other allies came from McLean's circuit service. The federal district judges and the lawyers that peppered his circuit courtrooms were among his most ardent supporters. Humphrey Leavitt, the federal district judge for the district of Ohio, was a regular correspondent when McLean was in Washington; Leavitt sent routine updates of the state political activities in McLean's favor and offered campaign advice. The district judge also complained when he thought McLean's Ohio friends were not doing enough, when they appeared to have a "culpable supineness."[69] Leavitt, by contrast, was active on the senior judge's behalf, sending letters to friends around the state and working his contacts in the county, telling McLean, "it will afford me great pleasure to contribute my aid in any way, to carry out the wishes of your friends in regard to the presidency."[70]

Like Leavitt, the federal district judge McLean worked with in Indiana was dedicated to a McLean campaign. Federal Judge E.M. Huntington had even been nominated to go to the National Whig Convention to represent Indiana. Huntington had already reported to McLean that he had "uniformly and every where said that you were my first choice for the next presidency." But he would

not stop there. "If I can do anything to bring about your nomination," he told the judge, "I am not only ready but anxious to do it."[71] McLean himself understood his circuit courts were organizing spaces. During the run-up to the 1848 campaign, he repeatedly entreated John Teesdale to come to Columbus when the Circuit Court would be in session, when they could have more time to speak privately about the campaign. As the judge explained, "at the Court influential men will be in Columbus from every part of the state. Consultation can be had and some concert of action procured."[72]

McLean's allies stretched beyond Whig regulars, however. While Woodbury was a staunch Democrat, John McLean appealed to both the Whigs and some members of the Liberty Party. Colleagues believed that McLean could win "the warm support of the Abolitionists" in the Whig Party, in part because of his longstanding ties to the antislavery movement in Ohio and the abolitionist reputation of his wife.[73] Sarah McLean, whom John married shortly before his circuit decision in *Van Zandt*, was well known in Washington and Ohio as a pure abolitionist. While appealing to some, this connection to abolitionism also could be seen as a mark against the justice; as one Delaware Whig told Henry Clay, "the known abolition principles of his wife, and his tendency the same way" suggested that some would never vote for him.[74] Thomas Hart Benton, one of Woodbury's supporters, later quipped that McLean was "abolitionist for any body outside of a mad house," and "his wife is abolitionist enough for all those who ought to be in one."[75]

McLean's background served as a selling point for antislavery Whigs, but also those who might support a new party dedicated to ending the peculiar institution. Among the most loyal of this antislavery group was Salmon P. Chase, an Ohio lawyer, who had been a regular in McLean's circuit courtroom, and had supported the justice's presidential aspirations for at least a decade. In 1846, Chase had even become part of McLean's family; he married Sarah McLean's niece, Bella. Both the McLeans and the Chases were also close to a third couple—Margaret and Gamaliel Bailey, the latter the former editor of Ohio's abolitionist newspaper, the *Philanthropist*, and then, in the late 1840s, Washington, DC's *National Era*. The Baileys, Salmon P. Chase, and Sarah McLean had all been part of a robust abolitionist network in Cincinnati in the 1830s and their relationships continued as the years went on. In fact, the three families formed a neat political circle at the end of the 1840s, with the Chases located primarily in Cincinnati, the Baileys in DC, and the McLeans alternating between. Letters often traveled back and forth from Ohio and DC that included messages to one or the other family.[76]

Chase's and Bailey's support for a McLean candidacy also demonstrated a degree of nuance when it came to the judge's circuit opinion in *Van Zandt*. Chase had actually served as Van Zandt's primary attorney and was clearly unhappy with McLean's decision. But, at the same time, the Ohio lawyer was no less committed to the justice's cause. As Chase told a friend, "I cannot but think Judge M'Lean to be all together the most reliable man, on the slavery question, now prominent in either party." Indeed, he believed "the nomination of M'Lean by the Whig Convention would be the most substantial triumph of antislavery which has been achieved this century."[77] Gamaliel Bailey, too, drew a stark contrast between McLean's circuit decision and that of the Supreme Court: "I have read the opinion of Judge Woodbury with extreme mortification," he told Sarah. The decision contrasted with McLean, who "could never have pronounced the decision in so cold-blooded a style."[78]

Allies understood that McLean's views on the Wilmot Proviso also needed nuance and explanation. While on the Supreme Court, McLean had consistently argued that

slavery was a local—rather than national—institution and therefore could only exist with the sanction of municipal law. This was a view he had repeated in *Van Zandt*. As a result, McLean believed that the Wilmot Proviso was unnecessary and tended toward supporting the opposite conclusion—that the government must legislate freedom rather than slavery. As he explained in a letter to Gamaliel Bailey, by insisting "the proviso is necessary to prohibit slavery," antislavery men "weaken the position." Instead, Bailey and his allies should "take the great constitutional ground that the territory is now free—that slavery can exist only in virtue of the local law; and that the territory if annexed, will remain free territory, unless slavery be sustained within it by law."[79]

By early 1848, a handful of antislavery men—including both Chase and Bailey—had publicly indicated their agreement with McLean. But the justice's approach still faced criticism from the Proviso's supporters and, given its popularity in the North, caused some confusion.[80] Why oppose an amendment guaranteeing freedom in the territories? Why suggest that Congress could not ban slavery? As one Ohio newspaper editor told him, "It appears to me that the doctrine that Congress cannot legislate on the subject is admitting all that the slave holders claim." The paper wondered if this was not the same position that Democratic presidential candidates such as Lewis Cass of Michigan and Pennsylvanian James Buchanan had been promoting.[81]

McLean was flabbergasted by such a question, which he thought to be "stupid or dishonest."[82] The justice's position was miles apart from these Democrats; Cass, Buchanan, and even Woodbury had claimed Congress had no power to legislate in the territories, while McLean argued merely that Congress did not have to in this case, because freedom was guaranteed under the Constitution. But, as the Whig Convention drew closer, McLean's stance on the Proviso began to seem costly to his supporters. After substantial pressure, McLean finally allowed them to "clarify" his position in the newspapers as a supporter of the Proviso, agreeing that Congress did have the power to legislate for the territories, and dropping the nuances of his earlier argument.[83]

The Nominating Conventions

As the May Democratic Convention drew nearer, Woodbury was delicately maintaining the balance between antislavery supporters and proslavery radicals in his camp. This was no easy task, particularly in the North where he was more likely to receive state endorsements. The issue came to a head when the convention in his home state of New Hampshire determined not to officially nominate Woodbury. The problem was not that they opposed Woodbury's candidacy—quite the opposite—but rather that the state had endorsed the Wilmot Proviso. Woodbury knew he would be embarrassed by the combination; as one paper noted, it would be "very injurious to him at the South, where his chief strength lies."[84]

At the same time, Woodbury did not want to go too far in the other direction, for fear of alienating his potential support from New York's Barnburners. Woodbury's Empire State opponents were fearful enough of his success in capturing the antislavery wing of the Democratic Party that they worked overtime to discredit the judge. In particular, former president Martin Van Buren's allies were adamant that Woodbury not receive the nomination. Van Buren's son John—by then an important New York political figure in his own right—had gathered information of Woodbury's connections with Yancey and Dixon, believing that a first-hand account of the judge's proslavery position on the territories would kill any hopes for antislavery support. While no friend to a doughface like Buchanan, John nonetheless wrote to the Pennsylvanian's managers asking for "au-

thentic information *as to Judge Woodbury's views on slavery* with permission to use it." Buchanan's men delivered and Woodbury found himself on shakier ground as April turned to May while his allies rushed to assuage angry Barnburners.[85]

When the Democratic delegates gathered in Baltimore in late May, Woodbury was still in the mix—enough that the Cass men were spreading wild rumors about the justice—but the balance had become more difficult.[86] And the rules of the Convention did not make it any easier. Since the 1830s, Democrats had implemented a "two-thirds rule" requiring both the presidential and vice-presidential candidates to receive two-thirds of the present delegates' votes to win the nomination. The result was often a protracted voting process, which would require the judge to hold his shaky coalition together for a much longer stretch. Woodbury was at a further disadvantage after the credentials committee made a fateful decision about the New York delegation. Hunkers and Barnburners had each sent the requisite 36 delegates and the committee asked both groups to assure their support of the eventual nominee if admitted. Hunkers were willing, but the Barnburners, some of whom preferred Woodbury, would not agree to the stipulation. Eventually Barnburners would walk out of the Convention, helping to swing the nomination to Cass.[87]

While Woodbury's candidacy went down to defeat, McLean's lieutenants were desperately trying to make up ground in the west before the Whig Convention met in June. McLean had managed to win the Indiana state convention's endorsement, thanks in large part to the efforts of Indiana Congressman Caleb Blood Smith. But the judge had failed to capture the Ohio convention's support. Senator Thomas Corwin, another Ohio Whig, had become the favorite among a faction of the party devoted to sitting Governor William Bebb, and the McLean forces struggled to counteract the senator's candidacy. When the Ohio state convention met in January 1848, McLean's allies were at such a disadvantage that they celebrated when the meeting broke up without a formal nomination.[88]

Still, supporters of other Whig candidates clearly believed McLean was a threat given how hard they worked behind the scenes to discredit him publicly. As in Woodbury's case, rival lieutenants published supposedly damning evidence of McLean's duplicity. In late January, a Cincinnati paper claimed to have first-hand knowledge that the judge was speaking out of both sides of his mouth: while arguing in the papers that the war with Mexico was "unconstitutionally begun," the paper charged, McLean had simultaneously written to President James Polk a letter of "warm and decided approbation of the President's war policy" in an effort to secure a position for his grandson in the army. The justice's team scrambled to counteract this letter, publishing a reply in the Washington *National Intelligencer* that was picked up by other papers.[89]

By the time that Cass received the Democratic nomination, McLean had become more circumspect about his chances at the Whig Convention. As a result, he instructed his chief lieutenant, Samuel Galloway, to withdraw his name at the Convention if Gallow saw no path to victory. When the Whig National Convention met in Philadelphia on June 7, the party's delegates remained deeply divided among Clay, Webster, Taylor, Scott, and McLean, in addition to some others. But Galloway quickly saw the writing on the wall when balloting began on the second day, and he withdrew the justice's name. After two days of voting, Taylor secured the nomination.[90]

Taylor's victory in Philadelphia, however, gave new life to a McLean candidacy elsewhere. In early 1848, antislavery organizers suspected that both Whigs and Democrats were likely to nominate pro-South candidates. In preparation for such an event,

they had determined to join with Liberty Party allies to form a new organization: the Free-Soil Party. The Free Soilers planned for an August meeting in Buffalo and anxiously awaited the results from the other conventions. When the news of Taylor's nomination reached him, Salmon P. Chase, who had pushed for McLean as the Whig nominee, naturally pivoted to promoting the justice as an ideal Free Soil candidate.[91]

Chase was not alone. Almost immediately after the Whig Convention, McLean began receiving entreaties from western antislavery men to consent to a nomination at Buffalo. A committee of men from Cleveland, for example, wrote to the judge to urge his candidacy, insisting that his nomination "would be satisfying to a large majority of the friends of Freedom. Would give a new impulse to the cause of humanity" and would "command the vote" of "several & perhaps a majority of the Northern States," a "result which we can hardly anticipate with any other man."[92] McLean's friends in Washington similarly reported that "many influential friends both here and elsewhere" believed McLean was the best candidate for the Free-Soil campaign.[93] Not all of McLean's Whig friends supported a move to the Free Soil Party.[94] But especially among antislavery Whigs, he was the clear favorite.

Despite this support, McLean again found himself at a disadvantage heading into the Buffalo Convention. New York was expected to play a large role in the contest, and Empire State politicos were well positioned to use their influence. Their choice was Martin Van Buren, the former president and Jacksonian ally who had been angrily rejected by the Democratic Convention in 1844 after declaring opposition to Texas Annexation.[95] Van Buren's power came from the same Barnburners who had abandoned the Democratic Convention in Baltimore and especially from long-established Democratic newspapers in the state that would be hard-pressed to promote anyone other than their native son.[96]

By late July, Van Buren's allies had shored up support for their choice, writing to Salmon P. Chase that the nomination was a foregone conclusion and urging McLean to accept a place on the ticket as the vice-presidential nominee.[97] Some of McLean's supporters came around to the idea of McLean for second place on the ticket, expecting that if the Ohioan accepted the vice-presidential nomination, he could expect to be the party's presidential candidate in 1852—when a victory seemed more likely.[98] The combination of the two elder statesmen running together was also appealing: "What a ticket—Van Buren & McLean! It would sweep the North like a tornado!" wrote one proponent.[99] In suggesting the second spot, McLean's allies assured him that a nomination would not affect his position on the Supreme Court. As Chase told him, "a nomination for the Vice Presidency does not, in the opinion of any one, involve any necessity of resigning any office the nominee may hold at the time of nomination. This is an important consideration which I need not enlarge on."[100]

Even with the assurances that he could remain on the Bench during a campaign, the Van Buren fever made McLean hesitant, and the justice publicly declared he would not be a candidate—though privately the judge kept his options open, giving Chase limited permission to use his name during the Convention, but only for the top of the ticket.[101] Following instructions from the justice, Chase withdrew McLean's name early in the proceedings and the Free Soilers nominated Van Buren.[102]

Many thought the choice of Van Buren was a guarantee of defeat: "Had McLean been nominated, his friends would have felt a personal interest and rallied to his support," one wrote to Chase. "But the nomination of Van Buren placed it in the situation of Noah's dove when it found no resting place."[103] Men

outside the Free-Soil Party also believed that the antislavery men had made an obvious mistake that would only benefit the Whigs: "I thought Judge McLean would have been" nominated over Van Buren, wrote one Virginia Whig, and "I still think it would have been more wise in the Convention to have selected him."[104]

Presidential Politics and the Supreme Court

Both Woodbury and McLean failed to secure a presidential nomination in 1848. But that failure should not be misunderstood as a general rule that Supreme Court justices could not be nominated for, or even win, a general election. Their contemporaries did not make such a mistake. In election after election, supporters argued that these justices were proven political leaders who could best promote the well-being of the nation. When Zachary Taylor captured the presidency in 1848, Woodbury's supporters immediately returned to the stump and the justice looked like a front-runner again for an 1852 nomination–until his death in 1851. In 1856, McLean returned to the presidential field and became John C. Frémont's chief rival for the 1856 Republican nomination. That year, his supporters even included future president Abraham Lincoln.[105]

It was not McLean's or Woodbury's place on the Bench that prevented a party from nominating them—in 1848 or any other time. Instead, the highly contingent and fluid nature of national politics in the nineteenth century prevented many perennial and expected candidates from achieving a nomination. Justices who considered running for president faced the same kinds of problems that any candidate did in effectively mobilizing supporters and promoting popular political viewpoints. In addition to strong ground operations, allies in state politics, and newspaper support, candidates also needed a good deal of luck, as Henry Clay's repeated failures to win the presidency demonstrate.[106] The justices' public political record—including their judicial opinions—also had to match the moment at hand. As William Henry Seward, reflecting on Woodbury's failed nomination in 1848, explained to Salmon Chase, "I am quite sure that Judge Woodbury has lost the last nomination that was open to a Judge of the Supreme Court who regarded Emancipation as Fanaticism."[107] Seward did not question the potential for a justice to serve as a nominee; he simply believed that such a candidate had to hold the right political positions.

That justices could be and were strong candidates for presidential nominations illustrates just how different the Supreme Court's relationship to the political system was in the nineteenth century. And articulating that relationship requires moving beyond our modern notions of the Court and its hallowed marble halls. From their seats in the basement of the Capitol building (and later the old Senate Chamber), justices were part of a broader process of political construction and creativity.[108] As Americans worked out the details of their political and constitutional structures, justices of the Supreme Court were key participants—and not simply by issuing opinions from the Bench.

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ENDNOTES

[1] On the dynamics of the 1848 party concerns, see Joel H. Silbey, **Party Over Section: The Rough and Ready Presidential Election of 1848** (Lawrence: University Press of Kansas, 2009) and Michael F. Holt, **The Rise and Fall of the American Whig Party: Jacksonian Politics and the Onset of the Civil War** (New York:

Oxford University Press, 1999), especially chapters nine and ten.

[2] On the history of the Proviso and its relationship to Democratic party conflict, see Chaplain W. Morrison, **Democratic Politics and Sectionalism: The Wilmot Proviso Controversy** (Chapel Hill: University of North Carolina Press, 1967). On the importance of the Wilmot Proviso to the 1848 election see Silbey, **Party Over Section**, 33–34.

[3] James E. Harvey to John McLean, August 1, 1847, John McLean Papers, Manuscript Division, Library of Congress, Washington, DC.

[4] On personal liberty laws, see Thomas D. Morris, **Free Men All: Personal Liberty Laws of the North, 1780-1861** (Baltimore: Johns Hopkins University Press, 1974). On the response of northern judges (especially antislavery judges) to the Fugitive Slave Law, see Robert Cover, **Justice Accused: Antislavery and the Judicial Process** (New Haven: Yale University Press, 1975) and H. Robert Baker, "The Fugitive Slave Law and the Antebellum Constitution," *Law & History Review* 30:4 (November 2012): 1133–1174.

[5] *Jones v. Van Zandt*, 13 Fed Cas 1047 (1843).

[6] *Jones v. Van Zandt*, 1048. There is a robust scholarly disagreement about whether McLean was forced to rule in this case in favor of Jones because of his commitment to judicial neutrality or whether the Constitution itself offered opportunities for McLean to rule differently. For those who argue that McLean (and other antislavery judges) were reflecting their view of neutral principles, see, for example, Cover, **Justice Accused**; Earl M. Maltz, "Slavery, Federalism, and the Structure of the Constitution," *American Journal of Legal History* 36 (1992): 466–498; and Peter Karsten, "Revisiting the Critiques of Those Who Upheld the Fugitive Slave Acts in the 1840s and 50s," *American Journal of Legal History* 58 (2018): 291–325. For the broader point that the Constitution was embedded with pro-slavery principles, see Mark A. Graber, **Dred Scott and the Problem of Constitutional Evil** (New York: Cambridge University Press, 2006). For critiques that suggest there were constitutional possibilities for McLean to rule otherwise, see Baker, "The Fugitive Slave Clause and the Antebellum Constitution"; Anthony J. Sebok, "Judging the Fugitive Slave Acts," *The Yale Law Journal* 100 (1991): 1835–1854; and Jeffrey M. Schmitt, "The Antislavery Judge Reconsidered," *Law and History Review* 29 (August 2011): 797–834.

[7] *Jones v. Van Zandt* (McLean) at 1042, 1043. *Jones v. Van Zandt*, 46 U.S. (5 How.) 215 (1847) at 225, 227, 236.

[8] *American Statesman*, July 10, 1847, quoting the *Georgia Times*. Also see Samuel R. Brooks to Levi Woodbury, April 6, 1848, Papers of Levi Woodbury, Manuscript Division, Library of Congress, Washington, DC.

[9] J. B. Mower to Willie P. Mangum, March 20, 1846, in Henry Thomas Shanks, ed., **The Papers of Willie Person Mangum, Volume 4: 1844-1846** (Raleigh, NC: State Department of Archives and History, 1955): 407-408; Epes Sargent to Henry Clay, February 27, 1847, in Melba Porter Hay and Carol Reardon, **The Papers of Henry Clay, Volume 10: Candidate, Compromiser, Elder Statesman, January 1, 1844-June 29, 1852** (Lexington: The University Press of Kentucky, 1991): 311.

[10] Richard H. Sewell, **Ballots for Freedom: Antislavery Politics in the United States 1837-1860** (New York: W.W. Norton, 1976): 121–156; Jonathan H. Earle, **Jacksonian Antislavery & the Politics of Free Soil, 1824-1854** (Chapel Hill: University of North Carolina Press, 2004): 71–77.

[11] Erik B. Alexander and Rachel A. Shelden, "Dismantling the Party System: Party Fluidity and the Mechanisms of Nineteenth-Century U.S. Politics," *Journal of American History*, forthcoming. For examples of party fluidity in the antebellum era see David Waldstreicher, "The Nationalization and Racialization of American Politics: Before, Beneath, and Between Parties, 179-1840" and Michael F. Holt, "Change and Continuity in the Party Period, 1835-1885," in Byron E. Shafer and Anthony J. Badger, eds., **Contesting Democracy: Substance & Structure in American Political History, 1775-2000** (Lawrence: University Press of Kansas, 2001): 37–63 and 93–115; and Daniel Peart, **Lobbyists and the Making of U.S. Tariff Policy, 1816-1861** (Baltimore, MD: Johns Hopkins University Press, 2018).

[12] On the historic dynamics of nominations, conventions, and voting, see Richard Bensel, **The American Ballot Box in the Mid-Nineteenth Century** (New York: Cambridge University Press, 2004); Michael F. Holt, "The Politics of Impatience: The Origins of Know Nothingism," *Journal of American History* 60:2 (September 1973): 309–331; and Mark W. Summers, **The Plundering Generation: Corruption and the Crisis of Union, 1849-1861** (New York: Oxford University Press, 1987).

[13] New Hampshire *Patriot*, January 28, 1828, quoted in Donald B. Cole, **Jacksonian Democracy in New Hampshire, 1800-1851** (Cambridge, MA: Harvard University Press, 1970): 71; Charles Eugene Hammond, **The Life and Times of Hannibal Hamlin** (Cambridge: Riverside Press, 1899): 180. See James Grant Wilson and John Fiske, eds., **Appleton's Cyclopaedia of American Biography, Vol. 4: Sunderland-Zurita** (New York: D. Appleton & Company, 1889): 601.

[14] Cole, **Jacksonian Democracy in New Hampshire**, 85–86.

[15] Levi Woodbury to Edmund Burke, March 26, 1845, Edmund Burke Papers, Manuscript Division, Library of

Congress, Washington, DC; Edmund Burke to James K. Polk, April 7, 1845, in Wayne Cutler, ed., **The Correspondence of James K. Polk** (Knoxville: University of Tennessee Press, 1996), IX: 257–258. On Woodbury's 1844 chances, see Cole, **Jacksonian Democracy in New Hampshire**, 237.

[16] Carl Brent Swisher, **The Oliver Wendell Holmes Devise History of the Supreme Court of the United States, Volume V: The Taney Period, 1836-1864** (New York: Macmillan, 1974): 234.

[17] Most historians have been critical of McLean's shifting allegiances throughout his career, assuming that switching parties indicated a change in principles. See, for example, Holt, **Rise and Fall**, 913; Stephen E. Maizlish, **The Triumph of Sectionalism: The Transformation of Ohio Politics, 1844-1856** (Kent, OH: Kent State University Press, 1983): 211; and William E. Gienapp, **The Origins of the Republican Party, 1852-1856** (New York: Oxford University Press, 1987): 312.

[18] John McLean to John Teesdale, September 26, 1846, John McLean Papers, Ohio Historical Society, Columbus, OH.

[19] See, for example, Silas Reed to John McLean, January 14, 1848 and E.S. Hamlin to John McLean, May 15, 1848, McLean-LC.

[20] *American Statesman*, February 24, 1847.

[21] *Montgomery Daily Advertiser*, April 15, 1848 (quoting the Macon Georgia *Telegraph*).

[22] *New-Hampshire Gazette*, March 28, 1848.

[23] *Indianapolis Journal*, January 3, 1848.

[24] T.J. Barnett to C.B. Smith, March 25, 1848, McLean-LC.

[25] [Philadelphia] *North American*, November 5, 1846.

[26] *Boston Courier*, March 15, 1848. Also see R.J. Arundel to John McLean, March 23, 1848, McLean-LC.

[27] On the importance of McLean as a "western" justice see Curtis Nettles, "The Mississippi Valley and the Federal Judiciary, 1807-1837," *Mississippi Valley Historical Review* 13 (1925): 202–226; and Kermit L. Hall, "Federal Judicial Reform and Proslavery Constitutional Theory: A Retrospect on the Butler Bill," *The American Journal of Legal History* 17 (April 1973): 166–184; and Justin Crowe, **Building the Judiciary: Law, Courts, and the Politics of Institutional Development** (Princeton, NJ: Princeton University Press, 2012), 109--110.

[28] On McLean's western bona fides as a presidential candidate, see, for example, H. H. Leavitt to John McLean, July 2, 1846, McLean-LC; Samuel Galloway to Thaddeus Stevens, May 3, 1848, Thaddeus Stevens Papers, Manuscript Division, Library of Congress, Washington, DC; "New Movement," *The Cincinnati Weekly Herald and Philanthropist*, February 21, 1844; "John McLean," *The United States Magazine*, July 1856.

[29] [Tallahassee, FL] *Southern Journal*, February 28, 1848.

[30] [Boston] *Atlas*, July 2, 1847.

[31] *Norfolk Democrat* [Dedham, MA], July 23, 1847.

[32] Luther J. Glenn to Howell Cobb, February 12, 1848, in Ulrich B. Phillips, ed., "The Correspondence of Robert Toombs, Alexander Stephens, and Howell Cobb," *Annual Report of the American Historical Association for the Year 1911, Vol. 2* (Washington, 1913): 96.

[33] Samuel R. Brooks to Levi Woodbury, April 6, 1848, Woodbury Papers.

[34] [Boston] *Atlas*, June 6, 1848.

[35] Samuel Treat to Stephen A. Douglas, April 8, 1848, Stephen A. Douglas Papers, Special Collections Research Center, University of Chicago, Chicago, IL. I am grateful to Michael Woods for sharing this letter with me.

[36] John A. Campbell to John C. Calhoun, December 20, 1847, in Clyde N. Wilson and Shirley Bright Cook, eds., **The Papers of John C. Calhoun, Volume XXV: 1847-1848** (Columbia: University of South Carolina Press, 1999), 4.

[37] *National Era*, May 18, 1848.

[38] Samuel Galloway to Thaddeus Stevens, May 6, 1847, Stevens Papers.

[39] John McDonogh to Sarah Bella McLean, February 20, 1846, in John McDonogh, **Some Interesting Papers of John McDonogh. Chiefly Concerning the Louisiana Purchase and the Liberian Colonization**, edited by James T. Edwards (McDonogh, MD: Boys of McDonogh School, 1898): 89.

[40] [Philadelphia] *North American*, July 8, 1846.

[41] J.B. Mower to Willie P. Mangum, February 19, 1846, in Shanks, **Papers of Willie Person Mangum**, IV:393.

[42] John G. Whittier to Charles Sumner, June 23, 1848, in John Albree, ed., **Whittier Correspondence from the Oak Knoll Collections, 1830-1892** (Salem, MA: Essex Book and Print Club, 1911): 9.

[43] Thomas B. Stevenson to Henry Clay, May 18, 1848, **Papers of Henry Clay**, X:464.

[44] See J.B. Mower to John McLean, April 20, 1848 and Elisha Whittlesey to John McLean, April 12, 1848, McLean-LC.

[45] See, for example, Boston *Evening Transcript*, April 3, 1848 and [Dedham, MA] *Norfolk Democrat*, February 1848.

[46] See, for example, John Teesdale to John McLean, February 1, 1848, McLean-LC.

[47] See, for example, Humphrey Marshall to John McLean, January 13, 1846, McLean-LC.

[48] M.J. Heale, **The Presidential Quest: Candidates and Images in American Culture, 1787-1852** (New York: Longman, 1982).

[49] Richmond *Whig*, September 28, 1847.

[50] On Hamlin, see Hammond, **Life and Times of Hannibal Hamlin**, 179. On Rantoul see Luther Hamilton, **Memoirs, Speeches and Writings of Robert Rantoul, Jr.** (Boston: John P. Jewett and Company, 1854): 19; and

Charles Levi Woodbury, "Some Personal Recollections of Robert Rantoul, Junior," *The Collections of the Essex Institute* XIV (July–Dec., 1898): 195. Also see Joseph G. Rayback, **Free Soil: The Election of 1848** (Lexington: University Press of Kentucky, 1970).

[51] *New Hampshire Patriot & State Gazette*, April 13, 1848.

[52] Rayback, **Free Soil**, 140.

[53] Frank Blair to Francis P. Blair, April 22, 1848, Martin Van Buren Papers, Manuscript Division, Library of Congress, Washington, DC. On the Blair-Woodbury family relationships, see William Ernest Smith, **The Francis Preston Blair Family in Politics, Vol. 1** (New York: The Macmillan Company, 1933): 228, 272. Smith explains that Francis Sr. supported Woodbury as well, if reluctantly.

[54] See, for example, Samuel Treat to A.W.H. Clapp, April 25, 1848, Woodbury papers; and Rayback, **Free Soil**, 140–141.

[55] Dixon H. Lewis to R. K. Crallé, June 10, 1842, in Frederick W. Moore, ed., "Calhoun as Seen by His Political Friends: Letters of Duff Green, Dixon H. Lewis and Richard K. Crallé, During the Period from 1831-1848," *Publications of the Southern History Association* 7 (September 1903): 358–359. Also see Sean Wilentz, **Rise and Fall of American Democracy: From Jefferson to Lincoln** (New York: W.W. Norton & Co., 2006): 544–545; Cole, **Jacksonian Democracy in New Hampshire**, 234–239.

[56] John C. Calhoun to Ellwood Fisher, February 14, 1848 (quotation) and Richard K. Crallé to John C. Calhoun, March 19, 1848, in *Papers of John C. Calhoun*, 25:194, 255–256.

[57] Salmon Chase to Charles Sumner, December 2, 1847, in S.H. Dodson, "Diary and Correspondence of Salmon P. Chase," *Annual Report of the American Historical Association for the Year 1902* (Washington: Government Printing Office, 1903), II:126.

[58] James E. Harvey to John McLean, March 16, 1847, McLean-LC.

[59] William Lowndes Yancey to Dixon H. Lewis, February 14, 1848, quoted in Eric Walther, **William Lowndes Yancey and the Coming of the Civil War** (Chapel Hill: The University of North Carolina Press, 2006): 104. Also see J. Mills Thornton, **Politics and Power in a Slave Society: Alabama, 1800-1860** (Baton Rouge: Louisiana State University Press, 1978): 172–173.

[60] See, for example, *Montgomery Daily Advertiser*, February 29, 1848, March 18, 1848, April 15, 1848, May 20, 1848 and May 27, 1848.

[61] See *National Era*, August 19, 1847.

[62] See Morrison, **Democratic Politics**, 106–110. Doughface was a term often used in the nineteenth century to describe Northern men with Southern sympathies. See, for example, Joshua A. Lynn, **Preserving the White Man's Republic: Jacksonian Democracy, Race, and the Transformation of American Conservatism** (Charlottesville: University of Virginia Press, 2019); and Matthew Mason, "The Maine and Missouri Crisis: Competing Priorities and Northern Slavery Politics in the Early Republic," *Journal of the Early Republic* 33:4 (Winter 2013): 675–700.

[63] John M. Niles to Martin Van Buren, April 18, 1848, Van Buren papers.

[64] See Milton Brown to John McLean, June 5, 1846, McLean-LC; Samuel Galloway to Thaddeus Stevens, May 6, 1847, Stevens Papers; Francis P. Weisenburger, **The Life of John McLean: A Politician on the United States Supreme Court** (Columbus: The Ohio State University Press, 1937): 133; Fawn M. Brodie, **Thaddeus Stevens, Scourge of the South** (New York: W.W. Norton, 1959): 239. On the importance of boardinghouses to Washington society see Rachel A. Shelden, **Washington Brotherhood: Politics, Social Life, and the Coming of the Civil War** (Chapel Hill: University of North Carolina Press, 2013).

[65] Worthington G. Snethen to John McLean, April 10, 1845, McLean-LC.

[66] See diary entry for February 29, 1847, in Frederick W. Seward, **Seward at Washington, as Senator and Secretary of State. A Memoir of His Life, with Selections from His Letters, 1846-1861** (New York: Derby and Miller, 1891): I:37; and John McLean to John Teesdale, December 3, 1846, McLean-OHS.

[67] John McLean to Humphrey Marshall, May 2, 1846, Humphrey Marshall Papers, Filson Historical Society, Louisville, KY.

[68] See, for example, James E. Harvey to John McLean, November 3, 1846; J. Teesdale to John McLean, December 29, 1846; and Silas Reed to John McLean, February 12, 1848, McLean-LC.

[69] H. H. Leavitt to John McLean, July 2, 1846, McLean-LC. Also see H. H. Leavitt to John McLean, January 24, 1847 and February 8, 1848, McLean-LC.

[70] H. H. Leavitt to John McLean, December 28, 1847, McLean-LC.

[71] E.M. Huntington to John McLean, March 28, 1848, McLean-LC. Also see Caleb Blood Smith to John McLean, May 28, 1848, McLean-LC.

[72] John McLean to John Teesdale, May 12, 1847 (quotation); John McLean to John Teesdale, October 19, 1846; October 29, 1846; and October 11, 1847, McLean-OHS. Duff Green to John McLean, July 1, 1833; and E. Whittlesey to John McLean, September 14, 1833, McLean-LC.

[73] J. B. Mower to John McLean, April 24, 1848, McLean-LC.

[74] John M. Clayton to Henry Clay, April 16, 1847, in **Papers of Henry Clay** 10:323.

[75] Elizabeth Blair Lee to Samuel Phillips Lee, May 12 [1856?], Blair-Lee Papers, Princeton University Libraries, Princeton, NJ, quoted in William E. Gienapp, **The Origins of the Republican Party, 1852-1856** (New York: Oxford University Press, 1987): 314.

[76] On Sarah's connection to the Baileys, see Stanley Harrold, **Gamaliel Bailey and Antislavery Union** (Kent, OH: Kent State University Press, 1986), 26. For letters connecting the families, see, for example, Gamaliel Bailey to S. B. McLean, July 17, 1847 and Gamaliel Bailey to Salmon Chase, July 14, 1848, Gamaliel Bailey Papers, Princeton University Libraries, Princeton, NJ.

[77] Salmon Chase to Charles Sumner, February 19, 1848, in Dodson, "Diary and Correspondence," 131–132.

[78] Gamaliel Bailey to Sarah B. McLean, April 3, 1847, Bailey Papers.

[79] John McLean to Gamaliel Bailey, October 10, 1847, Bailey Papers.

[80] See Gamaliel Bailey to John McLean, November 4, 1847, Bailey Papers.

[81] John Woods to John McLean, February 29, 1848, McLean-LC.

[82] John McLean to Salmon P. Chase, February 8, 1848, Niven, **Chase Papers**, Chase II:166.

[83] Frank Otto Gattell, **John Gorham Palfrey and the New England Conscience** (Cambridge, MA: Harvard University Press, 1963): 157; Holt, **Rise and Fall**, 296.

[84] *New Hampshire Statesman*, November 12, 1847.

[85] John Van Buren to Martin Van Buren, April 3[?], 1848, Van Buren Papers; *Salem Register*, May 22, 1848; A.W.H. Clapp to Levi Woodbury, May 18, 1848; and May 19, 1848, Woodbury Papers. Also see Morrison, **Democratic Politics**, 122–124.

[86] A.W.H. Clapp to Levi Woodbury, May 16, 1848, Woodbury Papers.

[87] On the history of the two-thirds rule, see Leonard L. Richards, **The Slave Power: The Free North and Southern Domination, 1780-1860** (Baton Rouge: Louisiana State University Press, 2000), 114–115. On the credentials committee and the New York divide see Silbey, **Party Over Section**, 63–64.

[88] See H. H. Leavitt to John McLean, January 26, 1848 and Salmon Chase to John McLean, May 25, 1848 (quotation), McLean-LC. On the state dynamics involving Governor Bebb and Thomas Corwin see Maizlish, **Triumph of Sectionalism**, 101–112; and Holt, **Rise and Fall**, 265–269.

[89] See New York *Herald*, January 31, 1848, and February 17, 1848.

[90] On the details of the Whig Convention, see Holt, **Rise and Fall**, 322–326.

[91] See, for example, Salmon P. Chase to Joshua R. Giddings, March 10, 1848, Niven, **Chase Paper** II:176.

[92] James A. Briggs et al. to John McLean, July 11, 1848, McLean-LC.

[93] Joshua Giddings to John McLean, July 13, 1848, McLean-LC.

[94] See, for example, James E. Harvey to John McLean, June 9, 1848; Elisha Whittlesey to John McLean, July 24, 1848; and John W. Allen to John McLean, June 24, 1848, McLean-LC.

[95] On Van Buren and the 1844 election, see Wilentz, **Rise of American Democracy**, 567–573.

[96] On this point, see, for example, Samuel J. Tilden to Salmon Chase, July 29, 1848, Niven, **Chase Papers**, II:180.

[97] H.B. Stanton to Salmon P. Chase, July 28, 1848, McLean-LC. Also see Salmon Chase to John Van Buren, [July] 19, 1848, Samuel J. Tilden Papers, Manuscripts and Archives Division, New York Public Library, New York, NY.

[98] Edward Everett to Daniel Webster, August 4, 1848, Edward Everett Papers, Massachusetts Historical Society, Boston, MA.

[99] H.B. Stanton to Salmon P. Chase, July 28, 1848, McLean-LC.

[100] Salmon P. Chase to John McLean, August 2, 1848, McLean-LC. Also see James W. Taylor to John McLean, August 1, 1848, McLean-LC.

[101] For McLean's public refusals, see John McLean to James A. Briggs, et al., July 31, 1848, McLean-LC. This letter was turned over to newspapers and printed widely. On continued support for a McLean candidacy, see Charles Sumner to John McLean, July 31, 1848; James W. Taylor to John McLean, August 3, 1848; and Jonathan C. Vaughan to John McLean, August 3, 1848, McLean-LC.

[102] Some contemporaries thought Chase may have withdrawn McLean's name prematurely for his own political gain, but the evidence is thin. Chase gave reasonable explanations for his actions to correspondents, including McLean himself. See Salmon P. Chase to John McLean, August 12, 1848, McLean-LC; and Salmon P. Chase to James W. Taylor, August 25, 1848, Niven, **Chase Papers**, II:184.

[103] Edward S. Hamlin to Salmon P. Chase, October 22, 1848, Niven, **Chase Papers**, II:192.

[104] John M. Botts to Henry Clay, August 23, 1848, in **Papers of Henry Clay**, 10:523.

[105] On Woodbury's chances in 1852, see Cole, **Jacksonian Democracy**, 258–259. On McLean's Republican candidacy, see Andrew Wallace Crandall, **The Early History of the Republican Party, 1854-1856** (Gloucester, MA: P. Smith, 1960): 183. For Lincoln's support, see Abraham Lincoln to Lyman Trumbull, June 7, 1856, in William H. Lambert, "A Lincoln Correspondence," *Century Magazine* 77:4 (February 1909): 617–626.

[106] Michael Holt speculates, for example, that had the Whigs decided to nominate Henry Clay in 1840, rather than William Henry Harrison, Clay almost certainly

would have won the presidency, given the underlying political context. But in 1836 and 1844, when the party did nominate him, the national political landscape gave him less of a chance. Holt, **Rise and Fall**, 80.

[107] William Henry Seward to Salmon P. Chase, June 12, 1848, quoted in Swisher, **The Taney Period**, 235–236.

[108] See Alison LaCroix, "The Interbellum Constitution: Federalism in the Long Founding Moment," *Stanford Law Review* 67 (2015): 397–445; and Jack Furniss, "Devolved Democracy: Federalism and the Party Politics of the Late Antebellum North," *Journal of the Civil War Era* 9:4 (December 2019): 546–568.

A Forgotten First: Everett J. Waring, First Black Supreme Court Advocate, and the Case of *Jones v. United States*

John G. Browning

Introduction

In reflecting upon her historic confirmation as the first Black woman on the nation's highest court, Justice Ketanji Brown Jackson acknowledged that she stood "on the shoulders" of many "true pathbreakers."[1] While Justice Jackson undoubtedly had in mind Black Supreme Court advocates turned members of the federal judiciary like Constance Baker Motley (first Black female federal judge) and Thurgood Marshall, one cannot ignore the rich legacy left by nineteenth century Black lawyers who appeared before the Court. While the history of lawyers generally has been too long regarded as "a White man's history"[2] and Black lawyers' "names and contributions remained unknown,"[3] the history of Black Supreme Court advocates has been particularly neglected.[4] Occasional mentions are made of pioneers like John Swett Rock (who in 1865 became the first Black lawyer admitted to practice before the U.S. Supreme Court) or Emmanuel M. Hewlett and Cornelius J. Jones (early Black Supreme Court advocates who on December 13, 1895, argued *Gibson v. Mississippi* and *Smith v. Mississippi*, respectively). But for too long, the question of "who was the first Black lawyer to ague before the United States Supreme Court?" has gone unanswered—or worse, incorrectly answered.[5]

This article seeks to rectify historical oversight and give due credit to this forgotten first: Everett J. Waring of Maryland, who in 1890 argued the case of *Jones v. United States*. The case he brought transcended garden variety criminal defense and the mistreatment of Black workers to raise important questions about sovereignty and jurisdiction in the early days of U.S. imperialism that still resonate today. But in order to appreciate Waring's achievement, and place it in historical perspective, we must first examine the complicated circumstances that launched his

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legal career just a few years before as well as the unique and heartbreaking situation that led to *Jones v. United States*.

Defying the Odds

That Everett J. Waring became a lawyer in Maryland at all is a testament to both his will and the perseverance and organizing of a group of activists, the Brotherhood of Liberty, that predated the NAACP. Maryland, like other Southern states, had never admitted a Black American to the practice of law before the Civil War—despite having a Black population that was roughly equally divided between free and enslaved people. Even after the war ended, however, Maryland—unlike virtually every other Southern state—continued to bar Black citizens from the practice of law.[6] Maryland's statute restricting entry to the legal profession to White men was not repealed until 1888—twenty years after the Fourteenth Amendment was ratified.[7]

The first challenge to the racial barrier in Maryland came in 1857, the same year as the *Dred Scott* decision. A twenty-four-year-old free Black man and Baltimore native, Edward Garrison Draper, sought admission to the Maryland bar. Draper, the son of a free Black tobacconist, had been educated in Philadelphia and then Dartmouth, becoming one of the school's first Black graduates in 1855.[8] At a time when most Maryland attorneys lacked a college education and entrance into the legal profession demanded no more preparation than time spent "reading the law" under the tutelage of an older lawyer, Draper spent the next two years apprenticing with a respected Baltimore lawyer, Charles Gilman.[9] Draper also spent his last several months in the Boston office of attorney Charles Storey, a Harvard Law graduate and clerk of the Superior Criminal Court.[10]

Upon returning to Baltimore, with Gilman as his sponsor, Draper was examined by Judge Zacheus Collin Lee of the Superior

Baltimore native Edward G. Draper sought admission to the Maryland bar in 1857. The son of a free Black tobacconist, he had graduated from Dartmouth College two years earlier and then read law. The Maryland bar did not admit him but furnished him with a certificate to practice law in Liberia.

Court of Baltimore City. Lee, a first cousin to General Robert E. Lee, knew that however impressive the young man was, he was not a "free White citizen" and so could not be admitted.[11] However, Draper persuaded him of his intent to emigrate to Liberia as part of the Maryland Colonization Society's campaign and his desire to practice in Liberia. So, on October 29, 1857, Judge Lee issued a certificate to Draper stating as follows:

> Upon the application of Charles Gilman Esq. of the Baltimore bar, I have examined Edward G. Draper, a young man of color, who has been reading law under the direction of Mr. Gilman, with the view of pursuing . . . practice in Liberia, Africa. And I have found him most intelligent and well informed in his answers to the questions proposed by me, and qualified in all respect to be admitted to the bar in Maryland, if he was a free white citizen of

> this state . . . This certificate is . . . furnished to him . . . with a view to promote his establishment and success in Liberia at the bar there.[12]

Armed with this, the newly married Draper headed off to Liberia with his wife, optimistic about his prospects. Barely a year after his arrival, however, tragedy struck: Draper became ill and on December 18, 1858, died in Cape Palmas of what was likely tuberculosis.[13]

Although a few Black lawyers would be permitted to practice in Maryland's federal courts as early as 1875, the state courts remained off limits. In 1876, a Black lawyer already admitted in Massachusetts, Charles Taylor, sought admission to Maryland's bar. Taylor had little difficulty in gaining admission to the bar of the U.S. Circuit and District Courts in June 1877, but his efforts in the state courts failed. In *In re Taylor*, the Maryland Court of Appeals denied Taylor's petition.[14] It specifically rejected his argument that admission to the bar was a privilege of citizenship, holding that such admission involved state and not national citizenship.[15] Citing the *Slaughterhouse* cases and the Supreme Court's rejection of Myra Bradwell's attempt as a woman to be admitted to the Illinois bar, it held that "the 14th Amendment has no application."[16] Taylor left the state soon after.

In 1884, another Black attorney from Massachusetts, Richard E. King, lobbied the Maryland House of Delegates to overturn the state's exclusionary law.[17] Although he was unsuccessful, King raised public awareness of this issue and newspapers like the *Baltimore Sun* soon called for the law to be changed, saying "The law has no right to keep a colored man from earning his bread in any honest way he may see fit, provided that he shows himself able to meet the requirements imposed on all other classes of citizens."[18] King's efforts also helped galvanize the nascent Mutual United Brotherhood of Liberty, a group of Black pastors and community activists led by Reverend Harvey Johnson, pastor of the Union Baptist Church.[19] With legislative efforts stalling (a bill to permit Black lawyers in state courts passed the Maryland Senate but failed in the General Assembly), Johnson and the Brotherhood of Liberty brought a test case on bar admission. Finding a plaintiff was not easy. The *Taylor* decision had already discouraged Black candidates from pursuing a legal career path while dissuading Black lawyers in other states from coming to Maryland.

Johnson and his attorney Alexander Hobbs finally found their plaintiff: Charles S. Wilson, a Massachusetts-licensed attorney who was teaching high school in Baltimore County. Arguing that later Supreme Court cases like *Strauder v. West Virginia*[20] had effectively overruled the holding in *Taylor* by extending the reach of equal protection, Hobbs was successful. On March 19, 1885, the Supreme Bench of Baltimore held that Maryland's statutory racial exclusion for the legal profession constituted a denial of the Fourteenth Amendment's equal protection guarantee. As the decision read, in part:

> To deter any class of citizen from its membership is not only to prevent their engaging in a lawful calling, but, in the language of the Supreme Court, tends to degrade and stigmatize the whole class by depriving them of a privilege which all other citizens possess and of the equal protection of the law.[21]

While it was an important victory, Wilson's case was not a complete one. For one thing, its application was limited to Baltimore, rather than statewide. For another, Charles Wilson did not go on to become admitted.[22] To fight the ongoing battle for civil rights in Maryland and beyond, Reverend Johnson and the Brotherhood of Liberty needed warriors. They found one

in a newly minted graduate of Howard Law School named Everett J. Waring.

A Champion is Found

Everett J. Waring was born in Springfield, Ohio on May 22, 1859 to James and Melinda Waring.[23] James, an educator, worked as the principal of the Black schools of both Springfield and Columbus. James was biracial and Melinda was White, and contemporary accounts described their son Everett as "very light-colored."[24] Everett was one of five children, and attended Columbus High School, where he graduated in 1877. After graduation, Everett began work as a teacher as well. James Waring died on May 15, 1878, and that year, Everett assumed his father's position as principal. Changes to the school system in 1882 left young Waring without a job. He briefly edited a newspaper in Columbus, but then received an appointment from U.S. Senator John Sherman to serve in the Department of the Interior as an examiner of pensions. The patronage job provided him with a steady income while he attended Howard Law School, and Waring graduated in 1885.[25]

Like many early Howard graduates, Waring became a trailblazer. How the young lawyer and the crusading pastor Harvey Johnson first crossed paths remains a mystery, but Johnson clearly had an eye out for a lawyer who could pick up where the successful Wilson case left off. As one account has it, "Johnson rushed to Howard University to convince Waring to come to Baltimore and make history."[26] Several months after graduating Howard Law School, Waring moved to Baltimore. On October 10, 1885, on the motion of Assistant State's Attorney Edgar H. Gans (a progressive White lawyer sympathetic to racial equality issues), Waring "presented himself to the Supreme Bench of Baltimore City and was admitted to the bar, becoming the first Negro lawyer admitted to practice in the courts in Maryland."[27] Not surprisingly, the Black press nationwide hailed the moment. In one New York paper, a Black lawyer from the District of Columbia named William E. Matthews was quoted as saying "I'm glad to see the subject [of bar admission] treated on its merits and not as a social or political question."[28]

Waring soon had a colleague: Joseph Seldon Davis, an 1884 Howard Law graduate. A native Virginian, Davis had graduated from the Hampton Institute in the late 1870s. Like Waring, he had initially worked as a teacher before moving to Washington, DC and finding a government job. Davis worked at the General Land Office while attending law school at Howard. Like Waring, he brought a sense of military-like obligation to his work in advancing civil rights, stating "Many a brave soldier gave his life for universal liberty, and we will be derelict of duty if we fail to labor unitedly in carrying out the principles of justice and liberty for which so many noble lives have been sacrificed."[29] On March 1, 1886, Davis was admitted to practice law before the Supreme Bench of Baltimore.[30] Together, Waring and Davis became co-counsel for the Brotherhood of Liberty.

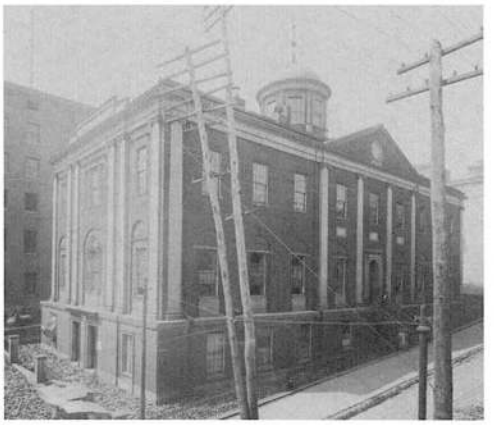
The Brotherhood wasted no time in putting Waring and Davis to work advancing a civil rights agenda by mounting legal challenges to Maryland's discriminatory laws. The first of these was the state's Bastardy Act, a law which established the rights of White women—but not Black women—to seek financial support in cases of abandonment by the fathers of their children. As originally written in 1781, the law had applied to all women; later, in 1785, legislators narrowed its scope to apply to free women, regardless of race. But in 1860, lawmakers added a racial restriction, inserting the word "White."[31]

Waring sought to challenge the Bastardy Act on behalf of a young Black woman named Lucinda Moxley, who sought the prosecution of her child's father, James

In 1895, the United Mutual Brotherhood of Liberty was formed as Baltimore's first civil rights organization. The group worked to overturn Maryland's prohibition on Black attorneys. Waring is front and center.

Smith. It is quite possible that this case was not as adversarial as it seemed on paper; the state was represented by the same Edgar Gans who had sponsored Waring's admission, and the father, Smith, was represented by Edwin R. Davis, a lawyer who had tried to change the law in Maryland's House of Delegates. The case also had popular support, with the *Baltimore Sun* reporting that many citizens both Black and White "think that the bastardy law, which discriminates against colored women, is a barbarism, and ought to be done away with."[32]

Davis entered a responsive pleading on Smith's behalf, arguing that because the law did not apply to Black women, Moxley



Waring unsuccessfully challenged Maryland's Bastardy Act, a law which established the rights of White women—but not Black women—to seek financial support in cases of abandonment by the fathers of their children. He argued the case in the Baltimore City Court House (pictured).

lacked standing to bring the suit. The lower court accepted this demurrer, setting the stage for Baltimore's Supreme Bench to determine the Act's constitutionality. In presenting his argument, Waring became the first Black lawyer to appear before the Supreme Bench.[33] On the day of the hearing, the courtroom was crowded with lawyers and laypeople alike, all eager to witness the historic first argument by a Black lawyer in a Maryland courtroom. According to one account, the "youthful advocate did not disappoint those who had pinned their faith in him."[34] Waring argued that the Act stigmatized Black women by denying them the same protections that White women enjoyed. "The Bill of Rights guarantees colored women the common law," he said, before continuing "They are on the same footing with white women at common law. Why not under statute?"[35]

However, Waring and his client did not prevail. The Baltimore Supreme Bench upheld the lower court's decision, ruling that the Bastardy Act did not violate the Fourteenth Amendment because it did not protect an individual.[36] Viewed technically, the statute protected the state from having to support the out-of-wedlock child by levying a fine against the father—thus safeguarding state revenue, rather than benefitting a mother or her child. The outcome was disappointing, especially since its racial restriction not only excluded Black women entirely, but also had the effect of protecting White men from the legal consequences of fathering children as the result of interracial relationships. Interestingly enough, just a few months later in a case involving a White couple, one of the same justices who decided against Ms. Moxley accepted the White father's argument that the law violated the Fourteenth Amendment's equal protection guarantee. Judge Edward Duffy apparently had a change of heart, writing the law "denied the colored woman the right to have the father of her illegitimate child compelled by process of law to support the child, a right accorded by law to the white woman, and was therefore in that respect also unconstitutional."[37] And the following year, the Maryland Court of Appeals heard yet another challenge to the Bastardy Act involving a White couple, in which counsel for the defendant father adopted Waring's Fourteenth Amendment equal protection argument.[38]

In a 5–1 decision, the court held that the Bastardy Act did not violate the Fourteenth Amendment, stating that "The procientiion of illegitimate children cannot be said to be a privilege or immunity of citizens of the United States, nor does the statute give any privilege or confer any benefit upon the mothers of such children."[39] The lone dissenting justice, Frederick Stone, made it clear that he felt the racially divisive wording of the Act should not pass constitutional muster, saying "If the fourteenth amendment to the constitution of the United States means anything it means that there shall not be in any State one law applying to the white race and another and different one applying to the black."[40]

The defeat had a silver lining for Waring and for the Brotherhood of Liberty. As one scholar has noted, his historic appearance had tremendous significance, since "to

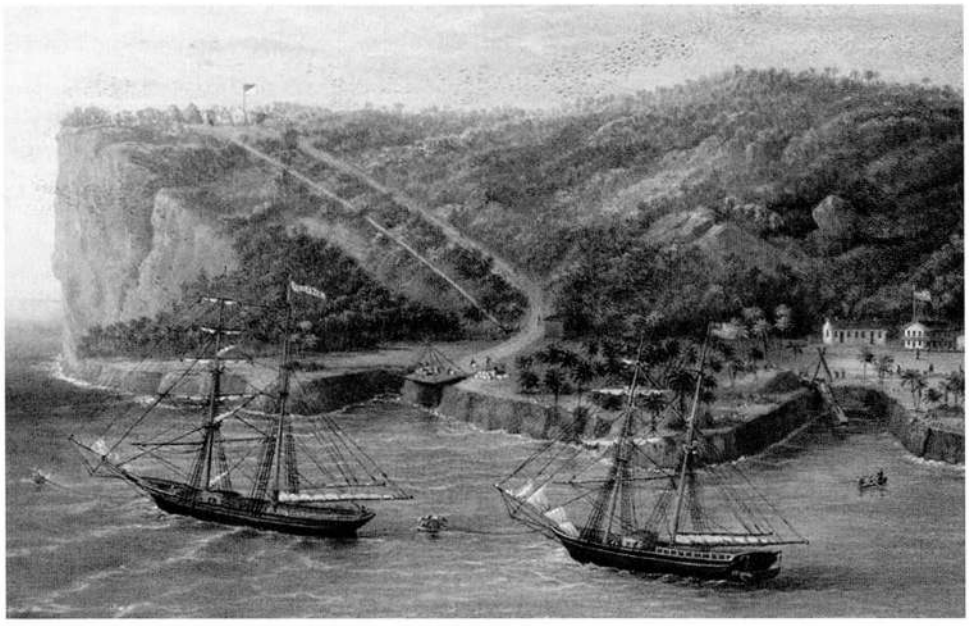
Several months after graduating Howard Law School, Everett J. Waring moved to Baltimore. In 1885, he was admitted to the bar, becoming Maryland's first Black bar member.

Baltimore's Negroes the mere presence of Waring as counsel made the event seem a major victory."[41] For the Brotherhood, the *Plunkard v. State* decision helped galvanize statewide public support for, first, lobbying the legislature to amend the Act (two bills were introduced and rejected in spring 1888), and later funding an appeal to the Supreme Court. A Black newspaper helped with a fundraising drive, and the Brotherhood issued a call for subscriptions to fund the legal costs.[42] Facing mounting public pressure, and staring at a potential showdown at the Supreme Court, Maryland's legislature gave in. In May 1888, when Dean John Prentiss Poe submitted his codification of Maryland's laws (the same one in which he eliminated the racial restriction of the bar admission statute), he omitted the word "White" in the Bastardy Act.[43] The legislature adopted the revised code without comment. That same year, Waring was admitted to practice before the Maryland Court of Appeals on April 17.[44]

Ultimately, the Brotherhood of Liberty's efforts helped defeat the Bastardy Act, notwithstanding the unsuccessful court challenge by Waring. Waring would be kept busy with other civil rights battles. Education reform was one of these. Baltimore was plagued by longstanding racial inequalities in education, from lack of funding to inadequate facilities to the city's refusal to hire Black educators. In 1886, the Brotherhood's education committee succeeded in getting the city council to pass an ordinance to build two new primary schools and a new high school.[45] After the mayor vetoed the measure the following year, Waring wrote a newspaper editorial in February 1887 that "called upon the mechanics, professional men, business men, laborers, women, children, in fact everyone, to join the army and storm the fortress that denied us [equal employment and opportunities in the schools]."[46] The Brotherhood's education committee and its offshoot, the Maryland Educational Union, continued to press the issue with public gatherings and protests that called for Black voters to make their wishes known. Finally, in May 1888, Baltimore's new mayor Ferdinand Latrobe signed an ordinance that made sweeping changes, including giving Black teachers the right to teach in Baltimore and at equal pay to their White counterparts.[47]

In other cases, Waring fought the good fight but did not emerge victorious. He defended a Black man named Ernest Forbes who was accused of raping a White woman. Despite the deathbed confession of a different Black man, Forbes was convicted and executed.[48] Waring also lost a suit against an insurance company that discriminated against Black customers by charging them higher premium rates; the insurance carrier maintained that the prices were justified by Black customers' higher mortality rates.[49]

Waring also represented Reverend Robert McGuinn, a Black pastor who had purchased a ticket in 1887 for travel to Virginia on the steamship *Mason Weems*. McGuinn sat down at a table onboard for dinner; upon seeing him there, White



From 1857 to 1898, American fertilizer companies based in Baltimore and New York mined lucrative guano on the island of Navasso, near Haiti. Subjected to horrific exploitation, the African-American laborers rose in revolt against their supervisors, murdering five.

passengers refused to dine, prompting the captain to intervene.[50] The captain asked McGuinn to move; when he refused, the captain tried to move him. A White passenger began to assault the clergyman, and fearing for his own safety, Rev. McGuinn left the vessel before it arrived at his destination. Waring sued the captain and the ship's owners in federal court for racial discrimination, but Judge Morris dismissed the complaint. While conceding that a common carrier must make a "bona fide effort" to provide equal accommodation to first class passengers regardless of race, Morris nevertheless foreshadowed *Plessy v. Ferguson*. He wrote:

> When public sentiment demands a separation of the passengers, it must be gratified to some extent. While this sentiment prevails among the traveling public, although unreasonable and foolish, it cannot be said that the carrier must be compelled to sacrifice his business to combat it. Within reasonable limits the carrier must be allowed to manage his own affairs.[51]

In fighting these "race battles," Everett Waring had achieved milestones for himself and for the Black community. He and the Brotherhood of Liberty succeeded in breaking Maryland's racial barriers to entering the legal profession, in ending the race and gender discrimination of the Bastardy Act, and in achieving meaningful educational reforms. Yet he and his clients also repeatedly experienced the racial inequalities of the criminal and civil justice systems. Before too long, however, the young lawyer would be tested on the biggest stage of all: the Supreme Court of the United States.

Navassa Island and the Road to *Jones v. United States*

Even as Waring absorbed the loss in Reverend McGuinn's suit over disparate treatment in public accommodations, events were occurring on a tropical island thousands

of miles from Baltimore that would result in the young lawyer becoming the first Black lawyer to argue before the U.S. Supreme Court.

The story begins decades earlier and involves not gold or oil, but a far more mundane treasure: guano (dried bird droppings). Rich in phosphates used for fertilizer during the nineteenth century, the guano deposits on islands or even rocks throughout the Caribbean and Pacific became immensely valuable. By the middle of the century, most of the guano deposits in the United States had been exhausted, and concerns mounted that American farmers were being gouged by foreign interests. Guano was so important that in 1850, President Millard Fillmore proclaimed that it was "the duty of the Government" to secure it at "a reasonable price."[52] On August 18, 1856, Congress passed the Guano Islands Act, which provided:

> Whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other Government, and not occupied by the citizens of any other Government, and takes peaceable possession thereof, and occupies the same such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States.[53]

In a November 18, 1857 letter to the U.S. Department of State, an American sea captain named Peter Duncan claimed Navassa Island for the United States under the Guano Act, and an official reply by the State Department dated December 8, 1859 formally recognized Navassa as appertaining to the United States.[54] The uninhabited Caribbean Island was three square miles, and located approximately 100 miles south of Guantanamo Bay, Cuba and about 30 miles west of Haiti.[55] It had been first discovered by Columbus in 1493, who sailed past it and named it "Navaza." No one ever landed on the island, and for good reason: the pear-shaped island lacked any sheltered harbor or safe landing spaces, had steep vertical limestone cliffs, and was surrounded by a submerged reef. The island had no fresh water, little vegetation and snakes—but, of course, it was a favorite spot for defecating birds. Honeycombed with caves and crevices packed with phosphates, Navassa was estimated by Captain Duncan to have at least one million tons of phosphatic guano.[56]

Duncan's employer, Edward Cooper, applied for exclusive rights to Navassa under the Guano Island Act, but it was not without dispute. Citing the 1697 Treaty of Ryswick (which divided up the island of Hispaniola between France and Spain), Haiti claimed ownership of the island by virtue of gaining independence from France. In 1858, prompted by attacks by the Haitian military, the U.S. Navy intervened to secure American/Cooper's interests. On December 8, 1859, Cooper was officially granted exclusive possession of Navassa, and he then transferred his rights to the newly formed Navassa Phosphate Company.[57] With the Civil War looming, the company did not begin active mining operations until 1865. Mining operations were difficult; two "harbors" were created by dynamiting cut-outs into the side of the island, enabling supplies (including food, water, and building materials) to be brought ashore via block and tackle. Labor, however, was the biggest issue.

Working conditions on Navassa during its first two-plus decades have been described as "abysmal," "horrific," and "grotesque," when an American sailor on the *U.S.S. Galena* visited the island in 1889, he could "hardly understand how human beings . . . [could] live in such a place and not go mad."[58] As if the backbreaking labor of digging into dried guano for long hours in the tropical heat was not bad enough, the overpowering stench of ammonia made work

even worse. Living quarters hewn out of native limestone were rudimentary and the company's supervisors (some of whom were former slave overseers) were abusive of the laborers. Their pay was docked if they were injured, wildly inflated prices were charged at "the company store," and workers deemed insubordinate were punished by being placed in "the stocks," a "barbarous instrument" in which a man was cuffed by his hands and feet.[59] Who would work under such conditions?

Cooper, based in Baltimore, initially contracted with the State of Maryland for convict labor that was mostly White. But after the convicts rebelled against the treatment resulting in several shootings by overseers, the company began to recruit Black laborers, both the recently emancipated and those who had always been free. Black Baltimoreans were lured into signing labor contracts with promises of working in a tropical paradise.[60] For most, however, there were limited alternative prospects. Black people living in the Chesapeake Bay region (and indeed, most of the United States) between 1865 and 1889 faced widespread poverty and limited employment opportunities. Mining employed more Black people than any other southern industry, according to one expert.[61] The typical labor contract with the Navassa Phosphate Company paid $8.00 per month (plus room, board, and transportation) and had a term of fifteen months.[62]

By 1889, there were 139 Black laborers on Navassa, and at least 11 White managers led by a superintendent, Dr. Charles Smith. Under Smith's watch, working conditions had steadily deteriorated and discipline had become more capricious. On September 14, 1889, what had once been simmering boiled over.[63] After a White manager, Charles Roby, threatened one of the Black workers, another laborer struck Roby with a metal bar. Chaos erupted on the island, and in the ensuing violence, five managers were killed. During a lull, Dr. Smith managed to send word to a British naval vessel offshore to call the U.S. Navy. Ultimately, the British ship transported the surviving White managers and several Black workers to Kingston, Jamaica, and from there, the American consul arranged passage to Baltimore.[64]

On October 4, 1889, the *U.S.S. Galena* arrived at Navassa. Its captain sent ashore a five-man board of inquiry to investigate the uprising and interview witnesses, accompanied by a detachment of Marines to maintain order. After a week of interviews, the sailors arrested and took into custody six Black laborers believed to be the "ringleaders" and actual murderers: James Johnson, Henry Jones, George S. Key, and Amos Lee (all suspected of murder), along with Albert Jones and James Phillips (suspected of mutiny and assault).[65] Three other workers were taken into protective custody as material witnesses, while the remaining Black laborers were loaded into two commandeered freighters to be transported back to Baltimore.

Baltimore's U.S. district attorney, Thomas G. Hayes, had gotten word of the riot and met the *Galena* off the coast of Virginia. On board, Hayes "practically held court," and ultimately selected 18 of the laborers to be presented to the grand jury for indictment.[66] When the *Galena* docked at Baltimore on October 27, the prisoners were identified by Charles Roby (who survived) and turned over to the deputy U.S. Marshal. When the two freighters arrived several days later, the process was repeated. In a scene that evoked Baltimore's slaveholding past, the defendants were marched through the city streets in chains, dressed in rags; onlookers said "they had never beheld men in such a degraded condition before."[67] Seven of the laborers were charged with murder: George S. Key, Henry Jones, Caesar Fisher, Edward Smith, Stephen Peters, Charles H. Smith, and Charles H. Davis, while the remaining 11 were charged with aiding and abetting. Faced with defense objections to trying all the defendants together, the judges decided

Waring defended seven Black laborers when they were brought back from Navassa to Baltimore. Henry Jones (above), the lead plaintiff in the case, was convicted of murder. After the Supreme Court ruled against Jones, President Benjamin Harrison commuted his sentence to prison time.

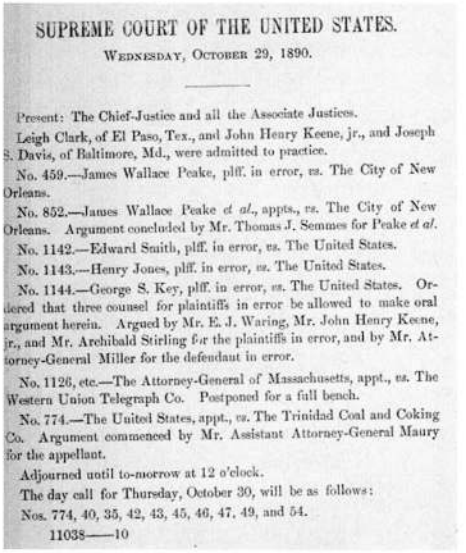
to hold five separate trials, which was later consolidated to three main trials.[68]

Newspapers around the country ran lurid, racially-charged stories. The *Washington Post* titillated readers with "A Horrible Butchery," claiming the murdering Black laborers had uttered "fiendish yells that a Comanche Indian would have envied."[69] The *New York Times* headline shouted "Hunted Down by Negroes."[70] The *Galveston Daily News* described the defendants as "Black Butchers," while the *New Orleans Daily Picayune* branded them as "a murderous gang of mutineers."[71] Even the hometown paper joined in calling the laborers as "fine a collection of scoundrels as could be gathered together in any jail in the country."[72]

The Brotherhood of Liberty, along with a Black fraternal organization based in Baltimore, the Order of Galilean Fishermen, quickly mobilized a defense team. It consisted of Everett J. Waring, Joseph S. Davis, and four White attorneys—Archibald J. Stirling, his son J. Edward Stirling, Robert B. Graham, and James D. Cotter. On November 3, Waring filed a writ of habeas corpus on behalf of Henry Jones, arguing that the United States did not have jurisdiction over Navassa Island. Although the court rejected Waring's request, he was clearly laying the basis for an appeal to the Supreme Court, which had never previously ruled on that issue.

Between November 19, 1889 and February 15, 1890, the trials were held in Baltimore's U.S. Circuit Court as the (then) court of general jurisdiction. Two judges presided over the trials: Judge Thomas J. Morris, U.S. District Judge for the District of Maryland, and Judge Hugh Lennox Bond, a judge on the Fourth Circuit Court of Appeals fulfilling his "circuit-riding" duties.[73] Before an all-White jury, the prosecution called all but one of the surviving White managers as witnesses, along with all 21 of the Black laborers. The prosecution strategy was to highlight the brutality of the violence itself and claim that it was the result of a conspiracy rather than a spontaneous uprising, while denying that the living and working conditions on Navassa were as horrible as described. The defense, meanwhile, did not deny the violent events themselves, but argued that there was no conspiracy and that the White supervisors had instigated the violence by their mistreatment and abusive working conditions. In the end, even as the prosecution's witnesses bolstered their claims of conspiracy, witness after witness detailed the horrific conditions on the island.[74] The defense called 16 witnesses (all Black), eleven of whom were defendants. Most testified to the living and working conditions that had led to the September 14 events, including heavy drinking by White managers, and to the spontaneity of the riot.

On December 2, 1889, the first verdict was reached.[75] Key was found guilty of murder, Moses Williams was acquitted, and the jury deadlocked on the remaining 16 defendants. Subsequent trials would not turn out as well for the defense. The second trial began on December 13, and in it Henry Jones was convicted of murder, while Caesar Fisher and seven others were found guilty



SUPREME COURT OF THE UNITED STATES.

WEDNESDAY, OCTOBER 29, 1890.

Present: The Chief-Justice and all the Associate Justices.

Leigh Clark, of El Paso, Tex., and John Henry Keene, jr., and Joseph S. Davis, of Baltimore, Md., were admitted to practice.

No. 459.—James Wallace Peake, plff. in error, vs. The City of New Orleans.

No. 852.—James Wallace Peake *et al.*, appts., vs. The City of New Orleans. Argument concluded by Mr. Thomas J. Semmes for Peake *et al.*

No. 1142.—Edward Smith, plff. in error, vs. The United States.

No. 1143.—Henry Jones, plff. in error, vs. The United States.

No. 1144.—George S. Key, plff. in error, vs. The United States. Ordered that three counsel for plaintiffs in error be allowed to make oral argument herein. Argued by Mr. E. J. Waring, Mr. John Henry Keene, jr., and Mr. Archibald Stirling for the plaintiffs in error, and by Mr. Attorney-General Miller for the defendant in error.

No. 1126, etc.—The Attorney-General of Massachusetts, appt., vs. The Western Union Telegraph Co. Postponed for a full bench.

No. 774.—The United States, appt., vs. The Trinidad Coal and Coking Co. Argument commenced by Mr. Assistant Attorney-General Maury for the appellant.

Adjourned until to-morrow at 12 o'clock.

The day call for Thursday, October 30, will be as follows:

Nos. 774, 40, 35, 42, 43, 45, 46, 47, 49, and 54.

11038——10

Waring was admitted to the Supreme Court Bar on April 11, 1890 and argued *Jones v. United States* on October 29. Above is the record of his argument in the *Journal of the Supreme Court*, which marked the first time a Black attorney argued or briefed a case in the High Court.

of manslaughter. Two defendants were found not guilty, and the jury deadlocked on the remaining seven.[76] The third trial, which began on February 10, 1890, resulted in Key, Smith, and Jones being found guilty of murder, while the remaining defendants were convicted of crimes ranging from manslaughter to participating in a riot.[77] There were two remaining trials for those charged with rioting; in the first, 23 of the 25 defendants were convicted. In the second, three defendants pleaded guilty to manslaughter.[78]

The final tally by February 15, 1890 was three men convicted of murder; fourteen convicted of manslaughter; and twenty-three of rioting. One defendant, Moses Williams, was exonerated in every proceeding. On February 20, 1890, the 40 defendants stood before both Judges Morris and Bond for sentencing. The three convicted of murder—Henry Jones, George S. Key, and Edward Smith—were sentenced to hang on March 28 at the Baltimore City Jail. Of the 14 convicted of manslaughter, eight were sentenced to 10 years in prison at hard labor, while four received five-year sentences and two received two-year sentences. The 23 convicted of rioting received terms ranging from six months to two years in Maryland's House of Corrections.[79]

The executions of Jones, Key, and Smith were stayed pending an appeal to the U.S. Supreme Court. In the fall of 1890, a lawyer making history would attempt to make even more history with an innovative jurisdictional argument.

A Black Advocate Before the Court

It has been said that the *Jones v. United States* case "lays the basis for the legal foundation for the U.S. empire because it establishes the constitutionality of the fact that the United States can claim overseas territory and that it is consonant with the U.S. Constitution."[80] But before considering the *Jones* case's significance from a purely legal standpoint, let us acknowledge another basis for its importance. While several other Black lawyers had followed in the footsteps of John Swett Rock and had been admitted to the Supreme Court bar between 1865 and 1890, none had appeared before the Court to argue a case or been listed on the brief. On the brief for appellants Jones, Smith, and Key were *two* Black lawyers—Everett J. Waring and Joseph S. Davis—along with three White attorneys, John Henry Keene, Jr., Archibald Stirling, and J. Edward Stirling.[81]

On Wednesday October 29, 1890 Waring, who had been admitted to the Supreme Court bar on April 11, sat at counsel table with Keene and Stirling, who also argued the case. Joseph S. Davis, the Black attorney who had helped write the briefs, was likely also seated with them as he had just been admitted to the Supreme Court bar that morning, but he did not argue the case.[82] The historic nature of Waring, a Black lawyer, arguing before the nation's highest court, especially in a case marked by the dehumanizing, slavery-like working conditions endured on

Justice Horace Gary (standing second from right) wrote for a unanimous Court that the islands acquired under the Guano Islands Act were "in the possession of the United States" and thus the defendants were properly subject to prosecution in American courts.

Navassa by the appellants, was not lost on the Black press. The *New York Age* commented, "On Wednesday of last week one of the most impressive and significant events in the jurisprudential history of the Republic transpired at Washington, and none the less so because the leading papers of the country allowed the event to pass without emphasizing it in any manner."[83] The paper went on to put the oral argument in perspective by referencing the dramatic turn since the 1857 *Dred Scott* decision denied the citizenship of Black Americans, proclaiming "Mark the change. Thirty-four years after the rendering of this monstrous decision . . . 'Negroes' appear before the same Court, full-fledged attorneys and counselors of law, residents of the erstwhile slave State of Maryland, and argue a question of Federal jurisdiction."[84]

Waring's argument, as much as his mere presence, was groundbreaking, too. His 14-page brief did not contest the facts, instead focusing on the argument that his clients were not subject to prosecution because Navassa—having never been legally acquired—was not part of the United States and therefore was not subject to its jurisdiction. Relying on both international and constitutional law doctrines, Waring argued that the "peculiar species of discovery" envisioned under the Guano Islands Act lacked the support of either international law or the U.S. Constitution.[85] Title, Waring stated, was acquired by "occupancy, discovery, conquest, or cession."[86] Waring summarily dismissed all but discovery as viable options (although, perhaps *too* summarily in the case of occupancy), and then proceeded to assert that title by right of discovery "means a title that is permanent, fixed, and indefeasible."[87] As Waring pointed out, the discovery contemplated by the Act could not possibly be permanent, since the Act's own provisions stated that all rights would terminate once the guano had been removed under the law's abandonment provision.

As a result, the question that remained, according to Waring, was whether Congress

had the power to legislate over territory that was acquired in a different manner—by a form of "discovery" that only involved temporary possession and never conveyed title under either international or constitutional law. Territory that had been taken only temporarily, Waring maintained, cannot constitute "part of the territorial domain of the United States."[88] While Waring acknowledged that the Constitution's Territory Clause "empowers Congress to make rules respecting territory belonging to the United States," he argued that the United States had not attempted to acquire title to Navassa and so the island "[did] not belong to the United States."[89]

Waring also took a shot at the Act's use of the vague word "appertain," questioning whether it actually meant anything at all.[90] In the brief, he asked "It is respectfully inquired what is the significance or meaning of this desultory phrase 'appertain to'?"[91] Later, of course, in *The Insular Cases*, the Court itself would use the term to explain the status of the Philippines, Puerto Rico, and Guam in the wake of the Spanish-American War.[92] The Supreme Court would adopt the position that territories "appertaining" to the United States are territories "belonging to," but not "part of" the United States, rendering them part of the nation's "territorial domain" while not part of the United States proper. As Chief Justice Edward D. White would later describe it in *Downes v. Bidwell* (1901):

> The result of what has been said is that whilst in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island has not been incorporated into the United States, but was merely *appurtenant thereto as a possession*.[93]

Waring's argument had merit. The U.S. government had never conducted an investigation into whether Haiti or any other nation had a superior claim to Navassa. And while it had asserted an economic interest, it had never claimed Navassa to be "part of" the nation, despite Haiti laying claim to it. In the face of government silence, even the press noted Haiti's declared interest.[94] But the government's response to Waring's brief began with a dismissive aside that his argument was "not easy to understand."[95] It ignored the defense's observations about the lack of permanent title conferred by the Guano Islands Act, and instead offered the suggestion that Navassa "being thus in the possession of this Government, it must be for the time being regarded as part of the national domain."[96] Without taking pains to define this amorphous "national domain," the government asserted that "Congress has the power to legislate co-extensive with the national domain, and not only co-extensive with the national domain, but co-extensive with the national authority, according to the maritime and international law."[97]

The Court, in a unanimous opinion, rejected Waring's argument, holding that the Guano Islands Act was "constitutional and valid" and "that the Island of Navassa must be considered as appertaining to the United States."[98] The justices reasoned that the determination of sovereignty over a territory was a political question properly reserved for the executive and legislative branches—not the judicial branch. The Court discussed the evidence of discovery, possession and occupation of Navassa—not to draw its own conclusion about sovereignty, but to demonstrate that the other two branches had come to their own conclusion, one which it was the Court's role to accept. As the justices concluded,

> [I]f the executive, in his correspondence with the government of Hayti, has denied the jurisdiction which it

> claimed over the Island of Navassa, the fact must be taken and acted on by this court as thus asserted and maintained; it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong; it is enough to know that in the exercise of his constitutional functions he has decided the question.[99]

The Court's holding that the islands acquired under the Guano Islands Act were "in the possession of the United States" meant that the Navassa Phosphate Company's claim to Navassa was valid and thus the defendants were properly subject to prosecution in American courts.[100] But on a greater level, it would be a distinction central to the reasoning of the *Insular Cases* ten years later, and would have repercussions that resonate even today. In the Court's most recent term, Justice Neil Gorsuch issued a blistering concurrence in a case involving Social Security benefits for a resident of Puerto Rico. Calling the *Insular Cases* a "rotten foundation" of racial stereotypes when it came to affording constitutional rights and protections for territory residents, Justice Gorsuch called for this "shameful" precedent to be overruled.[101]

The Court's decision in *Jones* did not actually settle the exact legal status of the various guano islands (Navassa had been the first one claimed, but more than 100 such islands were eventually claimed), nor did it determine the fate of Jones, Key, and Smith. While their death sentences were affirmed, the tide of public opinion had turned. Coverage of the case shined a spotlight on the abuses endured on Navassa by the Black laborers, and the defendants sought executive clemency. Media coverage, even by newspapers that had initially condemned the violent uprising, supported the clemency campaign. In an 1891 editorial, the *Washington Post* argued,

> The men employed by the Navassa Phosphate Company were subjected to brutal and inhuman treatment of "bosses" worse than the worst of the proverbial overseers of old slave times, and that there was great provocation for the outbreak and mutiny which culminated in the murder of five of the white men who had themselves precipitated the riot.[102]

The Brotherhood of Liberty mobilized a petition-writing campaign, with leading Baltimore citizens, clergymen, attorneys, the Baltimore Federation of Labor, and even some of the original trial jurors supporting the clemency effort. J.T. Ensor, the U.S. Attorney for the District of Maryland, even penned a letter, stating that "Expediency and justice justify the exercise of executive clemency in these cases."[103] On April 1, 1891, the Brotherhood of Liberty representatives personally delivered the petition to President Benjamin Harrison, along with an appeal written by Waring and the defense team. A month later, President Harrison commuted the defendants' death sentences to life in prison, saying that there were mitigating circumstances as a result of the inhumane working conditions in which "Their employers were, in fact, their masters." Such a state, the president wrote, "might make men reckless and desperate."[104] Negative publicity continued to plague the Navassa Phosphate Company, and it ceased mining operations in 1898 before going into receivership.

His historic defense ensured Everett J. Waring prominence in Baltimore's Black community. The fact that a Black lawyer had argued before the U.S. Supreme Court brought him a steady stream of clients of all races. Financial success led to Waring becoming active in real estate, and at one point, he owned as many as 40 properties. He was also a president and co-founder of the Lexington Savings Bank, the first bank

in Maryland started and run by Black Americans. But on March 8, 1897, the Lexington Savings Bank went into receivership.[105] Waring was charged with embezzlement, and the man who was once one of Baltimore's leading citizens had to seek a change of venue to Howard County, believing he would not receive a fair trial. Although he was acquitted and although evidence showed Waring had tried to use his own personal funds to save the bank, Waring's fall from grace was complete. He moved back to Ohio, where he died on September 2, 1914.

Conclusion

Everett J. Waring remains, sadly, a "forgotten first" despite his historic achievement. While his portrait hangs in Baltimore's Clarence Mitchell Courthouse, and while a minority bar association in Maryland bears his name, few even in the legal profession are aware of his significance. In a former slave state that clung to a "whites-only" legal profession for more than 20 years after the Civil War, Waring broke through the color barrier and then immediately set to work challenging discriminatory laws. And in only his fifth year as a lawyer, he found himself challenging U.S. sovereignty over a far-flung island in an effort to spare the lives of Black men who had endured slavery by another name. As if being the first Black lawyer to argue before the U.S. Supreme Court was not intimidating enough, Waring had to make that argument before a Court that included five of the justices who would decide *Plessy v. Ferguson* six years later.

In his marvelous biography **Young Thurgood: The Making of a Supreme Court Justice**,[106] Larry S. Gibson provides a lineal overview of the Maryland Black lawyers who championed civil rights in the late 19th and early 20th centuries (laying the foundation upon which Thurgood Marshall's work rested). Far more attention, however, has been paid by scholars to political organizing and its role in Black empowerment[107] than has been paid to lawyering. As Reverend Johnson and the Brotherhood of Liberty shrewdly recognized, waging legal battles using White proxies could only take the Black community so far. To have actual Black lawyers fighting inequities in education, housing, enfranchisement, and participation in the justice system was significant on multiple levels. Obviously, the presence of Black lawyers like Waring at the vanguard of these struggles was symbolically powerful and inspiring. Waring and other Black lawyers who followed also facilitated the Black community in Baltimore's earliest political successes, including the 1890 election of Harry Sythe Cummings as the first Black person to serve on the Baltimore City Council. And not withstanding the ignominious end of Waring's involvement with the Lexington Savings Bank, the role that he and other lawyers played in its founding—as well as the 1890 founding by Joseph S. Davis and William Ashbie Hawkins of an Economics Association to promote Black business ownership—was integral to building a Black business infrastructure in Maryland. As David S. Bogen has pointed out, the importance of Black lawyering in concert with action by Black ministers and other leaders cannot be overstated: "Measured by the forces arrayed against them, the achievements of the black lawyers in Maryland in [their] first four decades were substantial. Their economic survival was itself a triumph."[108]

While overlooked by scholars, Waring's historical importance is undeniable. His admission ushered in an era of distinguished Black civil rights lawyers in Maryland from William Ashbie Hawkins to Charles Hamilton Houston to Thurgood Marshall. And, as J. Clay Smith has compellingly argued, Waring may be deservedly remembered as a legal scholar as well, having been the first Black lawyer in Maryland to publish a scholarly article in 1886 and co-authoring

(in 1888) a legal treatise entitled *Justice and Jurisprudence*.[109] Acknowledgment for his place in history is long overdue.

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ENDNOTES

[1] *Ketanji Brown Jackson's Remarks at the White House After the Supreme Court Confirmation*, CNN.COM (last updated Apr. 5, 2022, 5:00 PM) https://www.cnn.com/2022/04/08/politics/ketanji-brown-jackson-confirmation-speech/index.html.

[2] Maxwell Bloomfield, *John Mercer Langston and the Training of Black Lawyers*, *in* W.J. LEONARD, BLACK LAWYERS 79 (1977).

[3] J. Clay Smith Jr., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844–1944, 19 (U. Pa. Press 1992).

[4] James A. Feldman's wonderful and thorough recent treatment of Cornelius Jones' life and career stands as a welcome exception. *See* James A. Feldman, *"So Forcibly Represented by His Counsel, Who Are of His Race": Cornelius Jones, Forgotten Black Supreme Court Advocate and Fighter for Civil Rights in the* Plessy *Era*, 47 J. S. CT. HIST. 2 (2022). And while the rise of the first Black lawyers in individual states has generally received little more than superficial examination, William Lewis Burke's masterful study of Black lawyers in South Carolina, ALL FOR CIVIL RIGHTS: AFRICAN-AMERICAN LAWYERS IN SOUTH CAROLINA, 1868-1968 (Univ. Ga. Press 2017) exhaustively charts the history of that state's Black attorneys from Reconstruction through the civil rights movement.

[5] *Samuel R. Lowery*, WIKIPEDIA.COM, https://en.wikipedia.org/wiki/Samuel_R._Lowery (identifying Samuel R. Lowery (a Black lawyer admitted to the Supreme Court in 1880 on the motion of Belva Ann Lockwood) incorrectly as "the first black lawyer to argue a case before the Supreme Court of the United States of America," even though he never argued *any* case before the Court). Other online sources have perpetuated this error. *See, e.g.*, *Samuel R. Lowery*, BLACKPAST.COM, https://www.blackpast.org/african-american-history/lowery-samuel-r-1830-or-1832-1900/; Sheldon Gilbert, *On This Day, the First African American Sworn in as Supreme Court Lawyer*, CONSTITUTION DAILY (Feb. 1, 2019), https://constitutioncenter.org/blog/john-rock-sworn-in-as-first-african-american-supreme-court-lawyer-on-february-1-1865. Some sources also conflate the time period of Rock's achievement of being admitted with Lowery, supposedly arguing a case in 1866—despite not being admitted until 1880.

[6] Texas admitted its first Black lawyer in 1873, and even that was after states like Louisiana (1871), Mississippi (1869), Alabama (1871), Arkansas (1866), Tennessee (1868), and Virginia (1871).

[7] That year, Dean John Prentiss Poe of the University of Maryland School of Law provided Maryland's General Assembly with a requested codification of Maryland law, which removed the reference to race in the statute on bar admission. The new code was passed without comment.

[8] *Edward Garrison Draper*, DARTMOUTH RAUNER LIBRARY, https://www.dartmouth.edu/library/rauner/blackgreens/e_draper.html.

[9] David S. Bogen, *The Transformation of the Fourteenth Amendment: Reflections from the Admission of Maryland's First Black Lawyers*, 44 MD. L. REV. 939, 982 (1985).

[10] *Ibid.* at 983.

[11] Act of March 10, 1832, ch. 268, § 2 (Md. Laws. 1831).

[12] The full text of Judge Lee's letter/certificate was published in the *Maryland Colonization Journal*, the publication of the state-supported Maryland Colonization Society, an organization advocating for the emigration of free Black people to Liberia. It can be found at 9 MD. COL. J. 89 (1857).

[13] 9 MD. COL. J. 133, 383 (1859).

[14] *In re* Taylor, 48 Md. 28 (1877).

[15] *Ibid.* at 32–33.

[16] *Id.* at 33.

[17] *Baltimore Topics*, N.Y. GLOBE (Apr. 10, 1884).

[18] *Colored Men as Lawyers*, BALTIMORE SUN, Mar. 12, 1884, at 5.

[19] *See, e.g.*, Dennis P. Halpin, A BROTHERHOOD OF LIBERTY: BLACK RECONSTRUCTION AND ITS LEGACIES IN BALTIMORE, 1865–1920 (U. Pa. Press 2019). Halpin's expansive work is a detailed examination of how Black activism coalesced in 1870s and 1880s Baltimore, forcing issues of inequality on many fronts into the public eye and bringing about change.

[20] 100 U.S. 3030 (1880).

[21] *Admitted to the Bar*, BALTIMORE SUN, Mar. 20, 1885, at 1.

[22] Sources disagree on how this happened. One leading scholar maintains that Wilson did not apply to the bar. HALPIN, A BROTHERHOOD OF LIBERTY, 57. Another says that the court ultimately found Wilson not qualified to practice law. AZZIE BRISCOE KOGER, THE NEGRO LAWYER IN MARYLAND 5 (1948).

[23] *Everett J. Waring: 1859–1914*, MARYLAND STATE ARCHIVES, https://msa.maryland.gov/msa/stagser/s1259/121/6050/html/17455000.html.

[24] *Ibid.*

[25] For a look at the early days of Howard Law School, see John G. Browning, *"Pioneers of an Interesting and Exciting Destiny": The Lives and Legacies of Howard's First Law Graduates*, 66:2 HOWARD L.J. (forthcoming 2023).

[26] *Everett J. Waring: Education, Law and Business Careers*, MARYLAND STATE ARCHIVES, https://msa.maryland.gov/msa/stagser/s1259/121/6050/html/17452000.html.

[27] W. Ashbie Hawkins, *Bar Association Holds Its Banquet*, BALTIMORE AFRO-AMERICAN (Sept. 27, 1922). Waring's historic admission appears in the TEST BOOK, SUPERIOR COURT, 1880–1895, 205 (available at the Court museum at the Clarence Mitchell, Jr. Courthouse in Baltimore).

[28] *The Colored Lawyer*, N.Y. FREEMAN, Mar. 14, 1885, 2, column 4.

[29] Plebeian, *Progress of the Emancipated Race*, 84:2 PHRENOLOGICAL J. SCI. OF HEALTH 85 (1887).

[30] *See* TEST BOOK, SUPERIOR COURT, 1880–1895, 205. In the wake of Waring's admission, even previously unsuccessful Black applicants like Richard King were inspired to try again. King applied in 1886 but was rejected after a "deficient" examination, only to apply again in 1887 and win admission.

[31] Henry J. McGuinn, *Equal Protection of the Law and Fair Trials in Maryland*, 24:2 J. NEGRO HIST. 146–47 (1939).

[32] *An Unjust Law*, BALTIMORE SUN, May 8, 1886, 2.

[33] *Ibid.*

[34] Elaine K. Freeman, "Harvey Johnson and Everett Waring: A Study of Leadership in the Baltimore Negro Community, 1880–1900" (M.A. thesis, George Washington University 1968) (*quoting* WARNER MCGUINN, BROTHERHOOD OF LIBERTY, 18–20 (1907)).

[35] *Maryland's Unjust Law*, N.Y. FREEMAN, June 12, 1886, 2.

[36] *A Bastardy Law Sustained*, BALTIMORE SUN, July 3, 1886, 4.

[37] *A Bourbon Law Blasted*, N.Y. FREEMAN, Nov. 12, 1886, 1.

[38] *Plunkard v. State*, 67 Md. 364 (1887).

[39] *Ibid.* at 370–71.

[40] *Id.* at 372.

[41] Freeman, "Harvey Johnson and Everett Waring," 30.

[42] *Our Baltimore Budget*, N.Y. AGE, Apr. 7, 1888.

[43] Bogen, *The Transformation of the Fourteenth Amendment*, 1043. As a number of scholars have pointed out, Poe's actions were likely the product of pragmatism rather than race sympathy. A segregationist, he later authored legislation to disenfranchise Black voters. And as dean of the University of Maryland School of Law, he supervised the 1891 expulsion of Black students.

[44] C. SAMS, BENCH AND BAR OF MARYLAND 431 (1901).

[45] *Colored Teachers*, BALTIMORE SUN, Feb. 9, 1886, 3.

[46] *A Baltimore Issue*, N.Y. FREEMAN, Mar. 12, 1887, 4.

[47] *Approved by the Mayor*, BALTIMORE SUN, May 4, 1888, 4.

[48] Freeman, "Harvey Johnson and Everett Waring," 76–77.

[49] *Ibid.*

[50] *McGuinn v. Forbes*, 37 F. 639 (1889).

[51] *Ibid.* at 641.

[52] *December 2, 1850: First Annual Message*, MILLER CTR., U. VA. (Dec. 2, 1850), https://millercenter.org/the-presidency/presidential-speeches/december-2-1850-first-annual-message.

[53] 48 U.S.C. § 1411 (2018).

[54] Christina Duffy Burnett, *The Edges of Empire and the Limits of Sovereignty: American Guano Islands*, 57:3 AM. QUARTERLY 788 (2005). A fascinating and exhaustive treatment of the United States' foray into imperialism with the Guano Islands can be found in JIMMY SKAGGS, THE GREAT GUANO RUSH: ENTREPRENEURS AND AMERICAN OVERSEAS EXPANSION (St. Martine's 1994). Dennis Halpin's *Brotherhood of Liberty* also provides great insight into the trial's impact on Black Baltimoreans.

[55] Adam Clanton, *The Men Who Would Be Kings: Forgotten Challenges in U.S. Sovereignty*, 26:1 UCLA PACIFIC BASIN L.J. 39 (2008).

[56] *Jones v. United States*, 137 U.S. 205 (1890).

[57] Clanton, *The Men Who Would Be Kings*, 40.

[58] John Cashman, *Slaves Under Our Flag*, 24:2 MARYLAND HISTORIAN 1 (1993).

[59] *Ibid.* a5–6.

[60] Those contracts called for the workers to "obey and abide by all the rules, regulations and laws that may now be in operations or hereafter put in force on the island of Navassa," and failure to obey would lead them to "forfeit all claims for wages and compensation which may be due them." *Jones*, 137 U.S. at 208.

[61] SKAGGS, THE GREAT GUANO RUSH, 174 (quoting W.H. Harris).

[62] *Ibid.*

[63] *Id.* 178–84.

[64] *Id.* 184.

[65] *Id.* a 185.

[66] *Id.*

[67] *Navassa Rioters Indicted*, WASH. POST, Nov. 11, 1889, 7.

[68] *Indicted on Five Separate Charges*, BALTIMORE SUN, Nov. 15, 1889, 4.

[69] *A Horrible Butchery*, WASH. POST, Oct. 2, 1889, 1.

[70] *Hunted Down by Negroes*, N.Y. TIMES, Oct. 2, 1889, 1.

[71] *The Black Butchers*, GALVESTON DAILY NEWS, Oct. 11, 1889, 1; *The Navassa Riot*, NEW ORLEANS DAILY PICAYUNE, Oct. 19, 1889, 2.

[72] *The Navassa Rioters*, BALTIMORE SUN, Oct. 18, 1889, 1.

[73] SKAGGS, THE GREAT GUANO RUSH, 186.

[74] *Story of Wm. Jones*, BALTIMORE SUN, Nov. 21, 1889, 6.

[75] SKAGGS, THE GREAT GUANO RUSH, 187.

[76] *Saturday's City News*, BALTIMORE SUN, Dec. 23, 1889, 4.

[77] *Fate of Navassa Rioters*, BALTIMORE SUN, Feb. 21, 1890, 5.

[78] SKAGGS, THE GREAT GUANO RUSH, 190.

[79] *Ibid.*

[80] Dave Davies, *The History of American Imperialism, from Bloody Conquest to Bird Poop*, NPR (Feb. 18, 2019), https://www.npr.org/2019/02/18/694700303/the-history-of-american-imperialism-from-bloody-conquest-to-bird-poop (quoting DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE – A HISTORY OF THE GREATER UNITED STATES (2019)).

[81] *Jones v. United States*, 137 U.S. 202 (1890). While all three of the defendants convicted in the U.S. District Court for the District of Maryland had separate appeals in which they were represented by Waring, their cases were consolidated for oral argument. *Smith v. United States*, 137 U.S. 224 (1890); *Key v. United States*, 137 U.S. 224 (1890). Sadly, by the time the Court decided *Jones*, Joseph Davis had passed away.

[82] The case was docketed for April 11, 1890 but "on motion of Mr. Attorney-General Miller, cases advanced and assigned for argument on the 2nd Monday of October next." *Journal of the Supreme Court*, 1890, 1891.

[83] *An Historical Event*, N.Y. AGE, Nov. 15, 1890, 2.

[84] *Ibid.*

[85] Brief for Plaintiffs-in-Error, Jones v. United States, Nos. 1142-44 (1890). The three defendants on appeal had become the "plaintiffs in error"; however the Court in its opinion refers to the as the "defendants," and I have referred to them by name or as the appellants.

[86] *Ibid.* at 3.

[87] *Id.*

[88] *Id.* at 4.

[89] *Id.*

[90] As a State Department memorandum in 1932 would later admit, the term "appertaining" was "deft, since it carries no precise meaning and lends itself readily to circumstances and the wishes of those using it." Office of the Legal Advisor, U.S. Dept. of State, *The Sovereignty of Islands Claimed Under the Guano Islands Act and of the Northwest Hawaiian Islands, Midway, and Wake* 317 (Aug. 9, 1932).

[91] Brief for Plaintiffs-in-Error, 5.

[92] *See, e.g., Downes v. Bidwell*, 182 U.S. 244 (1901).

[93] *Downes*, 182 U.S. 244, 341–42 (White, J. concurring) (emphasis added).

[94] On November 3, 1889, in a piece entitled *Jurisdiction in Navassa*, the *New York Times* wrote: "The latest reports from the West Indies declare that the newly-adopted Constitution of Hayti declares that the Black Republic has jurisdiction over Navassa, and the action of the Counsel Waring is to determine the question of jurisdiction."

[95] *Government's* Brief, Jones v. United States, at 5.

[96] *Ibid.* at 7.

[97] *Id.*

[98] *Jones v. United States*, 137 U.S. 202, 211 (1890).

[99] *Ibid.* at 221.

[100] *Id.* at 223–24.

[101] United States v. Vaello Madero, ___ U.S. ___ (Apr. 21, 2022).

[102] *A Good Case for Clemency*, WASH. POST, Mar. 17, 1891, 4.

[103] *The Baltimore Federation of Labor*, BALTIMORE SUN, Apr. 23, 1891, 6.

[104] *Imprisonment for Life*, WASH. POST, May 19, 1891, 7.

[105] *Everett J. Waring: 1859–1914*, MARYLAND STATE ARCHIVES, 24.

[106] *See generally* LARRY S. GIBSON, YOUNG THURGOOD: THE MAKING OF A SUPREME COURT JUSTICE (Prometheus Books 2012).

[107] *See, e.g.*, P. Gabrielle Foreman, Jim Casey, & Sarah Patterson (eds.), THE COLORED CONVENTIONS MOVEMENT: BLACK ORGANIZING IN THE NINETEENTH CENTURY (Univ. N. Carolina 2021).

[108] David S. Bogen, *The Forgotten Era*, 19:4 MARYLAND B.J. 13 (1986).

[109] J. Clay Smith, *Justice and Jurisprudence and the Black Lawyer*, 69:5 NOTRE DAME L. REV. (2014).

"Lost Laws" to "Eat Anywhere": *D.C. v. Thompson* and the Road to *Brown*

Charles J. Sheehan

On January 27, 1950, a woman invited three friends to lunch. Eighty-six-year-old Mary Church Terrell asked William Jernigan, Geneva Brown, and David Scull to meet at Thompson's Cafeteria, a few blocks from the White House, at 14th Street and New York Avenue, NW.[1] As they presented their trays to the cashier, the manager at Thompson's, one of a national chain headquartered in Chicago, told the group they would not be served (only Scull was white). "Why not?" asked Jernigan. "Because we don't serve colored people here," replied the manager. Terrell pressed. "Is Washington in the United States? Doesn't the Constitution of the United States apply here?"[2] Thompson's would not budge and Terrell's party found itself back on the street. But the would-be hostess had something better than a bowl of soup with friends. Terrell had a case.

Challenges to hydra-headed Jim Crow flared across the nation. America was two classes. One enjoyed the best offerings of transportation, public schools, and public accommodations. The other suffocated under generations of custom and law, enduring inferior treatment and shunted to the margins. In chambers of state and local governments and federal courtrooms, ripples of resistance to segregation were loosed. Largely hidden from public view by more widely covered segregation clashes, one civil rights battle—over the right to eat anywhere in the nation's capital city—was fought long and fiercely. Within the Court of Appeals for the District of Columbia Circuit, some judges strained to preserve the city's entrenched custom of segregation and others pressed for its extinction. When Terrell asked John R. Thompson Co. for racial equality, she could not have known she had sparked the Supreme Court case—*District of Columbia v. John R. Thompson Co.*—that would help set the course for justices about to decide *Brown v. Board of Education*.

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Reconstruction and D.C.'s Restaurant Laws

Seventy-five years before Thompson Restaurants was challenged for refusing to serve Black patrons, in the afterglow of the passage of the Thirteenth, Fourteenth and Fifteenth Amendments, came a burst of civil rights legislation in the city of Washington. During the brief Reconstruction window before city governance passed to three presidentially appointed Commissioners, the city's racially mixed Legislative Assembly—created by Congress in 1871 when the District was established as a territorial government[3]—passed two laws regulating places of public accommodation. The first was introduced by Lewis Douglass (son of Frederick Douglass) and enacted in June 1872. It stated that "any restaurant keeper … hotel keeper … refusing to sell or wait upon any respectable well-behaved person, without regard to race, color, or previous condition of servitude … as other well-behaved and respectable persons are served" committed a misdemeanor punishable by a fine and loss of an operating license.[4] The second, enacted in June 1873, mirrored the first but expanded to "any … eating-house [or] bar-room" required that businesses charge "the usual and common prices … for each article."[5]

Thompson's Cafeteria on 14th street (ground floor of building in middle) was part of a Chicago-based restaurant group owned by John R. Thompson that practiced segregation.

As local autonomy and civil rights began to fade in Washington, Congress took up the cause of racial equality in public accommodations. In language akin to the District's 1872 and 1873 laws and anchored in the Fourteenth Amendment, the Civil Rights Act of 1875 made "all persons … entitled to the full and equal enjoyment … of inns, public conveyances … and other places of public amusement," with equal enjoyment due "citizens of every race and color, regardless of any previous condition of servitude."[6] In *Strauder v. West Virginia*, the Supreme Court struck down a state law limiting juries to white males. The Amendment's "true spirit" was "to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons" and protect that right if "denied by the States."[7] A few years later the Court narrowed the Amendment to "State legislation … which denies [citizens] the equal protection of the laws," reaching neither "rules for the conduct of individuals … towards each other" or "equal accommodations [in] public accommodations."[8] Lone dissenter Justice John Marshall Harlan rebuked the Court for "defeat[ing] the ends the people desired … to prevent *race* discrimination in … the accommodations … of inns, public conveyances and places of public amusement."[9]

In 1896, *Plessy v. Ferguson* ushered in a newly minted "nature of things,"[10] refusing to "abolish distinctions based on color [long] recognized as within the competency of state legislatures" and allowing states "large discretion" to continue "established usages, customs and traditions of the people [considering] public peace and good order."[11] Indeed, the custom of separating the races could not be "more obnoxious to the Fourteenth Amendment" than those federal laws "requiring separate schools for colored children in the district of Columbia."[12]

Plessy's hold took longer to penetrate the nation's capital than elsewhere. At the turn of the century, African Americans enjoyed

a greater degree of freedom in Washington than in other southern cities. "They could eat in restaurants and patronize theaters,"[13] observed historian Flora Brown. Such freedoms soon withered when the long winter of Jim Crow set in and gripped the city. President Woodrow Wilson segregated the federal government in the 1910s. Black children and White children "studied in separate schools [and] played on separate playgrounds" and restaurants denied Black customers service.[14] Southern legislators offered bills "establishing Jim Crow transportation in the District ... even [attempting to] repeal the Fourteenth and Fifteenth Amendments."[15]

Truman and Post-War Segregation

The New Deal brought some relief. It was "the first national program since the end of Reconstruction ... to treat black Americans as recognizably human" and to slacken segregation's iron hold on the District.[16] In 1934, Secretary Harold Ickes opened the Department of the Interior cafeteria to Blacks, with most federal agencies following.[17] If only in government eating halls and Union Station, all races could quietly take their meals side by side.

Some desegregation headway was made in the Supreme Court. Lloyd Gaines of Missouri, a Black man, was denied admission to the all-white State law school. Charles Houston, a native Washingtonian who served in a segregated unit during World War I, protégé of Professor Felix Frankfurter who took Harvard Law School honors, former Dean of Howard Law School, and mentor to Thurgood Marshall, led the case to the Supreme Court as special counsel to the NAACP. Chief Justice Charles Evans Hughes wrote for the majority to overturn the State. "By operation of the laws of Missouri a privilege has been created for white law students which is denied to Negroes by reason of their race."[18] Two branches of the government soon clashed in another civil rights case. Interstate Commerce Commission (ICC) rules forced a Black congressman into a separate railcar. The Department of Justice backed the congressman, for which Solicitor General Francis Biddle drew heckling ("a Southern lawyer ... muttered ... 'And now I suppose he's going over to have tea with the Japanese Ambassador!'") as he left after argument in March of 1941.[19] In *Mitchell v. United States*, the unanimous Court found ICC rules to deny a "fundamental individual right which is guaranteed against state action by the Fourteenth Amendment."[20]

It was not until Harry Truman's administration that the tide began to turn. In 1947, he appointed leading Americans to a Committee on Civil Rights to examine myriad forms of segregation. "Most Americans patronize restaurants ... take their right to ... be served for granted," the committee reported, but other Americans enjoyed no such right:

> Because of their race or color ... they are barred from some places ... 20 states by law compel segregation ... [Blacks] are usually separated from whites in all forms of public transportation ... in hotels [and] restaurants.[21]

Eating out in the federal city received particular attention:

> If he stops in Washington, a Negro may dine like other men in the Union Station, but [when] he steps out into the capital, he leaves such democratic practices behind. With very few exceptions he is refused service at downtown restaurants.[22]

The keenest cut to Black residents may have been the twisted logic of "equality" for visitors to Washington. "Foreign officials are often mistaken for American Negroes and refused food ... [but] once it is established

that they are not Americans, they are accommodated."[23]

President Truman began 1948 with a "Special Message to the Congress on Civil Rights" taking a local emphasis. "The District of Columbia," he said, "should be a true symbol of American freedom and democracy," not show the world "racial barriers to places of public accommodation."[24] In July, he issued Executive Orders 9980 and 9981, the first requiring fair employment in the federal government and the second equal treatment and opportunity in the Armed Services. That autumn came the report of the privately funded National Committee on Segregation in the Nation's Capital, with Charles Houston leading the research. It found segregation "more rigid ... than anywhere in the south," where "ghettos of mind, body and spirit ... cramp the soul of the nation."[25] Although Blacks were nearly entirely shut out of eating establishments and hotels, the report noted that this had not been the case in the late nineteenth century, bringing to light the Assembly's two laws of 1872 and 1873.[26] Houston's revelation of laws assuring equal rights in Washington's dining establishments was not a mere academic achievement. Constitutional scholar Herbert Wechsler recalled that he once suggested having lunch with Houston after a Supreme Court proceeding when the Court was lodged in the Capitol building (prior to 1935). Houston, Wechsler recalled, "said no, we couldn't do that, but we might go over to Union Station for a bite. I hadn't realized ...."[27]

After seventy-five years, the word was out on what the press dubbed the "lost laws."[28] Their guarantee of racial equality offered a fresh civil rights weapon and most propitious timing, for the reports of 1947 and 1948 had drawn "widespread press coverage ... fortified the advocates of integration [and] worried the discriminators,"[29] and fresh Executive Orders took aim at vast spheres of segregation. Yet it would not go quietly in Washington. Even after the Supreme Court admonished the District of Columbia for segregation in 1948 by barring racist housing covenants in *Hurd v. Hodge*,[30] hotel proprietors nodded to "local custom" and refused to lodge out-of-town Black students on sightseeing trips.[31] It fell to Charles Houston to press the two restaurant laws. "We had that right [to equal service] in 1872 ... and when we ask for full civil rights in the District, we are [asking] merely to go back to the standards set 75 years ago."[32] In May of 1949, he urged the District's three Commissioners to prosecute segregating restaurants under the 1872 and 1873 "Equal Service Laws." The Commissioners answered with silence. Months passed while the laws slept on, but awakened activists united to form the Coordinating Committee for the Enforcement of the D.C. Anti-Discrimination Laws (Coordinating Committee).

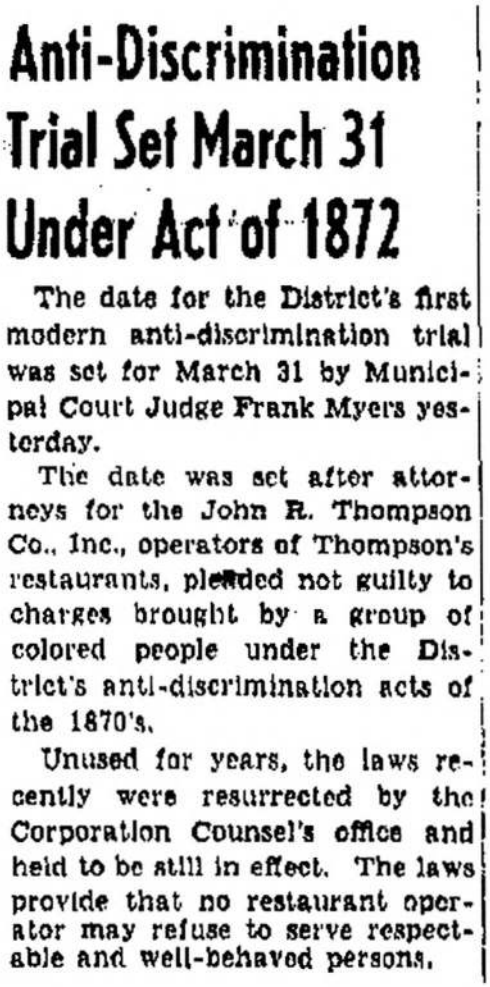
Mary Church Terrell

Mary Church Terrell, eighty-six years old, was elected Chairman of the Coordinating Committee and charged with leading its sixty-one organizations in challenging segregation. Despite her age, the seasoned protagonist was a natural choice. She was born in Tennessee in 1863, the year of the Emancipation Proclamation, to parents born into slavery.[33] In the late 1800s, her father had become a millionaire through real estate investments in Memphis and was considered the South's wealthiest Black businessman. After graduating from Oberlin College with a degree in classics, Terrell moved to Washington and met her husband, Robert Terrell, at the high school where they taught. Robert, born enslaved in 1857, had graduated from Harvard University and Howard Law School. President Theodore Roosevelt appointed him to the District's Municipal Court in 1901. The couple lost three children shortly after birth. After the third death, Terrell "was tormented ... that her baby might have survived in a regular incubator, like those

available to white people."[34] In 1892, she co-founded the Colored Women's League of Washington, and seventy-five-year-old Frederick Douglass asked that twenty-nine-year-old Terrell join him to meet with President Benjamin Harrison in the White House. It had been one of lynching's deadliest periods and they implored the president to "do something at once" to end the horrible practice.[35]

In 1895, Terrell became the first Black woman appointed to the District of Columbia Board of Education and the following year became the first president of the National Association of Colored Women. By 1903, she was traveling the Chautauqua circuit, giving lectures on the progress of Black women. She was the toast of the 1904 International Conference of Women in Berlin, but back home was banished to segregated trains. Lecture tours could be misery. "Some days she went twenty-four hours without eating because no restaurant in a town would serve a black person."[36] In 1909, she became a founding member of the NAACP. In 1947, she addressed the opening of the NAACP convention in Washington to urge "holy war" on segregation—beginning with apologies for indignities her audience would likely suffer during the conference, such as being barred from the city's restaurants and hotels.[37]

In 1946, Terrell had suffered a deeply personal indignity. She sought membership in the Washington branch of the American Association of University Women but was rejected because of her race.[38] She turned to the courts only to have the D.C. Circuit Court, on June 13, 1949, unanimously affirm the district court's "admirable opinion" that the local branch (represented by former Deputy and Acting Solicitor General Warner Gardner) could reject Black applicants.[39] The district judge felt himself "constrained" by common law to leave local branches full discretion "in selecting the members they desire," even desire based on "race [or] color."[40]



Anti-Discrimination Trial Set March 31 Under Act of 1872

The date for the District's first modern anti-discrimination trial was set for March 31 by Municipal Court Judge Frank Myers yesterday.

The date was set after attorneys for the John R. Thompson Co., Inc., operators of Thompson's restaurants, pleaded not guilty to charges brought by a group of colored people under the District's anti-discrimination acts of the 1870's.

Unused for years, the laws recently were resurrected by the Corporation Counsel's office and held to be still in effect. The laws provide that no restaurant operator may refuse to serve respectable and well-behaved persons.

The *Washington Post* announced that Municipal Court Judge Frank Myers would be hearing the challenge to the 1872 Equal Service Act.

Thompson's Cafeteria

Leading the Coordinating Committee, Terrell's first initiative was goading Commissioners to enforce the Equal Service Laws, as Houston had sought many months before. Thompson's presented an appealing target. Located in the hub of Washington's business and government district, it was part of a national chain, John R. Thompson Co., with a poor civil rights record. In 1944, Howard University's NAACP chapter held a sit-in at the Thompson's branch on Pennsylvania Avenue. A later sit-in briefly

succeeded before Thompson's resumed Whites-only service. Buoyed perhaps by President Truman's State of the Union address three weeks earlier pledging civil rights legislation, through Thompson's door on 14th street entered Terrell and her three companions on Friday, January 27, 1950. Their behavior and dress were "respectable and distinguished" as stipulated by the Equal Service Laws.[41] On Monday, they were in the Corporation Counsel's office—the District's prosecutor—affidavits in hand to demand that the Thompson Co. be charged for ejecting them.

Corporation Counsel Vernon West pointed to the Commissioners' long silence and pled powerlessness. Terrell held a press conference that afternoon and the *Washington Post* picked up the story. On February 21, the Commissioners directed West to prosecute the next instance the Equal Service Laws were violated. Terrell sprung. A week later she, Scull and two Black companions again attempted lunch at Thompson's. Again, all but Scull were refused service and, for the first time since the 1870s, the District filed charges under the Equal Service Laws. The Washington Restaurant Association rallied thousands of eating places in the metropolitan area. "It is vital that each of us defend the practices of our industry," the lobby group urged.[42]

The Commissioners may have unleashed the Equal Service Laws, but racial equality in Washington was hardly on the march. One week before, on February 14, 1950, another sphere of segregation—urged on by Vernon West—was bolted into place by the D.C. Circuit, the City's highest court.[43] In *Carr v. Corning*, West opposed a Black girl denied enrollment in a junior high school set aside for White children. He persuaded Judges E. Barrett Prettyman and Bennett Clark. Prettyman, writing for the majority, observed "coexistence of different races in the same area" to be "a delicate problem" and upheld segregation in Washington's public schools.[44]

Judge Wilbur Miller upheld Mary Church Terrell's rejection, due to her race, for membership in the American Association of University Women. Two years before, he joined the D.C. Court of Appeals' majority opinion in *Hurd v. Hodge* (1947) affirming that the city's racially restrictive housing covenants were constitutional.

Overcrowding had driven students enduring a doubled-up schedule at the Black-only school to seek transfers to the nearby uncrowded white-only school. But were Black children unequally burdened? The few-page opinion cited a statistical review showing "*temporary* deprivation" for a "limited number" of Black children. But segregation did not deny "substantially equal educational opportunity," and in any event "such problems [as segregation] lie naturally in the field of legislation."[45] Courts should not involve themselves.

Also dampening racial equality in Washington was the Circuit Court's blessing of another species of entrenched segregation. "The crying need among African Americans as the war ended was not jobs but housing,"[46] but the Supreme Court had long upheld racially restrictive covenants.[47] Houston challenged the District's judicial enforcement of deeds forbidding home sales to Blacks. In May of 1947, Judges Bennett Clark and Wilbur

Miller turned him aside in *Hurd v. Hodge* because "settled common law" bound them to uphold the covenants, and abolishing them would "destroy contracts and titles to valuable real estate."[48]

In a further new twist in city policy toward segregation, during the same month Corporation Counsel prosecutors were preparing the charges against Thompson's other Corporation Counsel prosecutors were charging segregation protesters at Scholl's Cafeteria, a few blocks from Thompson's, with disorderly conduct. "Inter-racial Workshop" members refused to leave the cafeteria line when Scholl's declined to serve Black customers. On July 28, fifteen workshop members were convicted and fined.

Meanwhile, on July 10, 1950, Municipal Court Judge Myers had ruled the 1872 and 1873 laws "repealed by implication" and Thompson's not guilty. The verdict left no right of appeal. Only fresh charges would draw higher court review. Terrell went back to Thompson's a third time on July 27, 1950, and drew new charges. Judge Myers quashed them on August 1 and the Corporation Counsel at last had a ruling it could appeal.

Despite recent pro-segregation rulings from the D.C. Circuit, on May 24, 1951, the Municipal Court of Appeals reversed and upheld the 1873 Equal Service law. "[T]he interest of good government, public peace and order [and] morals and general welfare of the community," the majority stated, "require [us] to hold that this was a ... proper exercise of the police power."[49] The District, handed its first victory for equal rights in public accommodations since the 1870s, promptly returned the prize. Vernon West declared that his office would not prosecute other segregated businesses until a higher court upheld the Equal Service Acts. Washington D.C. had some two thousand eating establishments and for seventy-five years "almost no restaurant outside the [ghetto] served blacks."[50] As endlessly before, "any Negro who worked downtown, out of reach of a government cafeteria, had to travel several miles to get a bite of lunch."[51]

Post-War Equal Rights in the Supreme Court

As segregation litigation increased in the late 1940s, backwaters at the Department of Justice began to stir. An Interior Department attorney, Phineas Indritz, offered research to DOJ lawyers handling restrictive covenant cases. Indritz and Phil Elman, the lone civil rights attorneys in the Office of the Solicitor General, joined forces.[52] They persuaded the Secretary of the Interior to urge the attorney general to file *amicus* briefs in racially segregated housing cases. A flock of lobbied-for letters from the NAACP and allied groups followed and Solicitor General Perlman directed Elman to draft an *amicus* brief in the housing covenant cases consolidated as *Shelley v. Kraemer*.[53] For the first time the federal government (Attorney General Tom Clark and Perlman signing) "put its full weight ... in a civil rights case." The unanimous Supreme Court employed the Fourteenth Amendment to strike down common law-based, racially restrictive covenants for deploying the "full coercive power of government" to deny property rights.[54]

On a June day in 1950 came three decisions testing segregated facilities. *Henderson v. United States* reviewed *Plessy*-like railway dining car segregation—a curtain separating white patrons from, in this instance, a Black federal government attorney traveling to investigate violations of President Roosevelt's Executive Order desegregating defense industries.[55] As for railcar separation of the races a decade earlier in *Mitchell v. United States*, the solicitor general turned against the ICC,[56] this time in the first government brief explicitly seeking *Plessy*'s demise:

> in the half-century which has elapsed since [the "separate

> but equal" doctrine] was first promulgated, the legal and factual assumptions upon which that doctrine rests have been undermined and refuted. The "separate but equal" doctrine should now be overruled and discarded.[57]

Perlman summoned vivid images of segregation's evils from the pages of Truman's 1947 report *To Secure These Rights* (e.g., "Segregation of Negroes ... is universally understood as imposing on them a badge of inferiority [and] brands [them as] not fit to associate with white people") to emphasize segregation's profoundly personal impacts.[58] The Court ruled against segregating dining cars on statutory grounds.[59]

Sweatt v. Painter challenged the University of Texas Law School's admission denial to an applicant "solely because he is a Negro,"[60] and *McLaurin v. Oklahoma State Regents* opposed requiring a Black student to "sit apart" from fellow graduate students in the classroom, library and cafeteria.[61] In both cases Thurgood Marshall pressed that *Plessy* be overruled,[62] Perlman's *amicus* briefs argued that denying equal protection "sanction[ed] disrespect for law and weaken[ed] the fabric of our society,"[63] and the unanimous Court found state discrimination based on race to deny equal protection. *Plessy* dodged the mortal blow, but the Court ventured some "chipping away at the edges of Jim Crow."[64] "Broader issues have been urged [with] excellent research and detailed argument," wrote Chief Justice Fred Vinson, before invoking the Court's "traditional reluctance" to go further than necessary to reach a decision.[65]

As the Hughes Court of the late 1930s broadened the constitutional contours of equal rights—"[t]he equality principle was now beyond argument"[66]—so the late 1940s and early 1950s saw the evolving mind, or heart, of the Court. Through Vinson's decisions for a unanimous Court in *Shelley, Sweatt*, and *McLaurin*, segregation was cast as touching the very humanity of its victims. Rights were "personal," he stressed in *Shelley*.[67] "It is fundamental," *Sweatt* enlarged, "that such rights are personal and present ... incapable of objective measurement," just as it was "as an individual that [Lloyd Gaines] was entitled to the equal protection of the laws."[68] George McLaurin was the man "handicapped" by more than physical separation, by indefinable but acutely felt lost opportunity "to study, to engage ... with other students."[69]

Judge Charles Fahy dissented from the D.C. Circuit Court of Appeals' decision in the *Thompson Restaurant* case. Long a champion of civil rights, he wrote that "community outlook changes with time and experience...."

The NAACP was consumed with school segregation cases and cool to Charles Houston's pressure in 1949 to enforce the District's Equal Service Laws on segregated eating establishments, but in 1950 "noted the Thompson's test case" and "committed every legal and constitutional means" to fight segregation in Washington.[70] The following year Thurgood Marshall "pledged an immediate assault on segregation everywhere, including hotels, theaters, and restaurants."[71]

The D.C. Circuit

The nine, white men of the 1951 District of Columbia Circuit Court, to whom Terrell's battle with Thompson's Cafeteria

Mary Church Terrell (fourth from left) and other activists picketed Murphy's five-and-dime store in 1953 because it refused to serve Black customers at its lunch counter.

would head after the Municipal Court of Appeals ruling, bore no collective philosophy or regional outlook. They hailed from Utah, Missouri, Kentucky, Kansas, Virginia, Georgia, Ohio, Wisconsin, and the District of Columbia. All but Judge Henry Edgerton (Roosevelt) were Truman appointees. Many had held national political office: Clark in the Senate, Charles Fahy as Solicitor General, George Washington as Acting Solicitor General, Harold Stephens and David Bazelon as Assistant Attorneys General. Stephens and Edgerton were close friends as Cornell undergraduates. Prettyman and Fahy shared perhaps the most roots, two sons of the south attending Georgetown Law School together.

Chief Judge Stephens, born in 1886, was raised in Utah. Early law teaching was a platform to "instruct a generation … in the glories of the common law," to "classify the case" in a legal category and "apply its principles to the facts at hand."[72] Statutes were inferior creatures, "fragmentary, arbitrary … local" and merely reflecting temporary "social demand," for only in case-driven common law lay "a people's 'sense of justice'."[73] He led the Justice Department's Antitrust Division in the mid-1930s before joining the D.C. Circuit.

Judge Prettyman, the son of a Methodist minister, was born in 1891 in southern Virginia where he took up a small-town law practice. He joined the New Deal as counsel to the Internal Revenue Service and, like the prosecuting office in *Thompson*, was Corporation Counsel for two years in the mid-1930s. He was appointed to the D.C. Circuit in 1945. When the U.S. Courthouse was named for him in 1997, Senator John Warner, law clerk to Prettyman and sponsor of the honoring legislation, spoke of "[h]ow

important good and decent people were to Prettyman," and of the Judge's excitement watching from chambers as his idea took shape in the plaza below—a twenty-four-foot granite triangle carved with excerpts from the Declaration of Independence, Constitution, and Bill of Rights.[74]

Judge Fahy was born in 1892 in Georgia. After a start at private practice in Washington came World War I. "Being unmarried and with no dependents, I felt I should go into the service."[75] He volunteered for the fledgling naval aviation corps and flew in the first American-led night bombing raid, attacking German submarine docks. On a later night bombing mission, he was injured in a crash landing on darkened Dunkirk beach. He received the Navy Cross. After a decade of practice in Santa Fe, recovering from tuberculosis contracted during the war and advocating Pueblo Indian rights, he was General Counsel of the National Labor Relations Board when it broke Supreme Court defiance of New Deal programs.[76] Fahy led legal negotiations for the U.S.–Britain Base-Destroyer agreement in London in early 1941 and was Solicitor General from 1941 to 1945. In post-war Germany, he directed the Military Government's Legal Division and was Legal Adviser to General Eisenhower. He was appointed to the D.C. Circuit in 1950.

The D.C. Circuit judges of 1951 were aware of desegregation efforts directed at the city's restaurants and lunch counters. In a snowstorm in December 1950, with *D.C. v. Thompson* in the lower courts, eighty-seven-year-old Terrell, cane in one hand and placard in the other, rallied picketers outside Kresge's downtown "five and dime" to urge shoppers to do business where Blacks could eat at lunch counters. Kresge's capitulated. "In less than a year ... Terrell and her ... activists had integrated nearly a dozen lunch counters and restaurants in downtown Washington."[77] In early 1951, Hecht's department store advertised "Brotherhood Week"—"two hands, one black and one white, clasped together"—but segregated its lunch counter.[78] Sit-ins in 1951 led to hundreds of canceled accounts. Beside a photo of the American flag-raising on Iwo Jima, a leaflet read: "Negroes are fighting and dying in Korea, but Hecht's says 'We won't serve colored people'." Hecht's surrendered in early 1952. Some theaters and hotels followed. By late 1952, over sixty restaurants ended segregated service in Washington.

Keenly attuned to civil rights stirrings were Judges Edgerton and Fahy. Edgerton's dissents over District school segregation in *Carr* and racially restrictive housing covenants in *Hurd* may have nettled fellow panelists Prettyman, Clark, and Miller. Edgerton met Prettyman's thin sprinkle of facts in *Carr* with nine data-dense pages showing inferior Black schools, including crammed classrooms in old buildings. "It is plain that ... pupils are denied better education and given worse because of their color," that *Shelley* branded racial discrimination "reconcilable neither with due process nor ... equal protection."[79] Edgerton invoked the Justice Department's brief in *Henderson* that "'separate but equal' [is] much a contradiction in terms as 'black but white'," and to Prettyman deferring racial inequality matters to Congress answered that "the Constitution does not permit Courts to wait for Congress."[80]

In *Hurd*, Edgerton subordinated common law to the Constitution and rebuked any who "ask the court to take away [Negro-purchased] homes by force because they are Negroes."[81] Federal courts—"arms of government"—are "not exempt" from "what the Constitution forbids," and the "right to buy and use anything that whites may buy and use is conferred upon Negroes implicitly by the ... Fourteenth Amendment."[82] If Edgerton cast cold light on segregated Washington, its prospects grew chillier at the hands of a Circuit Court alumnus five years departed, Chief Justice Vinson, when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High Court Opens D. C. Restaurants
1872, 1873 'Lost Laws' Valid, Justices Say In 8-0 Decision

Five School Cases Back On Docket

Girl, 10, Tells Jury How Father Stabbed Her Mother To Death

Hotels Not Included

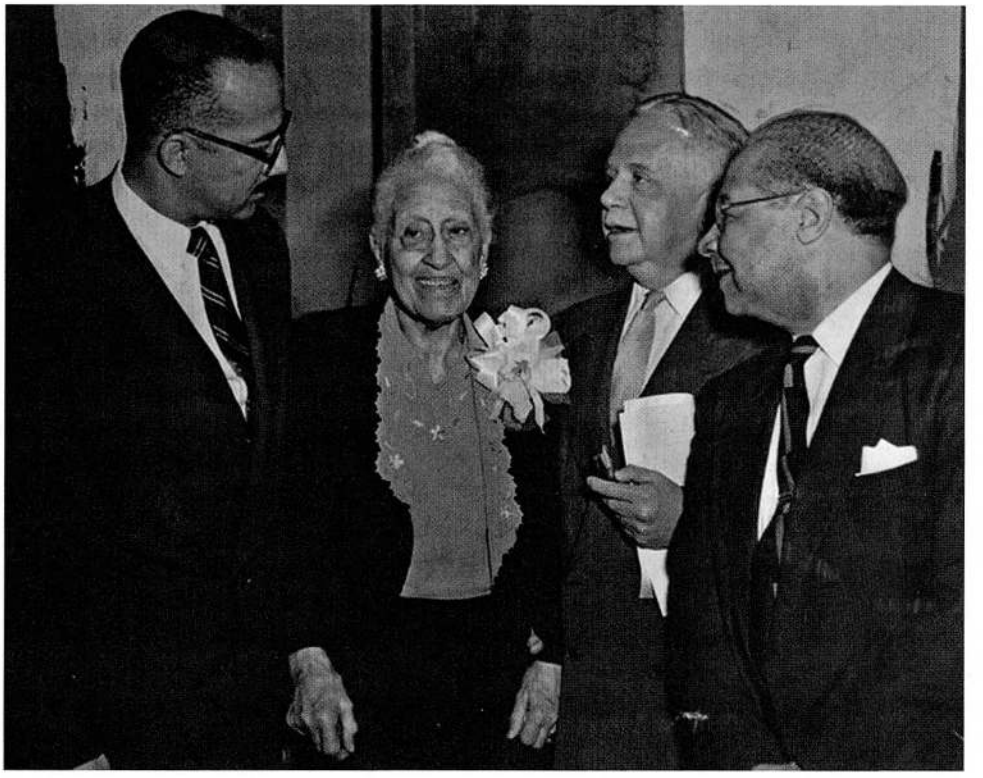
The *Washington Afro-American* trumpeted the Supreme Court's decision on June 9, 1953, enforcing the "lost" 1872 and 1873 Equal Service Acts.

the Supreme Court reversed *Hurd*. The Fourteenth Amendment disposed of state-enforced restrictive covenants in *Shelley*, but Vinson railed at its impotence in Washington, at "public policy of the United States" blocking state action violating equal protection but exempting "federal courts in the nation's capital" from enforcing equal protection.[83]

The Circuit's deep segregation rift resurfaced when *Bolling v. Sharpe* was filed in district court. It was not just that their school was inferior to the whites-only one denying them admission, charged Black school children. Invoking Edgerton's *Carr* dissent, they challenged the "fact of segregation itself" and demanded equal education assured by the Fifth Amendment.[84] But, citing Prettyman's majority opinion in *Carr*, the district court ruled in April 1951 that Washington's segregated schools were constitutional. Had not *Plessy* drawn support for "separate but equal" in Congress's imprimatur for segregating the races in Washington's public school system?

Leading the progressive charge was Judge Fahy, long a civil rights contender. In 1919, the young lawyer and a series of eminent lawyers represented a Chinese student indicted for triple murder. Wan's defense was an involuntary confession. He was convicted in 1923. One day from death on the jailhouse gallows his execution was stayed. The case went to the Supreme Court, where the Solicitor General argued that Wan's confession was voluntary and supported the conviction. At oral argument, Wan's lawyer was recounting "all night" police questioning when Justice Holmes "leaned forward and asked if he had heard correctly."[85] Once so assured, Holmes "leaned back and said audibly … 'Well, that's enough for me'."[86] The facts of the "terrible case," observed Professor Felix Frankfurter, led Justice Brandeis to an opinion of "Doric simplicity" for the unanimous court.[87] "Wan was held *incommunicado* … subjected to persistent, lengthy cross-examination … On the eighth day, the accusatory questioning took a more excruciating form…."[88] Wan was tried twice more into 1926, with juries deadlocking before the government relented. Only Fahy stayed with Wan beginning to end, in final years traveling to Washington from Santa Fe. His compensation was a silk pillowcase.

As Solicitor General, Fahy also spoke for Kumezo Kawato, a Japanese-born fisherman on Terminal Island, Los Angeles, who was thrown from a skiff and injured in 1940. He sued his employer in federal district court for lost wages and expenses. In January of 1942, the case came to trial with America and Japan



Judge William Hastie and Walter White and Eugene Davidson (both of the NAACP) congratulated Terrell at a 90th-birthday dinner honoring her achievements in 1953.

at war. The judge saw non-citizen Kawato as the subject of an enemy nation and "abated" his case "for the duration of the war." Kawato successfully petitioned the Supreme Court, which sought Solicitor General Fahy's views. Fahy supported the fisherman, even after learning that he was interned. "The spirit of justice [and] manifest undesirability of forcing innocent persons into want and destitution forbid any such result," he wrote, and "[t]he experience of this country ... has demonstrated that the vast majority of ... subjects of countries with which we are at war who reside here, are ... entirely loyal to our institutions."[89] Barring our courts inflicts "unnecessary hardship" and blocks "safeguarding their civil rights," as the unanimous Court agreed.[90] From many camps thereafter Kawato asserted his restored rights, reaching settlement in the final months of the war.[91]

In 1944, Solicitor General Fahy supported Charles Houston with an *amicus* brief on behalf of Black firemen employed by an Alabama railroad. The majority-white labor organization chartered under the Railway Labor Act excluded Black members and colluded with the railroad to block Blacks from promotions and other opportunities.[92] For the Black firemen, Fahy protested that "Congress would not have incapacitated a minority," and that "a serious question as to [an Act's] constitutionality [arises] when discrimination against the minority rests upon race."[93] The Court unanimously held that the Act extends equal protection to all employees and "discriminations based on race alone are ... invidious."[94]

The following year, Fahy backed the prosecution of a Georgia sheriff for killing Robert Hall, a Black man handcuffed, attacked, and left to die on the jailhouse floor.

The sheriff "beat him to death ... beat the poor man over the head with a club until he killed him," recalled Fahy.[95] The Justice Department's nascent Civil Rights Section had indicted the sheriff under a post-Civil War civil rights statute for violating Hall's Fourteenth Amendment rights, but over decades the statute withered into disuse. "[I]n terms of the constitutional rights the statute could ... enforce, no one was quite sure what to think."[96] Fahy urged the Court to breathe new life into it, with Marshall and Hastie filing an *amicus* brief for the NAACP. Justice William O. Douglas wrote for the majority sustaining the law and opening the way for federal prosecutions of police brutality against minorities for violating their Fourteenth Amendment civil rights.[97]

In 1948, President Truman appointed Fahy to chair the Committee, formed under the Executive Order desegregating the Armed Services, to chart the path to implementation.[98] Fahy "packed 'the punch of a mule'" as the Committee grappled for two years with the military.[99] His approach, as in personal discussions with Secretary of the Army Gordon Gray, was "not limited to military or manpower considerations ... but based upon the obvious injustice of the inequality of treatment of the individual."[100] The Committee made recommendations to the President in May of 1950, all accepted by the military. America had just shown the world "that we can move forward in the solution of our own problems," observed President Truman, "in accordance with ... the belief that all men are created equal."[101]

The D.C. Circuit Decides Thompson

In the fall of 1951, Thompson appealed its Municipal Court of Appeals loss to the D.C. Circuit. In their *amicus* brief supporting the Corporation Counsel, Solicitor General Perlman trumpeted equal rights with the vigor of his recent Supreme Court briefs. "The United States is now endeavoring to prove to the entire world that democracy is the best form of government [and] that the ideals embodied in our Bill of Rights are living realities."[102] The four Circuit judges on the *Carr* and *Hurd* panels, on one side Prettyman, Clark, and Miller (who in 1949 had upheld Terrell's rejection, due to her race, for membership in the American Association of University Women), Edgerton on the other side, remained. Bazelon, Washington, and Fahy had since joined. Outside raged protests at segregation. Washington's political leadership pleaded helplessness and sought judicial direction. National reports blared segregation's evils, Executive Orders rolled it back, the Supreme Court held an uneasy truce with "separate but equal," and the Justice Department openly opposed it. Review was granted and the full court held oral argument on January 7, 1952.

As the Circuit pondered *Thompson* through 1952, the Supreme Court docket swelled with civil rights cases. In January, the Court returned an issue involving segregated schools to state court.[103] It noted probable jurisdiction in *Brown v. Board of Education* in June and granted certiorari in *Bolling v. Sharpe* in November. Meanwhile, Justice Frankfurter, "fearful of the damage a premature Supreme Court decision might do to public education," tried to buy time to unify the Court. He "felt very strongly that the place to ... begin" was segregated District restaurants.[104] At the Department of Justice the political ground broke apart. Perlman's zeal for racial equality stopped with higher education. "Perlman was absolutely adamant ... [a]ll the letters to the Attorney General ... didn't make him budge ... not [elementary] schools; no sir!"[105] Then James McGranery replaced Attorney General McGrath and Perlman suddenly resigned.

Acting Solicitor General Robert Stern and Elman asked McGranery to back an *amicus* brief in *Brown* arguing to overrule *Plessy*. "'You're right, boys. Go ahead and write a brief'," replied McGranery. When *Brown*

and the four companion cases were argued in December 1952, the District government's diffidence at confronting restaurant, housing, and other forms of segregation, set beside its oral argument, was a positive triumph of civil rights fervor. The Assistant Corporation Counsel who argued *Bolling* approvingly recited "some eloquent words" of a former Chief Justice, "as relevant to this case as they were to the case in which [the former Chief Justice] wrote."[106] "I just couldn't believe it," Elman marveled, "He was reading ... from *Dred Scott*."[107]

Seeking support from Chief Justice Taney's infamous decision suggested the deeper truth. "The Nation's Capital at the beginning of 1953 is still a Jim Crow town,"[108] an ugly fact that made Joseph McGarraghy, President-elect Eisenhower's inaugural committee chairman, a worried man. The great day was January 20, 1953. Segregated hotels and restaurants would paint the host city as a national and international embarrassment. McGarraghy, former chairman of the Washington Board of Trade, lobbied restaurants and hotels to throw a segregation holiday—equal service to all—for just three days. Scarcely had the weekend's festivities died away when the D.C. Circuit decided whether segregation smoldering beneath the brief veneer of racial equality would remain extinguished. Two days after Eisenhower's inauguration, Chief Judge Stephens answered that the Equal Service Laws were unenforceable and segregation could lawfully resume.

With Clark, Miller, and James Proctor, Stephens framed *Thompson* as whether the Equal Service Laws were "within the power" of the Legislative Assembly.[109] The key was Article I's grant of power to Congress to legislate for the federal district. Whether the Equal Service Laws fell under congressional or local power carried Stephens through groves of common law, most cases a half century or more dated and involving rights of property, contract, or freedom to run one's business one's own way. Nearly all held District ordinances to offend one or more common law categories and were condemned as District arrogations of "general" powers "exclusive" to Congress. Mere "municipal" legislation could not trifle with common law.

Thus, an ordinance banning theaters from reserving seats was "vexatious and unlawful interference with the rights of private property," as liens on land wrongly attempted to "change the common law of titles" since common law property rights were—in *Plessy*'s words—"in the nature of things."[110] Plumbing regulation offended "constitutional guaranties of liberty and property" and common law "freedom of contracts" doomed setting auctioneer fees.[111] A sidewalk sweeping ordinance was "a plain usurpation of the powers of Congress."[112] Stephens concluded that the Equal Service Laws were improper restraints on a proprietor's freedom of property and contract—"thereby altering the common law"—and on his expression of "business or personal desire."[113]

Strains of *Plessy* grew as Stephens assembled dangers posed by the laws to the District's social order. "[E]qual service without respect to race or color ... do[es] not relate ... to preservation of the public peace and order."[114] No relation was possible, for "public peace" reigned when the laws were enacted, when "such discrimination was customary."[115] Forcing equality of the races today uproots that peaceful three-quarters of a century of "race dissociation," just as declaring "social policy which is now correct" by prosecuting restaurants twists truth because the policy is "not correct—else the [laws] would have been enforced heretofore."[116] As Prettyman held in *Carr*, "Congressional determination" alone could change the District's custom of segregation. Stephens took heart from ordinances in many cities currently segregating housing, transportation, and parks "for the purpose of preserving peace and good order ... likely ... interfered with by racial association".

Judge Prettyman concurred. Once valid or not, local authorities "abandoned" the laws in a way "active [and] consistent," and reviving "long-dead" acts was "as unjustifiable as [their] secret adoption."[117] A tranquil seventy-five years of restaurants "select[ing] their customers" would be undone, and although an "increasing number have served all well-behaved persons," none "thought this policy obligatory" for, as he daubed segregation, "[m]any have limited their clientele."[118] Prettyman's oblique admission of segregation in the town he called his home since the 1930s was then obliquely retracted. Did national reports, Executive Orders, and a sharp Supreme Court tilt against segregation that included reversing the D.C. Circuit on racist real estate practices slip him by? Did the native Virginian, *Carr's* author, racial equality opponent to Terrell's academic organization membership, and former Corporation Counsel suggest segregation to be a present-day myth even in Washington in noting "so called 'Jim Crow' ordinances such as *seem to have existed in some cities*"?[119]

If Prettyman was not roused by segregation, he was roused by attacks on it. That the Equal Service Laws were laws at all was fiction. They were "condition[s] ... imposed ... secretly" to strike an unsuspecting business after "seventy-five years of disuse," a furtive assault on "due process of law."[120] Prettyman called on the rages of Jeremy Bentham in 1843:

> We hear of tyrants, and those cruel ones: but ... we have never heard of any tyrant in such sort cruel, as to punish men for disobedience to laws or orders which he had kept them from the knowledge of.[121]

Fahy dissented, joined by Edgerton, Bazelon, and Washington. Supreme Court rulings such as *Nebbia v. New York* ("neither property rights nor contract rights are absolute") and *West Coast Hotel v. Parrish* (constitutional liberty safeguards "the morals and welfare of the people") sunk common law to "most questionable soundness," with property and contract rights now yielding to "the public welfare."[122] Congress had granted the Legislative Assembly authority over "all rightful subjects of legislation," and were "serving of food" not "local activity ... left to municipal authority," a "serious gap [opens] in the power of a community to govern itself."[123] Excepting one, "no case ... holds any regulation either forbidding or requiring racial segregation to be invalid merely because enacted by municipal authority [and if] a municipal ordinance may require segregation it may require equal treatment."[124] Indeed, "equal service" without respect to race answers a higher ideal than Article I. Echoing President Truman in 1950 upon desegregating the Armed Services, it is "consistent with ... a Constitution framed in the background of the principle that all men are created equal."[125]

Segregation in Washington, to Stephens and Prettyman, rooted in custom and shaping a peaceful social order, ever after withstood change. Fahy saw custom's old moorings in decay and race relations in active flux. "Communities vary in outlook and in the same community outlook changes with time and experience [as] is ... true of segregation."[126] Municipal legislatures were alive to "the local point of view as to what is conducive to the peace, order, morals or welfare of a community," as in six cities now requiring "fair employment" and Miami and Cleveland prohibiting discrimination in restaurants.[127] Prettyman's "abandonment argument in the end destroys itself," Fahy argued, "for if these regulations can be placed out of operation by non-use ... they can be put back into operation by use," nor were they masked license conditions any more than a law that "restaurants ... have [flameproof] draperies."[128] Two Judges joining Fahy offered supporting testimonies. "[T]his new 'GUIDE to eating places that serve all without discrimination

in the nation's capital' dated December 1952 may possibly be of interest ... Things have certainly started moving," Edgerton wrote Fahy. Judge Washington noted that "[t]he fact of discrimination here is notorious."[129]

At his close, the Georgia-born judge returned to custom, dynamic and contemporary. Laws assuring equality for restaurant patrons regardless of race were not "derelicts of the past," but of a piece with upheavals now penetrating many spheres of society.

> It is enough to point out that custom has not moved away from equal treatment [but] moved toward equal treatment, as is shown by developments of recent years in the Government, in the armed services, in industry, in organized labor, in educational institutions, in sports, in the theatre and in restaurants in the community ...
>
> Neither time nor neglect should bar the legislative application ... in this community of the principle which opposes discrimination on account of race or color.[130]

The Supreme Court Decides District of Columbia v. John R. Thompson Co.

In his State of the Union message eleven days later, the new president appeared to challenge the D.C. Circuit: "I propose to use whatever authority exists in the office of the President to end segregation in the District of Columbia."[131] The acting solicitor general and the president's new attorney general, Herbert Brownell Jr., supported the Corporation Counsel's petition for Supreme Court review. "In holding that 'civil rights' legislation is outside municipal power, the [D.C. Circuit] has erected a barrier ... to deal ... with the problem of racial discrimination [frustrating] equality of rights of all citizens of every race and color."[132] The "fact [of] judicial notice" taken by Stephens that "race dissociation has continued to this day" lacked "factual support" for, quoting Fahy, "custom has not moved away from equal treatment [but] toward equal treatment" in numerous aspects of national life.[133]

The Court granted certiorari on April 6, 1953 and set oral argument for April 30. The Justice Department argued that the distinction between "general" and "municipal" legislation was "neither relevant nor useful," that the "restricted view" that the Equal Service Laws exceeded municipal power or common law limits had been "discredited since *Nebbia* [and] *West Coast.*"[134] As to "prevailing custom" determining a law's validity, "[w]e agree with Judge Fahy that "'there is no [such] doctrine known to the law'.[135] Indeed, if prevailing custom were determinative "it would follow that the more ... noxious a local evil is, the less would be the power of the municipality to deal with it."[136] Lastly, the DOJ left no doubt where it stood despite the change in presidential administration. Citing its briefs in *Henderson*, *Sweatt*, *McLaurin*, and the "'school segregation' cases now pending before the Court ... it is the position of the United States that racial segregation enforced or supported by law is unconstitutional."[137]

The Court needed just five weeks to deliberate. On June 8, 1953, Justice Douglas reversed for the unanimous Court. The brisk analysis largely followed Fahy's path. The Act of 1871 conferred "municipal" power to the District over "all rightful subjects of legislation."[138] In furtherance of Article I congressional power to grant the District self-government—analogous to a state allowing a city to function as a "miniature State"—Congress could delegate "home rule ... as broad as the police power of the state," and "no subject of legislation is more firmly identified with local affairs than the regulation of restaurants."[139] The Equal Service Laws were never repealed because legislation endures unless legislatively repealed,

nor were the laws abandoned or mere license conditions. They were "*regulatory* laws [setting] the duties of restaurant owners"—no different, in Fahy's comparison, than banning "flameproof draperies"—and currently fully enforceable.[140]

The Aftermath of Thompson

The next day, under an exceedingly tall banner—"EAT ANYWHERE"—proclaimed the headline: "Thompson Head Says 'We'll Abide By Law'."[141] The manager refusing service to Terrell's group pledged to "start serving colored people immediately ... the law's the law." The chain's national headquarters acquiesced: "The law says any well dressed well behaved person, and that's the way it is."[142] Nearby Scholl's Restaurant had sought prosecution of an interracial student group refusing to leave when denied service, but its manager now saw matters differently. "That's the good American way and we are for it one hundred percent."[143]

Vernon West again wrung his hands. Although the Supreme Court upheld the laws, West would not enforce them until businesses were "amply advised" of the decision's "interpretation."[144] A few days later, West advised that dining rooms, bars, and hotel restaurants were "covered," the Washington Restaurant Association urged compliance, and by June 10 all 2000 Washington eating places "had opened their doors to everyone."[145] The Coordinating Committee set out to "scare some theater owners" and, in two weeks came the "shortest and pleasantest [victory] of my career," said Terrell, when "virtually all of Washington's movie houses had opened their doors to everyone."[146] That autumn the District barred racial discrimination in its agencies and peacefully integrated public housing. Terrell's ninetieth birthday party on October 10, 1953, was attended by 700 guests of all races at Washington's Hotel Statler. Only recently had the Statler begun admitting Black guests.

June 9, 1953, was an auspicious day for another reason. Coupled with much-cheered *Thompson* tidings was another consequential headline. "Five School Cases Back on Docket" announced the last stage of *Brown*—news greeted with frustration by the NAACP Board of Directors, which "regret[ted] the inability of the Supreme Court to reach a favorable decision at this time on the school desegregation cases."[147] In another newspaper that day a brief side column echoed NAACP restlessness, noting Judge Edgerton's 1950 yet unanswered lament in *Carr* that Black children in Washington's public schools still awaited the day of equal footing with white children.[148]

Segregation's custom still lingered on, a "powerful lawmaker."[149] It percolated beneath the surface of *Thompson*. The only reported sentiment as the justices deliberated it was by Kentuckian Stanley Reed. He and his wife Winifred lived at the Mayflower Hotel and ate in its dining room. As recollected by "several [law] clerks" from that term, Reed "expressed misgivings" that desegregating Washington restaurants meant that a Black person "can walk into the restaurant in the Mayflower ... and sit down to eat at the table right next to Mrs. Reed!"[150]

Six months later, the specter of custom that clung about *Thompson* returned in *Brown*'s final argument. John W. Davis, long the lion of the American bar, rose for the last of scores of Supreme Court appearances.[151] His appeal was to a settled past. "Somewhere, sometime, to every principle comes a moment of repose when it has been so often announced, so confidently relied upon, so long continued, that it passes the limits of judicial discretion and disturbance."[152] But beneath the lyricism, unregarded, was fresh constitutional growth. The glare of common law and custom of segregation had dimmed—or died.[153] Property rights had fallen before "liberty in a social organization." It "was as an individual that [Lloyd Gaines] was [due] ... equal protection," as

Heman Sweatt enjoyed "rights ... personal and present." The Court had united in *Shelley* and *Hurd*, *Henderson*, *Sweatt*, and *McLaurin* to put "separate but equal" in a chokehold.

The willingness of justices of widely different perspectives to review *Thompson* amid the school segregation surge testifies to what *Thompson* meant for the Court itself. Out of a splintered D.C. Circuit—whose opinions reflected national divisions—the justices could join in one voice against the long reign of restaurant segregation in the capital of democracy. In striking down intractable segregation, *Thompson* did not invoke the Fifth or Fourteenth Amendments. The District's home rule powers made this unnecessary. But as the Department of Justice recognized in summoning the whole force of its anti-*Plessy* school segregation arguments in *Thompson*, the Constitution's equal protection guarantees stirred in and permeated the case. "[S]o far as the Federal Constitution is concerned there is no doubt that legislation which prohibits discrimination on the basis of race in the use of facilities serving a public function is within the police powers of the states," and the Equal Service Laws expressed that power "in terms of civil rights."[154]

In simultaneously liberating one form of public accommodations in Washington and launching the five *Brown* cases into their final phase, *Thompson* made liberating the District's schools a shorter leap[155] and eased the way for *Brown* to liberate the nation's public schools—to bury *Plessy* altogether. Thurgood Marshall immediately observed that *Thompson* represented a "significant achievement in the drive [to] complete elimination of segregation in the United States."[156] In the later estimation of Chief Justice Earl Warren, *Thompson* "broke down segregation ... prior to our decision in *Brown v. Board of Education*."[157]

Four days after the decision, three and one-half years after her first visit to Thompson's on a January day in 1950, Mary Church Terrell sat down to her cup of soup. The manager carried her tray, settled her in the dining area among friends, and the battle quietly ended under the same roof where it had begun. At the turn of the twentieth century, she called for "fearless meddlers who will [investigate] institutions, customs, and laws ... who dare ask prejudiced bigots by what right they humiliate and harass their fellowmen."[158] At mid-century after the lost laws were found her fire burned yet. "A time comes ... when patience ceases to be a virtue and becomes an ugly, disgraceful vice ... [many fail to protest because] we are afraid of being called agitators."[159]

In one of those "idiosyncrasies of American constitutional law that cases of profound consequence are often named" for peripheral actors,[160] no court in *Thompson*'s years of judicial life ever named a case after, or identified, Terrell.[161] But in *Thompson* the great meddler-agitator joined high company wresting the constitutional current from "separate but equal," downstream from Houston and Marshall, Lloyd Gaines, Heman Sweatt and George McLaurin and just upstream of *Brown*. Born the year of the Emancipation Proclamation, she lived two months beyond *Brown*, passing just shy of her ninety-second year. "I will ... die happy that children of my group will not grow up thinking they are inferior because they are deprived of rights which children of other racial groups enjoy," she said the day after the *Thompson* decision.[162]

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Author's Note: The author extends deep thanks to staff of the Law Library of the Library of Congress for their many exertions in helping tell this story.

ENDNOTES

[1] JOAN QUIGLEY, JUST ANOTHER SOUTHERN TOWN 4 (Oxford University Press 2016) [hereinafter JAST].

[2] DENNIS B. FRADIN AND JUDITH B. FRADIN, FIGHT ON! 3 (Clarion Books 2005) [hereinafter FIGHT ON].

[3] Phineas Indritz, *Racial Ramparts in the Nation's Capital*, 41 Geo. L.J. 297, 304 n.31 (1953).

[4] D.C. Laws 1872, pt. IV, c. LI, Sec. 3.

[5] D.C. Laws 1873, pt. II, c. XLVI, Sec. 3.

[6] 18 Stat. 335, Sec. 1; Sec. 2.

[7] 100 U.S. 303, 306 (1880).

[8] *Civil Rights Cases*, 109 U.S. 3, 11, 13–14, 19 (1883).

[9] *Ibid.* at 26 (emphasis in original).

[10] 163 U.S. 537, 544 (1896).

[11] *Ibid.*, p. 550.

[12] *Id.*, pp. 550–51.

[13] Flora B. Brown, *NAACP Sponsored Sit-Ins by Howard University Students in Washington, D.C., 1943–44*, 85 Journal of Negro History 274, 275 (2000).

[14] JAST, 10.

[15] Indritz, 307.

[16] RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 754 (Vintage Books 2004) (1975) [hereinafter SIMPLE JUSTICE].

[17] CONSTANCE M. GREEN, THE SECRET CITY: A HISTORY OF RACE RELATIONS IN THE NATION'S CAPITAL 231, 261–62 (Princeton University Press 1967) [hereinafter GREEN].

[18] *Gaines v. Canada*, 305 U.S. 337, 348 (1938).

[19] FRANCIS BIDDLE, IN BRIEF AUTHORITY 153 (Doubleday and Co. 1962).

[20] *Mitchell v. United States*, 313 U.S. 80, 94 (1941).

[21] *To Secure These Rights: The Report of the President's Committee on Civil Rights* 76–77 (October 1947) [hereinafter *To Secure These Rights*].

[22] *Ibid.*, 89.

[23] *Id.*, 95.

[24] *Special Message to Congress on Civil Rights* (February 2, 1948).

[25] *Segregation in Washington: Blot on Our Nation* 17, 91 (November 1948) [hereinafter *Segregation in Washington*]. The report was authored by one hundred prominent Americans, including Eleanor Roosevelt.

[26] *Ibid.*, 17–18.

[27] SIMPLE JUSTICE, 129.

[28] They had been enforced a few times shortly after enactment. Indritz, 305–6.

[29] *Ibid.*, 298.

[30] *Hurd v. Hodge*, 334 U.S. 24 (1948).

[31] JAST, 135.

[32] *Ibid.*, 137.

[33] FIGHT ON, 9 (quoting A COLORED WOMAN IN A WHITE WORLD (Ransdell 1940) (Terrell autobiography).

[34] *Ibid.*, 55.

[35] M.C. Terrell, *I Remember Frederick Douglass*, EBONY, October 1953, 75–80.

[36] FIGHT ON, 70.

[37] *Ibid.*, 132.

[38] Beside her Oberlin degree she was awarded honorary doctorates from Oberlin and Howard University.

[39] *American Ass'n of University Women v. Washington Branch of American Ass'n of University Women*, 175 F.2d 368, 368 (D.C. Circuit 1949). The panel was Judges Bennett Clark (writing), E. Barrett Prettyman, and Wilbur Miller.

[40] *Washington Branch of American Ass'n of University Women v. American Ass'n of University* Women, 79 F. Supp. 88, 89 (D.D.C. 1948).

[41] Gregory M. Borchardt, *Making D.C. Democracy's Capital: Local Activism, the Federal–State and the Civil Rights in Washington* 31, George Washington University (2013 dissertation) [hereinafter Borchardt].

[42] *Ibid.*, 133.

[43] Until 1970, the D.C. Circuit had jurisdiction over federal issues and wholly local matters.

[44] 182 F.2d 14, 16 (1950).

[45] *Ibid.*, 21 (emphasis in original), 17.

[46] SIMPLE JUSTICE, 245.

[47] *Corrigan v. Buckley*, 271 U.S. 323 (1926).

[48] 162 F.2d 233, 234–35 (1947).

[49] *District of Columbia v. John R. Thompson Co.*, 81 A.2d 249, 252 (1951).

[50] SIMPLE JUSTICE, 511.

[51] Green, 298.

[52] Philip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946–196–: An Oral History*, 100 HARV. L. REV. 817, 818 (1987) [hereinafter Elman].

[53] 334 U.S. 1 (1948).

[54] *Ibid.*, 19.

[55] 339 U.S. 816 (1950).

[56] *Mitchell v. United States*, 313 U.S. 80, 94 (1941).

[57] Brief for the United States at 40, No. 25 (Oct. Term 1949).

[58] *Ibid.*, 27–28.

[59] *Henderson*, 339 U.S. at 824.

[60] 339 U.S. 629, 631 (1950).

[61] 339 U.S. 637, 640 (1950).

[62] Petition for Writ of Certiorari at 14, No. 44 (Oct. Term 1949) [*Sweatt*].

[63] E.g., Memorandum for the United States as Amicus Curiae at 14, No. 44 (Oct. Term 1949) [*Sweatt*].

[64] SIMPLE JUSTICE, 588.

[65] *Sweatt*, 339 U.S. at 631.

[66] SIMPLE JUSTICE, 290.

[67] 334 U.S. at 22.

[68] 339 U.S. at 634–35 (quoting *Gaines*, 305 U.S. at 351).

[69] *McLaurin*, 339 U.S. at 641.

[70] JAST, 13–14, 162.

[71] JAST, 176.
[72] Daniel R. Ernst, *State, Party, and Harold M. Stephens: The Utahn Origins of an Anti-New Dealer*, 14 Western Legal History 124, 131, 133 (2001).
[73] *Ibid.*, 133.
[74] Tony Locy, *A Tribute to a Champion of the Law*, WASH. POST, March 27, 1997, at J01.
[75] Charles Fahy, Columbia University Oral History Project Collection 16 (1958) [hereinafter Fahy Oral History].
[76] "I saw Justice Brandeis," original N.L.R.B. General Counsel Calvert Magruder told Fahy, "[who] of his own motion ... commented on the fine work you have done for the Board and said it was the opinion of the whole court that no government agency is more competently represented than the N.L.R.B." Letter from Calvert Magruder to Charles Fahy (June 21, 1938), in Charles Fahy Papers, Library of Congress, Manuscript Division, Box 10 [hereinafter Fahy Papers].
[77] Borchardt, 16–17.
[78] *Ibid.*, 34.
[79] *Carr*, 182 F.2d at 23–30.
[80] *Ibid.*, 32 (citing Brief for the United States at 12, No. 25 (Oct. Term 1949)) [*Henderson*], 33.
[81] *Hurd*, 162 F.2d at 246.
[82] *Ibid.*, 240–241.
[83] *Hurd*, 334 U.S. at 24, 35.
[84] SIMPLE JUSTICE, 523.
[85] Fahy Oral History, 49.
[86] *Ibid.* "These were the first judicial words of encouragement we had had for five years."
[87] MR. JUSTICE BRANDEIS 124 (Felix Frankfurter ed., Yale University Press 1932).
[88] *Wan v. United States*, 266 U.S. 1, 11 (1924).
[89] Brief of the United States as Amicus Curiae at 10–11, No. 10, Original (Oct. Term 1941).
[90] *Ibid.*, 6–7. *Ex Parte Kumezo Kawato*, 317 U.S. 69 (1942).
[91] *See* Charles J. Sheehan, *Kumezo Kawato and "Justice Court,"* 45 Journal of Supreme Court History 194 (2020).
[92] Fahy's feelings for labor injustice included his own workplace as N.L.R.B. General Counsel during the 1930s, as Peter Irons reported: "Jewish lawyers created 'political liabilities' for ... New Deal agencies [but] Fahy (an Irish Catholic) not only hired many Jewish lawyers ... but defended them vigorously against the political attacks of a congressional committee headed by a blatant anti-Semite." Peter Irons, *Jerome Frank on the Jewish Question*, 4 ASLA 53, 56 ((1979–80).
[93] Brief for the United States as Amicus Curiae at 11, 48, Nos. 37 and 45 [*Tunstall v. Brotherhood of Local Firemen and Enginemen* and *Steele v. Louisville and Nashville Railroad*] (Oct. Term 1944) (joint brief).
[94] *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192, 201–2 (1944).
[95] Fahy Oral History, 187, 190.
[96] Paul J. Watford (Lecture), *Screws v. United States and the Birth of Federal Civil Rights Enforcement*, 98 MARQ. L. REV. 465, 476 (2014).
[97] *Screws v. United States*, 325 U.S. 91 (1945).
[98] The five member Committee included two leading Black Americans: Lester Granger, Executive Secretary of the National Urban League, and John Sengstacke, publisher of the nation's largest chain of Black-oriented newspapers.
[99] LEE NICHOLS, BREAKTHROUGH ON THE COLOR FRONT 89 (Random House 1954) (quoting White House adviser).
[100] Fahy Oral History, 305.
[101] Statement Responding to the Report of the Committee (May 22, 1950).
[102] Memorandum for the United States as Amicus Curiae at 2 (September 19, 1951) [*John R. Thompson Co. v. District of Columbia*].
[103] *Briggs v. Elliott*, 342 U.S. 350, 350 (1952) (per curiam).
[104] Elman, 823.
[105] *Ibid.*, 825.
[106] *Id.*, 836.
[107] *Id.*
[108] Indritz, 328.
[109] *John R. Thompson Co. v. District of Columbia*, 203 F.2d 579, 581 (1953).
[110] *Ibid.*, at 583–84 (quoting 1874 and 1879 cases).
[111] *Id.*, 585–86 (quoting 1907 and 1901 cases).
[112] *Id.*, 586.
[113] *Id.*, 588. Only two ordinances survived, one for vendors, one preventing cruelty to animals. *Id.*, 585, 587.
[114] *Id.* In *Plessy*, a law's validity turned on "the preservation of the public peace and good order." 163 U.S. at 550.
[115] *Id.* 589. *Plessy* deferred to the "customs and traditions of the people." 163 U.S. at 550.
[116] *Id.*, 589, 592.
[117] *Id.*, 595–96.
[118] *Id.*, 594.
[119] *Id.*, 596 (italics added).
[120] *Id.*, 595–96.
[121] *Id.*, 596.
[122] *Id.*, 602 n.42. *Nebbia*, 291 U.S. 502, 525 (1934); *West Coast Hotel*, 300 U.S. 1, 33 (1937).
[123] *Id.*, 588–89.
[124] *Id.*
[125] *Id.*
[126] *Id.*, 599.
[127] *Id.*, 599–600.
[128] *Id.*, 607, 605.

[129] Henry W. Edgerton to Charles Fahy Memorandum (December 19, 1952), Fahy Papers, Box 23; George T. Washington to Charles Fahy Memorandum (December 31, 1952). *Ibid.*

[130] Elman's old ties from service on Fahy's Solicitor General and Berlin's Legal Division staffs encouraged unusual liberties. The day of the decision he penned: "'BRAVO!' I think your opinion is superb – & not the least of its virtues is the quiet, restrained, rational, unhysterical way in which you dispose of the various questions ... so calm, logical & persuasive." Letter from Elman to Fahy (January 22, 1953), Fahy Papers, Box 6.

[131] H.R. Doc. No. 75, 83d Cong., 1st Sess. 13 (February 2, 1953).

[132] Brief for the United States as Amicus Curiae in Support of the Petition for a Writ of Certiorari at 12, No. 617 (Oct. Term 1952).

[133] *Ibid.*, 32 n.29.

[134] Brief for the United States as Amicus Curiae at 11, 43–44, No. 617 (Oct. Term 1952).

[135] *Ibid.*, 52.

[136] *Id.*, 54.

[137] *Id.*, 51 n.26.

[138] *District of Columbia v. John R. Thompson Co., Inc.*, 346 U.S. 100, 105 (1953).

[139] *Ibid.*, 108–9, 113.

[140] *Id.*, 114 (legislation endures unless legislatively repealed), 116–18 (emphasis in original).

[141] *High Court Opens D.C. Restaurants*, WASH. AFRO-AMERICAN, June 9, 1953, 1.

[142] *Ibid.*

[143] *Id.*

[144] *No Rush ... on Cafe Owners*, WASH. AFRO-AMERICAN, June 9, 1953, 20.

[145] FIGHT ON, 159.

[146] *Ibid.*, 160–61, 162.

[147] *Id.*

[148] *Negro Schools Are Facing Serious Crowding Problems*, EVEN. STAR, June 9, 1953, A4.

[149] Memorandum by Robert Jackson (February 15, 1954) (quoted in SIMPLE JUSTICE, 692).

[150] SIMPLE JUSTICE, 598. Reed would also prove to be a holdout in Earl Warren's quest for unanimity in the *Brown* decision but would come around when pressured by the chief justice.

[151] "He was a great advocate, the greatest," said Thurgood Marshall. WILLIAM H. HARBAUGH, LAWYER'S LAWYER, THE LIFE OF JOHN W. DAVIS (Oxford U. Press 1973) 503.

[152] *Ibid.*, 483. On behalf of South Carolina, Davis argued on December 7, 1953.

[153] Even Oliver Wendell Holmes, whose first fame was authoring *The Common Law* in 1881, had long declared common law "dead." Letter from O.W. Holmes to Joaquim Nabuco (January 3, 1908).

[154] *Thompson*, 346 U.S. 109, 116.

[155] Chief Justice Vinson's frustration in *Hurd* at segregation's constitutional double standard was vindicated. "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

[156] Alice Dunnigan and G.J. Fleming, *D.C. Negroes Eating Everywhere*, N.Y. AMSTERDAM NEWS, June 13, 1953, 1.

[157] Honorable Earl Warren, *A Tribute to Judge Fahy*, GEO. L. MAG. (Fall 1971) 8.

[158] M.C. Terrell, *The Mission of Meddlers*, The Voice of the Negro, August 1905, 566.

[159] M.C. Terrell, *Remarks to the National Committee to Free the Ingram Family* (June 22, 1949).

[160] SIMPLE JUSTICE, 408.

[161] All mentions of the precipitating incident and actors were impersonal, e.g., Thompson Restaurant refusing service to "prospective patrons ... of the Negro race." *District of Columbia v. John R. Thompson Co.*, 81 A.2d at 250.

[162] JAST, 228 (quoting *Washington Post*, June 9, 1953).

An Accident of History: The Fourth Amendment as Applied to Schools and *New Jersey v. T.L.O.*

Andrew H. Meck

Do students have a right to privacy while attending public schools? The Fourth Amendment protects a U.S. citizen and their effects from "unreasonable searches and seizures" unless a warrant is issued "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[1] The protection is potentially robust, but may change. For example, federal and state penitentiaries are places where individuals have limited Fourth Amendment rights. Public schools are another. The Supreme Court's 1985 ruling in *New Jersey v. T.L.O.* changed the landscape for searches in public schools. The case involved, a fourteen-year-old high school student (named T.L.O. in the brief) caught smoking cigarettes in a girls' restroom at the school, which was a violation pursuant to school policy.[2] After denying that she was smoking, an administrator searched her purse and found rolling paper and later marijuana.[3]

The Supreme Court held the search of T.L.O.'s purse did not violate the Fourth Amendment and that the Fourth Amendment applies to searches conducted by school officials.[4] However, the decision was much more than a simple one line holding. It tracked an ideological shift in the country's view on drugs and child safety, and the effort of a judiciary eager to resolve ambiguities in the law. The decision would have real-life consequences for schools and students.

The first section of this article will discuss the historical background leading up to *New Jersey v. T.L.O.* and the rising concern for child safety relating to drugs. The next section will discuss other cases that took place before 1985 in order to see the development of rules related to student rights. The third section will focus specifically on the facts of *New Jersey v. T.L.O.* Section four will discuss the players involved in the case. Section five will focus on the lower court decisions leading up to Supreme Court

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review. Section six will then focus on the Supreme Court case itself and its multiple opinions. Finally, section seven will analyze the impact the ruling had on the parties and subsequent impact on school searches.

Historical Background

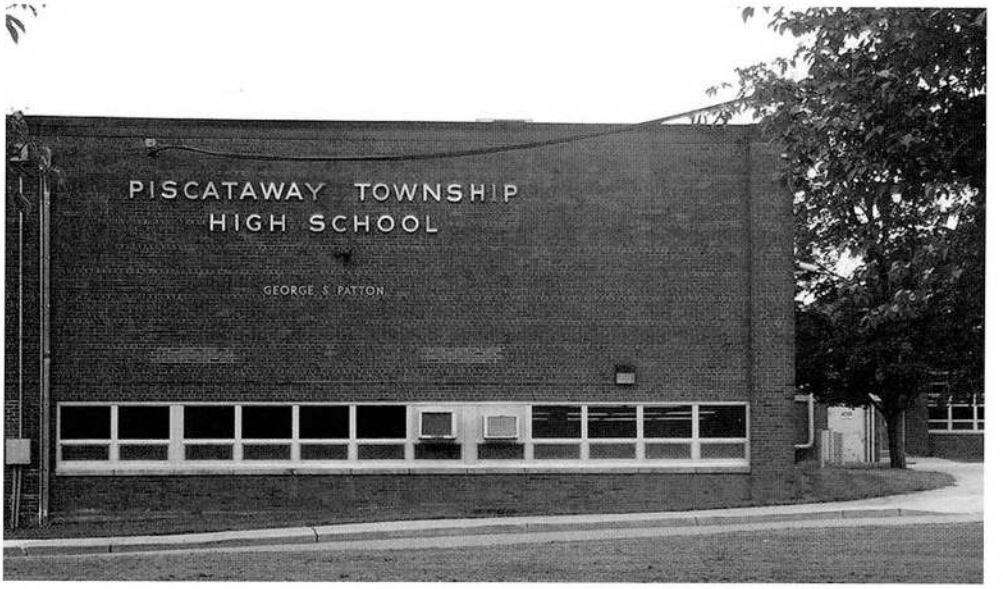
Public education and student rights were rapidly changing in the 1970s, but to understand why, one must look at the historical context starting in the 1950s. During the Civil Rights Movement, large numbers of middle-class white Americans were moving out of cities and into suburban areas in what was characterized as "white flight." This increased when "busing" was attempted to achieve effective school desegregation.[5] This migration had a huge impact on urban decay by draining cities of tax revenue and led to an increase in crime.[6] The causes were numerous: deindustrialization, depopulation, economic restructuring, abandoned property, high poverty rates, poor quality of life, pollution, and rising crime rates.[7]

Piscataway, a New Jersey suburb where T.L.O. attended public school, is a short drive from New York City and was one of the suburbs largely affected by urban decay and white flight. The population of Piscataway grew from 10,180 in 1950 to 42,223 by 1980.[8] This was the largest increase in the town's history. Urban decay in the areas surrounding New York City led communities like Piscataway to become more concerned about crime.

New York City in the mid-1970s was seeing the worst effects of urban decay. "Welcome to Fear City" was a headline on pamphlets handed out to individuals arriving at New York City's airports.[9] These pamphlets listed "guidelines" that expressed a deep concern for safety in the city, instructing travelers to avoid subways and stay inside after six in the evening. From 1965 to 1975, the murder rate and assaults in the city doubled, rapes and burglaries tripled, and robberies increased ten-fold.[10] Along with increased violent crime, drug crimes were on the rise as well.[11] Crack cocaine and heroin became serious issues in many urban cities, especially New York.[12]

At the same time, there was also an explosion of marijuana use on college campuses across the country, leading to the classification of marijuana as a narcotic.[13] This classification and the severe criminal penalties attached to it drove the use and experimentation with marijuana underground.[14] Although these criminal penalties drove experimentation out of the public view, the use of drugs was still a serious concern to Americans in the 1970s. Due to the increase in drug crime, Americans had strong views on punishing drug users with hopes to deter drug sellers and drug users from entering their communities. In 1969, a Gallup poll asked about illegal drug use and found that 48% of Americans thought it was a serious problem in their community.[15] By 1978, two thirds of Americans believed marijuana was a serious problem in high schools and even middle schools.[16] Most suburban Americans in the late 1970s and early 1980s were not willing to accept marijuana use.[17]

Although the recreational use of marijuana was becoming common, a counterrevolution in suburban America in towns such as Piscataway was formed.[18] A grassroots campaign that ended up influencing the national drug debate started in one family's home in Atlanta, Georgia, in the summer of 1976. This campaign grew substantially and spread throughout suburban counties across the United States, including Piscataway. This movement was later coined the "Parent Movement," which consisted of suburban, white, middle-class men and women who wanted to keep their children away from drugs.[19] They formed the National Federation of Parents for Drug-Free Youth in 1980 in response to the rising level of youth drug use.[20] These parents used the education system as their frontline to address



In 1980, the vice principal at Piscataway High School in New Jersey searched a ninth-grade girl's purse because a teacher had caught her smoking cigarettes in the bathroom, which was against school policy. He found marijuana in addition to cigarettes.

the issue. By 1985, when *New Jersey v. T.L.O.* was decided, there were over 4,000 parent groups in the United States spreading anti-drug messages in schools.[21]

The Parent Movement led communities to put pressure on schools to ensure their children were not involved in drug use. The authority of schools to act *in loco parentis* or "in the place of the parent" was a concept articulated in common law but was extremely limited in the late 1970s.[22] This concept allowed schools to act in the same capacity as if they were the parents of the children and entitled them to the same exceptions as if they were their actual legal guardians. Traditionally, schools would educate students on the effects of drugs through the dissemination of information regarding their negative health effects and legal consequences.[23] But in public schools during the late 1970s, marijuana use among teenagers in high schools peaked.[24] One study showed that in 1978, the number of seniors who reported recreational marijuana use was 38%.[25] As use of narcotics rose, schools began to implement drug searches, including random searches of lockers and personal items.[26]

Some of these random searches included the use of dogs. School administrators would allow dogs into classrooms where they would roam the room and, if they picked up a scent of narcotics, would alert an officer present.[27] The dogs would also sniff lockers in the hallways and alert officers of any locker containing narcotics. These policies were utilized by school officials in an effort to try to combat an increase in serious drug use, as well as deter future behavior. Many students claimed these searches violated their Fourth Amendment rights to privacy.[28] They mounted legal challenges that reached different conclusions regarding the constitutionality of the use of drug searches, but there was consensus that a lesser standard existed when a search of a student was conducted by a school administrator.[29]

Upon taking office in 1980, President Ronald Reagan implemented multiple changes that may have impacted the outcome

In the 1980s, First Lady Nancy Reagan orchestrated an antidrug campaign with the slogan "Just Say No." The campaign led many state legislatures to increase punishments for small drug offenses.

of the case. Reagan declared his own "war on drugs" on October 14, 1982.[30] He further declared that drugs were a direct threat to the U.S.' national security. David Rubin, one of the attorneys involved in *New Jersey v. T.L.O.*, believes that Reagan's policies caused courts to move in a more conservative direction, meaning rather than the pro-student decisions coming from the 1960s and 1970s, the courts began giving more deference to the rights of school administrators.[31]

During the 1980s, First Lady Nancy Reagan also began an antidrug campaign under the slogan "Just Say No." In a 1981 interview with *Good Morning America*, she said her goal was to bring public awareness, particularly parental awareness, to the problems of drug abuse" by "understanding what drugs can do to your children, understanding peer pressure and understanding why they turn to drugs is...the first step in solving the problem."[32] The First Lady spent countless hours traveling throughout the United States to present this message.[33] This campaign led to a pop culture shift, where popular American television series such as *Diff'rent Strokes* and *Punky Brewster* started to include the message of "Just Say No."[34] The campaign expanded across the globe. In 1985, Nancy Reagan invited the First Ladies of thirty other nations to the White House to persuade them to broadcast the message in their respective countries. The campaign led many state legislatures to increase punishments for small drug offenses. The climate for small drug offenses turned hostile, paving the way for the facts that led to *New Jersey v. T.L.O.*

Cases before New Jersey v. T.L.O.

The road to *New Jersey v. T.L.O.* began with *West Virginia State Board of Education v. Barnette* (1943), which involved a challenge to a 1942 resolution—passed during World War II—requiring all students in public schools to salute the flag.[35] The resolution provided that "refusal to salute the Flag be regarded as an Act of insubordination, and shall be dealt with accordingly." The statute required students and teachers to "stiff-arm" salute and proclaim the "Pledge of Allegiance to the Flag of the United States." One way in which a school could punish insubordination would be through expulsion, which stated that "readmission ... denied by statute until compliance. Meanwhile the expelled child is 'unlawfully absent' and may be proceeded against as a delinquent." Once a delinquent, a student can be liable to prosecution and subject to minimal fines and short jail time.[36]

The case involved a student of the Jehovah's Witness faith who refused to salute the flag. Jehovah's Witnesses follow the "literal version of Exodus, Chapter 20, verses 4 and 5 which state 'Thou shalt not make unto thee any graven image, . . . thou shalt not

bow down thyself to them nor serve them.' They consider that the flag is an 'image' within this command." Based on these beliefs, students refused to salute the flag and pledge allegiance to it. Many were expelled and threatened to be sent to reformatories for juveniles. The Court in *Barnette* held that compelling children in public education to salute the flag was unconstitutional. It reasoned the First Amendment cannot enforce "unification of opinion" on any topic. Further, the Court held that although the flag is a symbol of our nation, no deference should be given to this law that disregards constitutional protections.[37]

Another prominent case where school officials attempted to control students' behavior was *Tinker v. Des Moines Independent Community School District* (1969). This case was about a group of students who planned a public showing of support for an end to the Vietnam War.[38] Students decided to wear black armbands to express their views during the holiday season. The principals of the Des Moines schools created a policy that required the removal of armbands if asked by someone of authority. Failure to do so would result in suspension. Mary Beth Tinker, John Tinker, and Christopher Eckhardt all wore their armbands and were sent home by administrators. They brought an action to district court suing the school district for violating a students' right of expression. The Supreme Court held that the school could not punish nondisruptive expression. But it also stressed that "conduct by the student, in class or out of it, which for any reason – whether it stems from time, place, or type of behavior materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."[39]

Tinker was the first time the Supreme Court held that in order for school officials to justify the censoring of speech, they "must be able to show that [their] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," and that if a school is to forbid conduct it must "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[40] The Court said that the specific action of wearing armbands did not create disruption and was constitutionally protected as speech. *Tinker* led to other cases in the circuit courts challenging the overreaching authority of public-school officials.

Courts also started to receive more cases on appeal relating to the search of a student in a public-school setting by school officials. In 1982, the Fifth Circuit Court of Appeals was presented with the question: "as a matter of constitutional law, can a school district, acting in good faith in an effort to deal with a serious drug and alcohol problem, subject students, their lockers, and their automobiles to the exploratory sniffing of dogs trained to detect certain contraband?"[41] In *Horton v. Goose Creek Indep. Sch. Dist.*, the court listed multiple issues to consider when answering this question:

> the special circumstances peculiar to the public-school environment, the duty of school officials to protect the minors in their care, the growing problem of drug and alcohol abuse in the schools, the students' interest in the integrity of their persons and effects, and the importance of demonstrating to the young that constitutional guarantees are not only lofty theories but do in practice control our government.[42]

In *Horton*, a drug search program was adopted by the Goose Creek Consolidated Independent School District (GCISD) in response to a growing drug problem in public schools.[43] GCISD employed a security services firm Securities Associates

International, Inc. (SAI), which provided GCISD with drug-sniffing Doberman pinschers and German shepherds. These dogs could detect the presence of sixty different illegal substances, including drugs both over the counter and controlled. If any of the dogs alerted the handler to some illegal substance on a person, the student would be asked by a school official to go to an administrator's office and subjected to a search of their "pockets, purses, and outer garments." If the dog alerted a locker, the locker would be searched without consent from the student to whom it was issued. Students who were found to have drugs in their possession had an option to seek outside counseling and if they did not do so, the administrator could suspend the student. Second-time violators were suspended and did not have the option of counseling. Here, one student named Sandra Sanchez had her purse searched without consent after one of the dogs alerted his handler to an odor. Sanchez did not have any drugs on her, but rather a perfume bottle. She, along with another student, brought an action alleging a violation of their Fourth Amendment rights.

The Fifth Circuit Court held the use of drug-sniffing dogs to search students was unconstitutional, but the use of these dogs in searching lockers and cars was constitutional.[44] The Fifth Circuit looked to other circuit courts to determine the constitutionally of the use of dogs to search for drugs. First, the Fifth Circuit determined the use of drug-detecting dogs constitutes a search in purview of the Fourth Amendment when it comes to the searches conducted because the dogs were placing "their noses right up against the children's bodies."[45] The Fifth Circuit stated that although they held "the sniffing is a search [it] does not, however, compel the conclusion that it is constitutionally impermissible." The court referred to the history of the school system and stated "it was not uncommon for a court to view the school official who searched a student as acting under authority derived from the parent and therefore as a private party not subject to the constraints of the fourth amendment."[46] It acknowledged that a school administrator is an agent of the government and is constrained by the Fourth Amendment.[47] The court reasoned that the Supreme Court in *Tinker* held that school officials are subject to constitutional restraints that are applicable to state action.[48] The Fifth Circuit's conclusion focused on the reasonableness of the search. The court stated that "[w]hen the school official acts in furtherance of his duty to maintain a safe environment conducive to education, the usual accommodation is to require that the school official have 'reasonable cause' for his action."[49]

Another case of note prior to *New Jersey v. T.L.O.* took place in the Ninth Circuit. *Bilbrey v. Brown* (1984) involved two younger students who were observed on the playground passing something to one another.[50] Suspected of trading drugs, administrators called the two students into an office, and they were searched. One student was strip-searched to their underwear. Consent to the search was debated at the trial court level with the administrators saying they asked to consent and the students saying they were just told they were being searched. No drugs or illegal substances were found. The school administrators conducting the searches in *Bilbrey* relied on a qualified immunity defense that was recognized in *Scheuer v. Rhodes* (1974), but the Ninth Circuit held that the principal and teacher who conducted the searches were not entitled to a good-faith immunity and that the search was unconstitutional.[51] The immunity doctrine has subjective and objective elements. An administrator must sincerely have a "good faith belief that he is doing the right thing."[52] Further, that administrator or school official is only immune if he or she "reasonably believed he had a lawful right to take the action in question."[53] Subsequently, school administrators, including those in *T.L.O.*

thought a similar immunity applied to them when searching students' effects. All of the cases above set the stage for the Supreme Court to take on a case like *New Jersey v. T.L.O.*

New Jersey v. T.L.O. *(The Facts)*

Before discussing the Supreme Court's ruling and the impact it had on the Fourth Amendment as it applies to school searches, it is important to understand the facts surrounding this case. The complaint brought before the Juvenile and Domestic Relations Court in Middlesex County arose from a search that occurred on March 7, 1980, in Piscataway High School, when a teacher at this school observed 14-year-old T.L.O. and another student smoking cigarettes in the girls' bathroom.[54] The teacher escorted both girls to an assistant vice principal's office where they were questioned about the incident.[55] The vice principal was a man named Theodore Choplick, who had been vice principal at Piscataway High School for over twenty years. He viewed himself as a surrogate parent, saying "[w]e are responsible for them... I treat them like they are my children."[56]

At the time the children were escorted to Choplick's office, there was no suspicion of any drug violation. As head of discipline, Choplick knew the school had the "typical" problems such as fist fights, alcohol, and teen pregnancy, but he also knew the school had drug problems too. Choplick later said he was surprised to find T.L.O. and her friend in his office, stating "[t]hey were not the ones I was watching."[57]

Once both girls were in the office, he began questioning them about the smoking violation. One girl admitted to the violation and was punished accordingly and sent on her way. However, T.L.O. denied smoking, saying "she didn't smoke at all."[58] Choplick, again privately asked if she had been smoking, in which T.L.O. again denied the accusation.[59] The vice principal requested the student's purse and began inspecting its contents.[60] This kind of search was not unusual for him: "I had asked boys and girls before to empty out their purses or give me their wallets. If they had book bags, we looked in the book bags. We did all of that."[61]

Once Vice Principal Choplick opened the purse, he saw a cartridge of Marlboro cigarettes sitting on top.[62] He removed the cigarettes and accused T.L.O. of lying.[63] Choplick then looked back down and saw E-Z Widers, which he knew to be a common rolling paper used for marijuana. He immediately emptied the purse and discovered a "pipe, several empty plastic bags, and one containing a tobacco-like substance." He opened one of the bags and it smelled like marijuana. After seeing all of this contraband, Choplick searched further and discovered $40 in singles in her wallet, along with an index card that had the heading "People Who Owe Me Money," with a list of names and amounts.[64]

The police and T.L.O.'s parents were then notified.[65] T.L.O., while in police custody, stated that she had sold around twenty marijuana cigarettes for a dollar each. As a result of this search and discovery, T.L.O. was suspended from Piscataway High School for three days for the cigarette violation and another seven days for the marijuana violation. T.L.O. was also subsequently charged with delinquency based on possession of marijuana with intent to distribute.

Two proceedings got underway, one in criminal court on the delinquency charges and another in civil court by T.L.O.'s parents seeking an order to show cause in order to get their daughter reinstated in school. The civil court judge found that the search violated the student's rights under the Fourth Amendment. T.L.O. also sought at the Juvenile Court to bar this matter entirely through a motion to dismiss, asserting the "doctrines of res judicata and collateral estoppel." Specifically, T.L.O. asked the court to suppress evidence

recovered because it was only discovered through an unconstitutional search.[66]

The Players

The media attention that T.L.O. and her family endured was unwanted. This was in no way a test case. Since the case began T.L.O. has adamantly refused to be interviewed and out of respect for her and her family this article will not reveal her name or whereabouts. She has since gone on to business school and has several children.[67]

Lawyers involved in this case were willing to speak on the record about their legal strategy. They believe this case should be looked at in its entirety rather than just what is in the opinion by the Supreme Court. David B. Rubin represented Piscataway's school district at the time the case took place in 1980. He continues to be an attorney in New Jersey who has been representing many different school districts for over 40 years. Rubin was also involved in representing the school district in the civil litigation against T.L.O.'s parents.[68] The judge involved in the civil case was David D. Furman of the New Jersey Superior Court. According to Rubin, he was "an avid civil libertarian" who "if he had a clean slate would find some way to not let this evidence in." It was of no surprise to Rubin when Judge Furman held the search violated the student's Fourth Amendment rights and the district could not use any evidence uncovered.[69]

Rubin and his colleagues decided not to appeal this decision, but rather to wait and see how the juvenile case down the hall went in Judge George Nicola's courtroom at the Middlesex County Juvenile and Domestic Relations Court.[70] Rubin said this felt like a safe gamble because Judge Nicola was a more conservative judge who if "he had a clean slate would find some way to let the evidence in."[71] Judge Nicola had the nickname "The Ayatollah Nicola" because he was known for being a strict juvenile court judge. His courtroom would be set up like you were going to see the Wizard of Oz in order to scare the kids straight. He was described by many lawyers to have "a heart of gold" and spent the majority of his career on the bench as a juvenile court judge and was also involved in a number of committees dealing with juvenile justice. Rubin hoped to use the conviction itself as the evidence in the suspension.[72]

Rubin described this case as one that took a surprising turn. During the 1980s, "drugs in suburbia were becoming a phenomenon," he recalled, "especially in Piscataway New Jersey."[73] College kids from the Rutgers University campus and dealers from nearby cities led to drugs infiltrating the community.[74] However, the search that occurred in March of 1980 was not for the purpose of finding drugs, it was a case about cigarettes, and drugs happened to "fall in Principal Choplick's lap."[75] He mused that "no one at the time expected this small ninth grade girl to be what would be considered in Piscataway New Jersey at the time a drug kingpin."

Lois DeJulio, the former public defender for T.L.O., agreed that it was not a test case but that it unexpectedly ended up becoming a landmark case in constitutional law.[76] DeJulio compared *T.L.O.* to *Tinker* and said the Tinkers knew the law they were challenging, whereas T.L.O. did not and did not want to.[77] DeJulio said "this case meant nothing but trouble for her and her family because of how the media pounced upon it."[78] Indeed, the local papers covering the place T.L.O. lived revealed a great deal of misinformation about her and the case. One incident sheds light on how intense the media scrutiny was and how it negatively affected the family. Local television station (Channel 5) discovered the address of T.L.O. and sent a news van to park in front of her house.[79] T.L.O. has a sister that is close in age and, at the time, the two looked quite a bit alike. The sister was on her way home from school when this

news team physically grabbed her thinking she was T.L.O.[80] Eventually the local law enforcement intervened.

The scrutiny and misinformation by the media led juvenile court Judge Nicola to hold a press conference inviting the media to his courtroom. Without revealing T.L.O.'s identity he simply said: "I feel that I have to correct the record. This case is a poster child case for how well the system works. The juvenile involved received probation and counseling, completed high school, went on to business school, and is living a productive life as a member of the community."[81] According to DeJulio, this type of press conference was extremely uncommon.[82] She also theorized about the impact the media could potentially have had if this case had been a jury trial. The publicity had such a huge impact on the case that it was what ultimately allowed it to get to the Supreme Court.[83]

Once the appeals were under way, T.L.O. was ordered by the judges to continue with probation and counseling.[84] According to DeJulio, the prosecutor, T.L.O., and her family were all perfectly happy with this result. However, the media attention was so frenzied that the school board decided they were going to expel T.L.O. It was then that she and her family knew they needed to apply to the public defender's office. She was assigned DeJulio.[85] After the expulsion decision was released, DeJulio sought an order to stay the action pending the outcome of the appeal. New Jersey appellate judges convened an emergency proceeding and granted the stay order.[86] Had the school board not given in to pressure by the media and tried to expel her, there would not have been an appeal because all parties were satisfied.

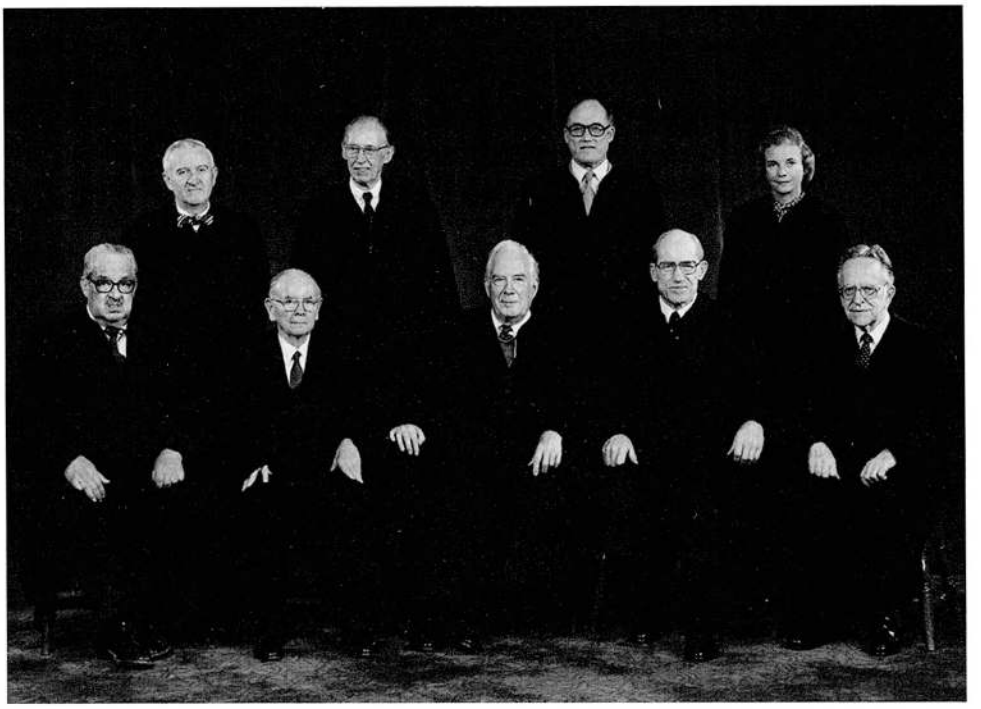
Leading up to the Supreme Court

No Supreme Court rulings existed at this time on whether a school principal or administrator was subject to the limits

The New Jersey Supreme Court held that the vice principal lacked "reasonable grounds to believe that the student was concealing in her purse evidence of criminal activity or evidence of activity that would seriously interfere with school discipline or order."

of the Fourth Amendment.[87] Lower courts were all over the place, some on the side of *in loco parentis* allowing school authorities to act as parents and not bound by the Fourth Amendment, while others held school authorities to the strictest standards of the Fourth Amendment.[88] The exclusionary rule regarding contraband discovered after a Fourth Amendment violation in schools had not been addressed. Therefore, this case was neither obvious nor straightforward and moved through the courts like a "roller coaster."[89]

The Juvenile and Domestic Relations Court of Middlesex County held that the search of T.L.O. was reasonable because of the circumstances. The vice principal had a "duty to investigate" T.L.O. and whether a violation had occurred on school grounds.[90] The court ruled that the administrator did not violate the Fourth Amendment because the search was permissible under the 'plain view' doctrine, an exception to the warrant requirement.[91] The Juvenile Court also touched upon the issue of consent, writing "[a]ny consent to the search of the purse by the juvenile was ruled ineffective due to a failure to advise her that she had a right to withhold such consent."[92]



When the Burger Court (above) heard the T.L.O. case in March 1984, both parties argued the exclusionary rule. The justices requested that the case be reargued on October 2 to focus on whether school officials were bound by the Fourth Amendment.

T.L.O. appealed the Juvenile Court's ruling to the New Jersey Superior Court. The Superior Court (Appellate Division) affirmed the denial of the motion to suppress due to the reasons asserted at the Juvenile Court. It vacated the delinquency order and remanded it for further proceedings due to the trial court lacking sufficient findings "to determine the sufficiency of the Miranda waiver which was assertedly made by or on behalf of the juvenile immediately before her resumed questioning by the police officer."[93]

The New Jersey Supreme Court reversed. It concluded the vice principal lacked "reasonable grounds to believe that the student was concealing in her purse evidence of criminal activity or evidence of activity that would seriously interfere with school discipline or order."[94] Further, the court held that a student's expectation of privacy exists when it comes to the contents of his or her purse.[95] The holding noted the possession of cigarettes did not violate school rules because there were designated smoking areas.[96] Finally, the court held that the vice principal at best had a "hunch" that cigarettes were in T.L.O.'s purse which was not enough to conduct a search.[97]

The New Jersey Supreme Court included a companion case, *State v. Engerud* (1983), in its opinion,[98] which involved the search of a high school student's locker pursuant to a tip that he was selling illegal substances in school.[99] The defendant was killed in a motorcycle accident after the court's decision and his appeal became moot.[100] The New Jersey legislature promptly adopted a statute allowing the searches of lockers without reasonable suspicion as long as students were put on notice in advance.

New Jersey v. T.L.O. *(Supreme Court)*

The state of New Jersey appealed. Deputy Attorney General Allan J. Nodes asked the Supreme Court of the United States to review the case but did not ask the justices to reverse the state court's holding in its entirety.[101] New Jersey focused on the use of the exclusionary rule. "We felt more comfortable asking for a modification of a judge made rule, like the exclusionary rule," recalled Node, than asking for a modification of the Fourth Amendment. On the other side, Lois DeJulio, still representing T.L.O., was "dreading what was going to happen next." She said she was "very afraid that this would be the end of the Fourth Amendment for juveniles." DeJulio emphasized that this was "not a case where [T.L.O.] set out to test constitutional rights." In fact, by the time the case was decided by the Supreme Court, T.L.O. had been readmitted and graduated high school.[102]

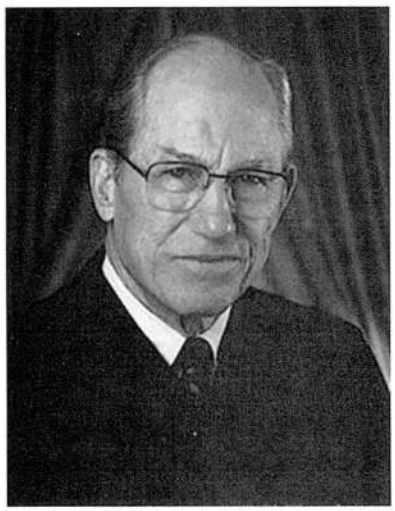
During the first round of oral argument on March 28, 1984, both parties argued about the exclusionary rule. The Court, however, requested to hear arguments focused on whether school officials were bound by the Fourth Amendment. On October 2 the case was reargued; the Supreme Court published its decision on January 15, 1985.

Justice Byron R. White wrote the opinion for the 6–3 Court. He generally used a fact-specific philosophy, consistently voting against creating constitutional restrictions on the police. White had notably dissented in *Miranda v. Arizona* (1966). His majority opinion first held that when "carrying out searches and other disciplinary functions pursuant to [school] policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment."[103] White further noted that few other courts had concluded school officials are exempt from the scope of the Fourth Amendment.

The Court's opinion then stated that "the standard of reasonableness governing any specific class of searches requires 'balancing the need to search against the invasion which the search entails.'"[104] White also noted that a search of a child's person or purse is no different from the search of one on an adult.[105] The Court agreed with its previous holding in *Hudson v. Palmer*, that for an expectation of privacy to be protected under the Fourth Amendment, it must be one that society "prepared to recognize as legitimate."[106]

Deputy Attorney General Nodes of New Jersey had argued that society was not willing to recognize any privacy interest in public school children's personal property. The opinion did cite a study by the U.S. Department of Health that in 1978 school discipline was seen as necessary in order to prevent the rising social problems of drug use and violent crime in schools.[107] It then listed precedents that stated discipline in schools sometimes required quick and effective action.[108] The Court noted, however, that in 1985 there was no dire situation in schools that required students to give up their expectation of privacy. Additionally, the Court said there was no reason to conclude that all rights to privacy in items brought onto school grounds are waived.

As for the warrant requirement, the Court held it was not useful for schools and would "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." Further, it noted there is a substantial need for administrators to quickly conduct a search in order to maintain school discipline and order. In conclusion, White's opinion created a two-fold test that would allow for a search of a student's personal property, such as a purse. He stated: "first, one must consider 'whether the . . . action was justified at its inception; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'"[109] Turning to



Justice Byron R. White wrote the opinion for the 6–3 Court. He held that when "carrying out searches and other disciplinary functions pursuant to [school] policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment."

the facts, the Court held that the search of T.L.O.'s purse was not unreasonable in the scope of the Fourth Amendment.[110]

Although Justice White authored the majority opinion, several other justices wrote their own analysis of why this conclusion was reached. Justice Lewis F. Powell, joined by Justice Sandra Day O'Connor, concurred, but wanted to emphasize the "special characteristics of elementary and secondary schools...."[111] Justice Powell articulated his belief that there is a lower expectation of privacy within schools than within the general public in a non-school setting because of the special relationship between the teacher and the student. Powell stated, "[o]f necessity, teachers have a degree of familiarity with, and authority over, their students that is unparalleled except perhaps in the relationship between parent and child." Further, Powell said this familiarity or commonality of interests between students and teachers provides the state with a compelling interest in assuring the education and training of the students is done safely.[112]

Justice Harry Blackmun also concurred in *New Jersey v. T.L.O.* and concluded that teachers should be held to a lower standard when conducting searches in public schools because the need in society was so great. Specifically, Justice Blackmun stated that a crucial step of analysis was omitted: limiting exceptions to the probable-cause requirement when a public interest is best served with a lesser standard.[113] He gave the example of *Terry v. Ohio*, where law enforcement officers are held to a lower standard when conducting a stop and frisk because the action was limited in scope.[114] Stop and frisk was deemed by the state as an important government interest that requires a step away from the probable-cause balancing test. Blackmun reasoned that a public-school setting creates "a special need for flexibility, justifying a departure from the balance struck by the Framers." In his concurrence, he argued that "because drug use and possession of weapons have become increasingly common among young people, an immediate response frequently is required not just to maintain an environment conductive to learning, but to protect the very safety of students and school personnel." Blackmun saw the worry over drug use in schools and said immediate action must be necessary as it is a legitimate government interest. He also emphasized the difficulty of holding a higher standard for teachers. Specifically, immediate action would not be possible if a warrant is required because of its lengthy process. Furthermore, teachers do not have the day-to-day training law enforcement officers have when determining probable cause.[115]

Three justices disagreed with at least part of the majority opinion. All three dissenting justices found judicial activism was taking place. Justice William J. Brennan, with whom Justice Thurgood Marshall joined in part and dissented in part, wrote an opinion focusing on the improper standard being applied. He emphasized that judicial notice should be taken regarding the growing

problem of drugs in public schools, but that this reason alone did not justify this specific search.[116]

Justice Brennan stated the majority's opinion created a 'reasonableness' standard to be applied when analyzing a school official's ability to search student's person and belongings.[117] This standard is different from the probable-cause standard found in the Fourth Amendment. Further, he reasoned this exception by the majority is not supported by either precedent or a fair application of the balancing test. Here, Brennan argued, a serious intrusion of T.L.O.'s privacy took place when a detailed and lengthy examination of her purse was conducted, and the contents thoroughly scrutinized. This serious intrusion weighed against a government's interest of preventing minor infractions and did not create the justification for this exception. Rather, Brennan claimed that the probable-cause standard should be applied. When he applied the facts here to the probable-cause standard, he found that Vice Principal Choplick's search violated T.L.O.'s Fourth Amendment rights because the search went beyond its scope. Once the cigarettes were located, the search ended, and the continuous rummage through her belongings was a violation of her rights.[118]

Justice John Paul Stevens, with Justice Marshall joining and Justice Brennan joining as to part 1, submitted his dissenting opinion. The dissent revolved around the idea of an eager judiciary that "seized upon this 'no smoking' case to announce 'the proper standard' that should govern searches by school officials who are confronted with disciplinary problems far more severe than smoking in the restroom."[119] Further, Justice Stevens, along with Brennan and Marshall, stated that overreach by the judiciary would produce a precedent allowing school officials to search students suspected of the most trivial school regulations. Stevens bluntly said that the doctrine of judicial restraint was ignored when the Court ordered a reargument and directed the parties to consider a constitutional question that neither party wished to address.[120]

Justice Stevens focused on the specific facts that led up to the search of T.L.O.'s purse. He concluded that the suspected misconduct of smoking was not illegal because there were designated areas for smoking, and this activity did not pose a serious threat to school discipline. Furthermore, Stevens found the search of the student's purse to be a serious invasion of her legitimate expectation of privacy and that the need to search against this invasion must be analyzed.[121] The state, he said, is required to identify some serious and immediate consequences. Stevens reasoned that the nature of the infraction was the most important variable when determining if the invasion was justified. He concluded that no hunch of criminal activity existed, and because the school allowed smoking in designated areas, the search of the handbag had no direct bearing on the infraction of smoking in the bathroom. Furthermore, he expressed concern about the open-ended precedent that was being set by the majority. It may make the Fourth Amendment "virtually meaningless in the school context," he wrote.[122]

It is important to recognize that everything leading up to this decision was not based on the state of New Jersey or T.L.O. herself, but rather reflected a Court that was eager to clear up ambiguities in the law surrounding school searches. This case garnered interest from a variety of groups—including eight that filed amicus briefs—which recognized the impact it could have.[123] Most of the amicus briefs argued for or against the exclusionary rule and did not weigh in much on the Fourth Amendment. It was the justices, not the lawyers, who asked for the case to be reargued to focus on the Fourth Amendment.[124] Indeed, the Court itself wanted to use this case as the precedent-setting case regarding Fourth Amendment and school searches. Justice Steven's dissent in part 1, joined by three of the nine justices, argued that judicial activism was a factor

in reaching the Court's decision rather than applying the facts as presented and answering the specific questions proposed by all parties involved.

Impact

New Jersey v. T.L.O. was, as Rubin put it, "Ground Zero" for searches in public schools.[125] The decision led to much debate in the 1980s and 1990s on what constituted a search so that Peter Veniro, the New Jersey Attorney General, released a manual to public schools consisting of over 100 pages of guidance for school officials on searches and seizures.[126]

Drug Searches in Public Schools

After *New Jersey v. T.L.O.*, public schools began conducting searches based on the two-part analysis provided by the Court. In 1996, the Supreme Court of Illinois held in *People v. Dilworth* that the Joliet Alternate School correctly applied T.L.O.'s "reasonable suspicion" standard when a school security officer searched a student's flashlights and discovered cocaine.[127] Just like T.L.O., the search was based on a report that the student had been violating school rules. The court stated that it was reasonable and permissible within the scope of the Fourth Amendment.[128]

Another example is *In re Murray*, where a student's bookbag was searched based on a tip from a student.[129] In 1998, a student at Williston Middle School alerted an assistant principal that the defendant was holding something in their book bag that was not allowed in school.[130] The accused student denied having any contraband, but the assistant principal stated she needed to search the student's bag. The student requested his father be called and that the book bag not be searched. When the school's Resource Officer arrived on the scene, he asked to search his book bag, but the student did not let him. The Resource Officer than grabbed the student and handcuffed him, searched the bag, and a pellet gun was found. Applying the ruling of *New Jersey v. T.L.O.*, the court first determined the assistant principal had reasonable grounds for suspicion based on the tip from another student. It then held that the second part in *New Jersey v. T.L.O.* was met in light of the circumstances: the student refused to hand over the book bag and therefore the handcuffing may have been reasonably necessary.[131] The handcuffs allowed a safe search of the book bag without any interference or danger to all individuals in the room. The court, applying the reasonable standard, held the entire search did not violate the student's Fourth Amendment rights.

While the cases aforementioned agreed with the holding in *T.L.O.* and applied its two-part test, some cases have since revised the holding. For example, in *Commonwealth v. Damian D.*, the court held that the search of a student did not reach the reasonableness standard because truancy alone could not establish reasonable suspicion.[132] Another case that affected *T.L.O.* was *Safford Unified School District No. 1 v. Redding*.[133] In that case, an eighth-grade middle-school girl was apprehended by an assistant principal based on a tip she was distributing pills to her classmates. Like T.L.O., the girl also denied involvement in distributing drugs. The school administrator searched the student's belonging for evidence, and when he did not find any evidence of the alleged violation, the student was instructed to be strip-searched in the nurse's office.[134] The Supreme Court in 2009 decided that this search was unreasonable because of the "excessively intrusive" nature of the search.[135] Further, the Court held the search was unreasonable because of the high level of expectation of privacy that exists for students' undergarments. Moreover, the administrator lacked reason to believe the pills were hidden in her underwear.

New Jersey v. T.L.O. opened the doors to other cases involving the diminished

expectation of privacy regarding students in schools. For example, in 1995 the Supreme Court in *Vernonia School District 47J v. Acton* upheld the random drug testing of athletes.[136] In 2002 the Court in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* upheld drug testing of all students participating in after-school activities, not just athletes.[137] The Court reasoned that the school board's interest in deterring and preventing drug use by schoolchildren outweighed the minimal intrusions resulting from the search.[138] Further, the Court reasoned it is the student's ultimate choice to participate in these activities, therefore opening themselves up for a lower expectation of privacy.[139] Pursuant to the National Institute of Drug Abuse, drug use rates have consistently increased over the last few decades, confirming a viable government interest when it comes to protecting schoolchildren.[140]

Other Searches in Public Schools

The *T.L.O.* decision did not answer the question of whether students in public schools have an expectation of privacy in other areas outside their purses, such as lockers or desks, nor did it set a standard that school officials must follow when searching these other areas.[141] Lower courts began to issue decisions in cases involving searches pertaining to lockers, pockets, calculators, wallets, and jacket.[142] Eugene Lincoln in his article "Searches and Seizures in Public Schools: Going Beyond the Supreme Court's Ruling in New Jersey v. T.L.O.," summarizes their holdings as follows: (1) school searches will extend beyond the purse and consist of personal property and school property while on school premises; (2) the school official will have the burden to show the search was based upon reasonable suspicion; (3) the school official may be required to show a rule was violated and the search could expect to produce evidence of said violation; (4) school security guards will be considered "school officials" or "school authorities"; and (5) in cases involving multiple searches, school officials will "be required to show that each of the searches was 'justified at its inception."[143]

Although *T.L.O.* set a precedent for searches related to drug violations, it also has implications for a new problem: schools looking for weapons on school grounds. Public schools across the nation began creating policies that allowed for school officials to search students for weapons. Many of these searches were challenged in court. For example, in *In re Latasha*, the Fourth Circuit held the searches for weapons met the standard for constitutionality under *T.L.O.* because "[t]he need of schools to keep weapons off campuses is substantial. Guns and knives pose a threat of death or serious injury to students and staff."[144]

Electronic Searches

New Jersey v. T.L.O. took place in the 1980s when technology was limited compared to today. A recent survey found 53 percent of U.S. children by the age of 11 possess a smartphone and 84 percent of high school–aged students own smartphones.[145] Schools have a genuine interest in limiting access to cell phones in public schools because studies have found they are distracting to the students and can be used as tools to cheat.[146] As a result, the majority of schools in the United States have a policy regarding cell phones.[147] Courts began to apply the two-point test established in *T.L.O.* to cases involving cell phone searches, with varying results.[148]

In 2006, a district court in Pennsylvania held that a search of a student's cell phone for the purpose of acquiring evidence of another student's misconduct failed the two-point test set out in *T.L.O.*[149] In *Klump v. Nazareth Area School District*, it determined that the search was justified in this situation because

a student was violating school policy when the phone fell out of his pocket. However, the search was not reasonable in its scope.[150] A district court in Mississippi held that a search of a student's cell phone was reasonable when this student was intentionally violating school policy.[151] The court in Mississippi did distinguish this case from *Klump* stating that the plaintiff's intentional violation of school policy "further diminish[ed] his expectation of privacy."[152]

The Sixth Circuit also heard a case in 2013 regarding two instances of a cell phone being searched by a school official.[153] The first instance related to a principal searching a student's cell phone for any evidence of suicidal tendencies after the student told the principal he was feeling depressed.[154] Although the principal found no evidence on the student's phone, the Sixth Circuit held this search was reasonable.[155] The second instance related to a teacher confiscating and searching a student's cell phone after witnessing the student use the phone in school.[156] The school argued reasonable suspicion existed to search the phone because the student was a "drug abuser with suicidal tendencies...."[157] The Sixth Circuit rejected reasoning that allows for a search of a cell phone if a student intentionally violates school policy.[158] It held reasonable suspicion did not exist because there was no evidence the student was involved in drug activity or had suicidal thoughts.[159] As the cases above make clear, *New Jersey v. T.L.O.* cleared up some ambiguity in the law, but still left many issues involving the search of students on school grounds and student privacy unresolved.

Conclusion

There is value in understanding the full picture of what happened surrounding the much-cited Supreme Court case *New Jersey v. T.L.O.* Understanding when and where this case took place in history, makes it clear why a case like this came about in the first place. Unraveling the facts and circumstances of the actual search and the subsequent litigation gives a perspective on the impact this case had on individuals who had no intention of challenging the Constitution. Finally, the holding in *New Jersey v. T.L.O.* poured over into countless decisions and continues to be used to this day. DeJulio described the case as an "accident of history," but it is because of this accident we have had such development in the law regarding school searches.[160]

ENDNOTES

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[1] U.S. Const. amend. IV.

[2] *New Jersey v. T.L.O.*, 469 U.S. 325, 328 (1985).

[3] *Ibid.*

[4] *Id.* at 347–348.

[5] Charles T. Clotfelter, **After Brown: The Rise and Retreat of School Desegregation** (Princeton University Press, 2004).

[6] Robert Caro, **The Power Broker: Robert Moses and the Fall of New York** (Knopf, 1974), 522.

[7] Hans Skifter, **Urban Sores: On the Interaction Between Segregation, Urban Decay, and Deprived Neighbourhoods** (2003).

[8] U.S. Censuses of Population and Housing, https://www.washingtonpost.com/wp-stat/graphics/politics/trump-archive/docs/atlantic-city-population-1990-census.pdf.

[9] *Welcome to Fear City* brochure (1975).

[10] New York Crime Rates 1960–2019, http://www.disastercenter.com/crime/nycrime.htm.

[11] Christina Sterbenz, "New York City Used to Be a Terrifying Place Photos," https://www.businessinsider.com/new-york-city-used-to-be-a-terrifying-place-photos-2013-7?r=UK (2013).

[12] *Ibid.*

[13] Mervin B. Freedman & Harvey Powelson, "Drugs on Campus: Turned On & Tuned Out," *The Nation*, 125–127 (Jan. 31, 1966).

[14] *Ibid.*

[15] Jennifer Robinson, "*Decades of Drug Use: Data From the '60s and '*70s," 2002 https://news.gallup.com/poll/6331/decades-drug-use-data-from-60s-70s.aspx.

[16] *Ibid.*

[17] *Id.*

[18] Emily Dufton, **Parents, Peers and Pot: The Rise of the Drug Culture and the Birth of the Parent**

Movement, 1976–1980 (2013) 219. http://sites.uci.edu/transscripts/files/2014/10/2013_03_15.pdf.

[19] *Ibid.*, 212–213.

[20] National Family Partnership, http://nfp.org/2016/03/07/nfp-mourns-the-loss-of-nancy-reagan/.

[21] *Ibid.*

[22] William Blackstone, **Commentaries** vol. 1, 453.

[23] Gilbert Botyin & Kenneth Griffin, "Drug and Alcohol Abuse," https://education.stateuniversity.com/pages/1923/Drug-Alcohol-Abuse.html.

[24] J. G. Bachman, L. D. Johnson, & P. M. O'Malley, "Explaining recent increases in students' marijuana use: impacts of perceived risks and disapproval, 1976 through 1996," 88(6) *Am. J. Public Health* 887–892 (1998).

[25] *Ibid.*

[26] Anthony Gillman, "*Use of Drug Detecting Dogs in Public High Schools,*" 56 *Indiana Law Journal* 321 (1980), https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article%3D;3538%26;context%3D;ilj.

[27] *Doe v. Renfrow*, 4775 F. Supp. 1012 (N.D. Ind. 1979).

[28] See *Jones v. Latexo Independent School* District, 499 F. Supp. 223 (E.D. Tex. 1980); *United States v. Venema*, 563 F.2d 1003, 1004 (10th Cir. 1977); *United States v. Bronstein*, 521 F.2d 459, 459 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); *State v. Young*, 234 Ga. 488, 216 S.E.2d 586 (1975); *State v. McKinnon*, 88 Wash. 2d 75, 558 P.2d 781 (1977).

[29] *Jones v. Latexo Independent School* District, 499 F. Supp. 223 (E.D. Tex. 1980), *citing Bellnier v. Lund*, 438 F. Supp. 47, 53 (N.D.N.Y. 1977).

[30] Watch: Ronald Reagan and his 'War on Drugs' 2017, https://timeline.com/ronald-nancy-reagan-war-on-drugs-crack-baby-just-say-no-cia-communism-racial-injustice-fcfeadb3548d.

[31] Telephone Interview with David B. Rubin, Managing Partner, David B. Rubin. P.C. (Nov. 5, 2020).

[32] Sally Bedell Smith, "Mrs. Reagan Takes Her Anti-Drug Campaign to Television," *The New York Times*, Oct. 11, 1983.

[33] *First Lady Biography: Nancy Reagan*, National First Ladies Library, Nov. 9, 2008.

[34] *Diff'rent Strokes': The Reporter* (1983), imbd.com.

[35] *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 626 (1943).

[36] *Ibid.* at 628–629.

[37] *Id.* at 641–642.

[38] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

[39] *Ibid.* at 513.

[40] *Id.* at 509.

[41] *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 473 (5th Cir. 1982).

[42] *Ibid.* at 474.

[43] *Id.*

[44] *Id.* at 488.

[45] *Id.* at 478.

[46] *Id.* at 479–480.

[47] Citing *Bellnier v. Lund*, 438 F. Supp. 47 (N.D.N.Y. 1977); *State v. Baccino*, 282 A.2d 869 (Del.Super.1971); *State v. Young*, 234 Ga. 488, 216 S.E.2d 586, cert. denied, 423 U.S. 1039, 96 S. Ct. 576, 46 L.Ed.2d 413 (1975); *People v. Scott D.*, 34 N.Y.2d 483, 358 N.Y.S.2d 403, 315 N.E.2d 466 (1974).

[48] *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 473 (5th Cir. 1982), citing *Goss v. Lopez*, 419 U.S. 565 (1975); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

[49] *Ibid.* at 481.

[50] *Bilbrey v. Brown*, 738 F.2d 1462, 1464 (9th Cir. 1984).

[51] *Ibid.* at 1472.

[52] *Id. at 1465.*

[53] *Id.*, citing *Wood v. Strickland*, 420 U.S. 380 at 322.

[54] *State in Interest of T. L. O.*, 178 N.J. Super. 329, 334, 428 A.2d 1327 (Juv. & Dom. Rel. 1980), *vacated*, 185 N.J. Super. 279, 448 A.2d 493 (App. Div. 1982), *rev'd sub nom. State in Interest of T.L.O.*, 94 N.J. 331, 463 A.2d 934 (1983), *rev'd sub nom. New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

[55] *Ibid.*

[56] Ellen Alderman & Caroline Kennedy, **The Right to Privacy** (1995) 36.

[57] *Ibid.* at 37.

[58] *State in Interest of T.L.O.*, 178 N.J. Super. 329, 335, 428 A.2d 1327 (Juv. & Dom. Rel. 1980), *vacated*, 185 N.J. Super. 279, 448 A.2d 493 (App. Div. 1982), *rev'd sub nom. State in Interest of T.L.O.*, 94 N.J. 331, 463 A.2d 934 (1983), *rev'd sub nom. New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

[59] **The Right to Privacy** 37.

[60] *State in Interest of T. L. O.*, 178 N.J. Super. at 335.

[61] **The Right to Privacy** (1995) 38.

[62] *State in Interest of T.L.O.*, 178 N.J. Super. at 335.

[63] **The Right to Privacy** (1995) 38.

[64] *State in Interest of T.L.O.*, 178 N.J. Super. at 335.

[65] *Ibid.* at 335.

[66] *Id.* at 336.

[67] Telephone Interview with Lois DeJulio, former Public Defender (Nov. 8, 2020).

[68] Telephone Interview with David B. Rubin.

[69] *Ibid.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] Telephone Interview with DeJulio.

[77] *Ibid.*

[78] *Id.*

[79] *Id.*

[80] *Id.*
[81] *Id.*
[82] *Id.* DeJulio also discussed how not all reporters were spreading misinformation.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] **The Right to Privacy** 40.
[88] *Ibid.*
[89] *Id.*
[90] *State in Interest of T.L.O.*, 178 N.J. Super. 329, 343, 428 A.2d 1327 (Juv. & Dom. Rel. 1980).
[91] *Ibid.* at 329.
[92] *Id.* at 335.
[93] *Id.* at 280.
[94] *State in Interest of T.L.O.*, 94 N.J. 331, 347, 463 A.2d 934, 942–943 (1983), *rev'd sub nom. New Jersey v. T.L.O.*, 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).
[95] *Ibid.*
[96] *Id.*
[97] *Id.*
[98] *State v. Engerud*, 93 N.J. 308 (1983).
[99] *New Jersey v. T.L.O.*, petition for cert., No. 73-712 (filed Oct. 7, 1983).
[100] *Id.* at 4.
[101] **The Right to Privacy,** 41.
[102] *Ibid.*
[103] *New Jersey v. T.L.O.*, 469 U.S. 325, 336–337 (1985).
[104] *Ibid.* at 337, *citing Camara v. Municipal Court*, 387 U.S., at 536–537.
[105] *Id.* at 337–338.
[106] *Id.* at 338, *citing Hudson v. Palmer* 468 U.S. 517 (1984).
[107] *Id.*, citing U.S. Dept. of Health, Education and Welfare, Violent Schools—Safe Schools: The Safe School Study Report to the Congress (1978).
[108] *New Jersey v. T.L.O.*, *citing Goss v. Lopez*, 419 U.S., at 580.
[109] *Ibid.* citing *Terry v. Ohio*, 392 U.S., at 20.
[110] *Id.* at 343.
[111] *Id.* at 348.
[112] *Id.* at 348–350.
[113] *Id.* at 351.
[114] *Id.* at 352.
[115] *Id.* at 352–353.
[116] *Id.* at 357.
[117] *Id.* at 354.
[118] *Id.* at 355–366.
[119] *Id.* at 371.
[120] *Id.* at 375.
[121] *Id.* at 375.
[122] *Id.* at 380–385.
[123] STATE OF NEW JERSEY, Petitioner, v. T.L.O., a Juvenile, Respondent., 1984 WL 565547 (U.S.), STATE OF NEW JERSEY, Petitioner, v. T.L.O., 1984 WL 565546 (U.S.), STATE OF NEW JERSEY, Petitioner, v. T.L.O., a Juvenile, Respondent., 1984 WL 565550 (U.S.).
[124] **The Right to Privacy** , 42.
[125] Telephone Interview with David B. Rubin.
[126] Peter Veniro, Attorney General, New Jersey School Search Policy Manual and Companion Reference Guide, 1998, https://www.state.nj.us/lps/dcj/school/.
[127] *People v. Dilworth*, 169 Ill. 2d 195, 200 (1996).
[128] *Ibid.*
[129] *In re Murray*, 136 N.C. App. 648, 649 (2000).
[130] *Ibid.*
[131] *Id.*
[132] *Com. v. Damian D.*, 434 Mass. 725, 730–731 (2001).
[133] 557 U.S. 364 (2009).
[134] *Ibid.* at 369.
[135] *Id.* at 375–376.
[136] 515 U.S. 646, 665 (1995).
[137] 536 U.S. 822, 838 (2002).
[138] *Vernonia*, 515 U.S. at 661; *Earls*, 536 U.S. at 834.
[139] *Ibid.*, at 831–832.
[140] National Institute of Drug Abuse, Dec. 18, 2019, https://www.drugabuse.gov/drug-topics/trends-statistics/monitoring-future/monitoring-future-study-trends-in-prevalence-various-drugs.
[141] Eugene Lincoln, "Searches and Seizures in Public Schools: Going Beyond the Supreme Court's Ruling in New Jersey v. T.L.O.," 57 (1) *The Journal of Negro Education* 3 (1988); citing *New Jersey v. T.L.O.*, 105 S. Ct. (1985), at 741, n.5.
[142] Eugene Lincoln, "Searches and Seizures in Public Schools: Going Beyond the Supreme Court's Ruling in New Jersey v. T.L.O.," 57 (1) *The Journal of Negro Education* 5 (1988); *citing* (1) *State of Washington v. Brooks*, 718 P.2d 837 (1986); (2) *Martens v. District No. 22, Board of Education*, 620 F. Supp. 29 (D. C. Ill. 1985); (3) *In re William G.*, 709 P.2d 1287 (1985); (4) *In the Interest of Guy Dumas, a minor*, 515 A.2d 984 (1986); (5) *In re Robert B.*, 218 Cal. Rptr. 337 (1985); (6) *In re Bobby B.*, 218 Cal. Rptr. 253 (1985); (7) *State of West Virginia v. Joseph T.*, 336 S.E.2d 728 (1985); and (8) *Cales v. Howell Public Schools*, 635 F. Supp. 454 (E.D. Mich. 1985).
[143] Lincoln, "Searches and Seizures," at 5–6.
[144] *In re Latasha W.*, 60 Cal. App. 4th 1524, 1527, 70 Cal. Rptr. 2d 886, 887 (1998).
[145] Victoria Rideout & Michael Robb, **The Common Sense Census: Media Use by Tweens and Teens** (Common Sense Media, 2019).
[146] S. John Obringer & Kent Coffey, "Cell Phones in American High Schools: A National Survey," *The Journal of Technology Studies*, 2016, 1.

[147] *Ibid.*

[148] Ross Hoogstraten, "Implications on the Constitutionality of Student Cell Phone Searches Following Riley v. California," 24 *Wm. & Mary Bill Rts. J.* 879, 889 (2016).

[149] *Ibid., citing Klump v. Nazareth Area School District*, 425 F. Supp. 2d 622, 640–641 (E.D. Pa. 2006).

[150] *Ibid.*

[151] *Id.* at 890; *citing J.W. v. Desoto County School District*, No. 2:09-cv-00155-MPM-DAS, 2010 WL 4394059 at 4 (N.D. Miss. Nov. 1, 2010).

[152] *Id.* at 899; citing *W. v. Desoto County School District.*

[153] *Id.* at 891; *citing G.C. v. Owensboro Public Schools*, 711 F.3d 623 (6th Cir. 2013).

[154] *Id.*; *citing G.C. v. Owensboro Public Schools*, at 627.

[155] *Id.*

[156] *Id.;* citing *G.C. v. Owensboro Public Schools*, at 634. 711 F.3d

[157] *Id.;* citing *G.C. v. Owensboro Public Schools*, at 633.

[158] *Id.* at 892; citing *G.C. v. Owensboro Public Schools*, at 633–634.

[159] *Id.*

[160] Telephone Interview with Lois DeJulio.

BOOK REVIEW

Paul Kens

Helen J. Knowles, **Making Minimum Wage: Elsie Parrish versus the West Coast Hotel Company**. Norman: University of Oklahoma Press, 2021, 257 pp. + acknowledgements, notes, bibliography, and index

In *West Coast Hotel v. Parrish* (1937), the Supreme Court upheld a Washington state law that instituted a minimum wage for women working in certain industries.[1] The dispute began when a chambermaid, Elsie Parrish, and her husband sued West Coast Hotel Company for having paid her less than the minimum wage set under the law. Relying on a doctrine established thirty-three years earlier in *Lochner v. New York* (1905), the company argued that the minimum wage law denied the parties' liberty of contract and was thus invalid as a violation of the Fourteenth Amendment guarantee that "no state shall deny any person life, liberty, or property without due process of law."[2] The Court rejected that argument. By refusing to follow the liberty of contract doctrine, the majority opinion in *West Coast Hotel* marked the end of a period of Supreme Court history during which a majority of Supreme Court justices were committed to a jurisprudence that restricted government authority to regulate business. That period is commonly referred to as the "Lochner era" or the "*laissez-faire* era."

Although the *Lochner* decision invalidated a state regulation, the *laissez-faire* era Court also limited the regulatory power of the federal government. In a series of 5-4 decisions, it applied a narrow interpretation of the Article I Commerce Clause and the taxing and spending power to overrule some of President Franklin D. Roosevelt's early New Deal programs.[3] Frustrated by the decisions that stymied his plans to address the Great Depression, FDR proposed his infamous "Court-packing plan," which would have increased the size of the Court to reverse the direction of its decisions. Common belief has it that the president's plan fizzled only when Justice Owen Roberts, who had regularly voted against regulation, switched sides to produce a 5-4 decision upholding the state regulation in *West Coast Hotel*. However, many legal historians now believe that this story, popularly captured with the phrase "a switch in time saved nine," is mostly myth.[4]

In **Making Minimum Wage,** Helen Knowles, associate professor of political science at SUNY-Oswego and a member of this journal's Board of Editors, provides an interpretation of early 20th-century cases concerning the constitutionality of shorter hours and minimum wage laws. She carefully places the development of precedent within the political and economic circumstances in which it takes place. But the inspiration for her work was her desire to put "people" into the scholarly commentary about the Supreme Court and its opinions.[5]

Knowles draws on an impressive array of sources to accomplish her goal. In addition to using existing books and articles, she has dug through collections of court records, newspaper files, memoirs of lawyers involved in the case, and the records of local historical societies. She has engaged in genealogical research producing some surprising discoveries. She also interviewed descendants of Elsie Parrish and other people connected to the dispute, and even local historians and leaders

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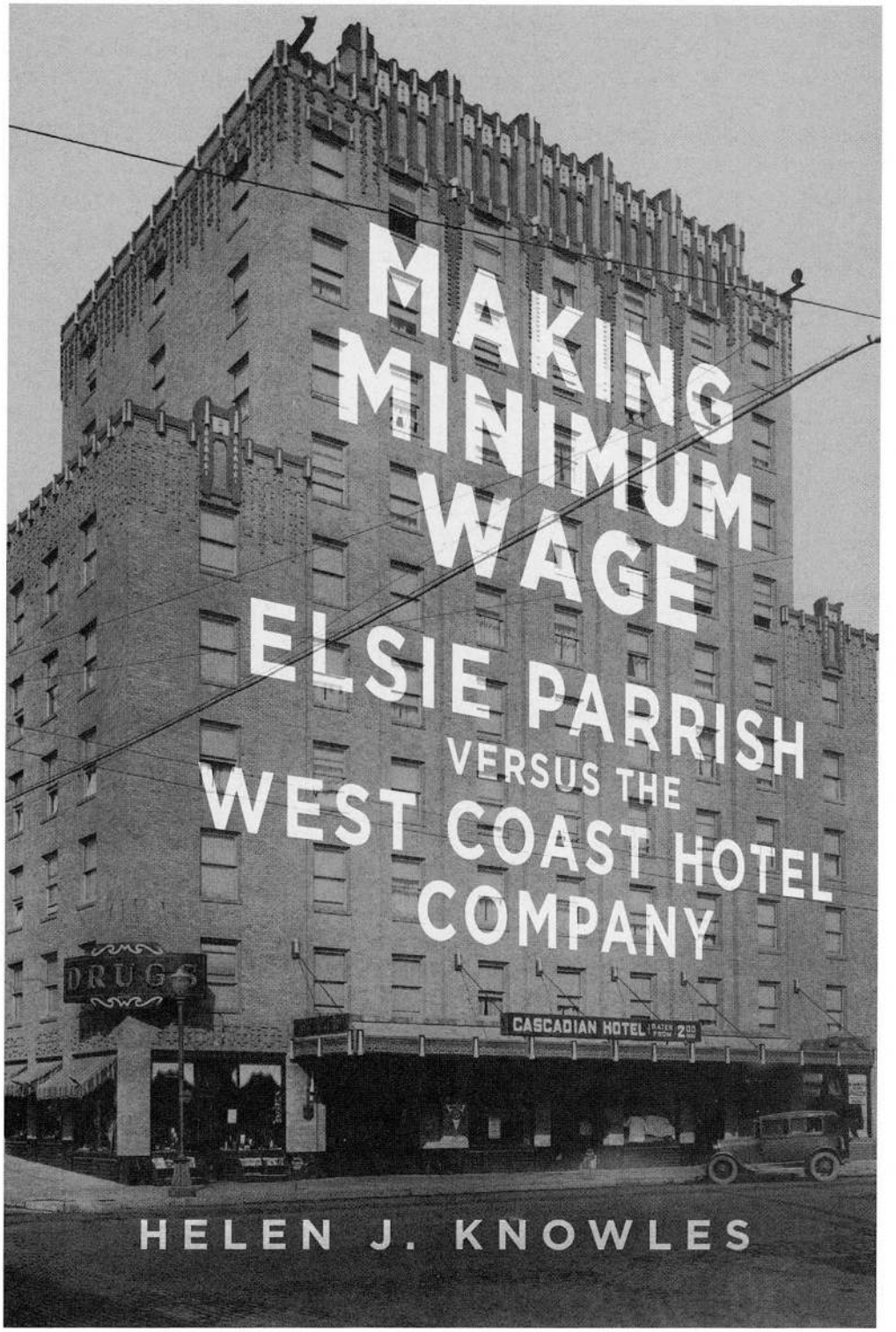

Helen Knowles' new book on *West Coast Hotel* draws on interviews with descendants of Elsie Parrish and other people connected to the case, as well as local historians and leaders of the communities in which it took place.

of the communities in which it took place. The result is an engaging and enlightening story about how real people feel the impact of Supreme Court decisions and how real people can have an impact on constitutional doctrine. It is also a detailed history of the campaign to secure minimum wage laws.

Knowles astutely points out that the Court's opinion in *West Coast Hotel* describes the parties to the case in just two sentences. "The appellant conducts a hotel. The appellee, Elsie Parrish was employed as a chambermaid and (with her husband) brought this suit to recover the difference between the wages paid her and the minimum wage fixed pursuant to state law."[6] Given only that terse description some readers might assume Parrish was born into poverty. But tracing Parrish's family back two generations, Knowles discovered her grandparents were Illinois pioneers and modestly successful farmers. Continuing the family tradition of homesteading, successive generations settled in Kansas, then in Montana. The picture Knowles paints is one of an extended family neither poor nor particularly secure. Bad luck or an unfortunate choice might cause whatever degree of prosperity they possessed to vanish—and Elsie Parrish had her share.

Born in Kansas in 1899, Elsie was the tenth child of Edward and Emma Murray. Her father died a year later in an agricultural accident, and her oldest brother drowned a year after that. After her mother had remarried in 1907, Elsie's new family moved to Montana to take advantage of a new homestead law. There, in 1914, at the age of fifteen, Elsie married Roy Lee, moved in with his family, and had the first of her seven children before she turned sixteen. Elsie and Roy left Montana in 1928, eventually ending up in Wenatchee, Washington. In 1933, she divorced Roy, who was an alcoholic. Now on her own, she took a job as a hotel chambermaid to support her family. In 1934, she married Ernest Parrish. She continued to work at the hotel until she was discharged on May 11, 1935. When the hotel offered to pay her $17 for wages earned, much less than she would have been entitled to under the minimum wage law, Elsie refused the money. This set in motion the lawsuit that would eventually lead to the Supreme Court.

The account of Elsie's life with Roy reads as a story of a woman trapped by her circumstances. But as the legal dispute over her wages progressed Elsie Parrish emerged as a strong-willed and determined woman. Knowles features other strong-willed and determined people who were involved. Interestingly, one of the featured characters is not a person at all. It is the Cascadian Hotel. Although the opinion in *West Coast Hotel* does not mention the Cascadian, it was there that Elsie was discharged from her job. The West Coast Hotel Company, a corporation, was its parent company.

Opened in 1929, the Cascadian was intended to be the crown jewel of main street Wenatchee. Knowles tells an interesting story of the history of the Cascadian and its importance to the small city of Wenatchee. Ray Clark, the Cascadian's first manager who guided the hotel through the early years of the Great Depression, is among the humans Knowles features. She also features Clark's successor, Willard Abel, who made the decision to fire Elsie. Frederick Crollard, the lawyer for the West Coast Hotel Company, and Parrish's attorney, C.B. Conner, are obviously important to her story. However, Knowles does not limit her treatment of the two lawyers to tracing their legal tactics and performances in court. She also digs into their reputations, personalities, and motivations. Conner left an unpublished memoir that proved valuable in her research. Her even-handed treatment of these people and others provides an exceptional back story of the case.

Knowles sets up her analysis of legal precedent with a very short summary of *Munn v. Illinois* (1876) to introduce the concepts of "substantive due process" and "af-

fected with public interest." But the anchor of her analysis is *Lochner v. New York* (1905), the 5-4 decision in which the majority ruled that a law setting maximum hours for bakers was an unconstitutional violation of "liberty of contract."[7] Knowles does not address the dissenting opinions. Instead, she uses the majority's liberty of contract rationale as the standard against which the subsequent cases workers' hours and minimum wage laws are measured. Liberty of contract was the rule. A state regulation of working conditions would only be a valid exercise of state authority if the state could show it deserved to be an exception to the rule. One category of exceptions fell under the states' power to protect the health of the public. The Court had, for example, upheld a statute limiting the hours of work in dangerous jobs.[8]

The Court recognized another exception in *Muller v. Oregon* (1908), when it upheld an Oregon law setting maximum hours for women working in various industries.[9] Muller was a victory for progressives seeking to improve the conditions of workers in an industrial society. But it was a victory accomplished at the expense of equality for women. As Knowles points out, the *Muller* opinion based its rationale for upholding the law on the Victorian era perception of female inferiority. Writing for the majority, Justice Brewer observed that, "A woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for substance." In his view, protection of women was not the only justification for the Oregon shorter hours law. "Healthy mothers are essential to vigorous offspring," he wrote. Preserving their well-being was a matter of public interest in preserving the "strength and vigor of the race."[10]

In *Bunting v. Oregon* (1917), the Court seemed to apply the public health exception again when it upheld a law limiting the hours of work for both men and women.[11] A bare majority of the justices agreed that working long hours was detrimental to the health of all employees working in certain industries. But *West Coast Hotel* would be different in that it required employers to pay a minimum wage for women. This allowed Knowles to set up her analysis with a question. Would the Court follow the rule (liberty of contract) or would it apply the exception (protection of women)?[12] There was, of course, a third possibility. The Court could reject the liberty of contract rule. Although it may not have seemed likely at the time, that is what the Court did in *West Coast Hotel v. Parrish*.

However, *West Coast Hotel* was not the Court's first foray into the matter of minimum wage laws. In *Adkins v. Children's Hospital* (1923), it overruled a District of Columbia minimum wage law for women.[13] Knowles notes that Justice George Sutherland's opinion for the 5-4 majority revealed his unshakable commitment to the doctrine of liberty of contract. She also emphasizes that Sutherland's rationale for rejecting the protection of women exception hinged in part on the ratification of the Nineteenth Amendment in 1920. Having won the right to vote, it demonstrated to him that "a woman no longer needed to be placed in a class by herself."[14] In 1936, just one year before *West Coast Hotel*, the Court reaffirmed the *Adkins* precedent in a case involving a New York minimum wage law.[15]

The Washington State Supreme Court surprised just about everyone when it chose not to follow the *Adkins* precedent.[16] Chief Justice William J. Millard's opinion for the state court upheld the minimum hours law, sending Elsie and Ernest Parrish's case on the path to the United States Supreme Court, which heard arguments in *West Coast Hotel Co. v. Parrish* on December 16–17, 1936. On March 29, 1937, by a vote of 5-4, it handed down its decision overruling *Adkins v. Children's Hospital* and upholding the Washington law. The result in *West Coast Hotel* was made possible because Justice Owen Roberts, who had voted against minimum wage laws in *Adkins*, famously switched

sides. Chief Justice Charles Evans Hughes wrote the majority opinion. Justice Sutherland, the author of the majority in *Adkins*, wrote a dissent.

Following the case's progress through the courts, Knowles nicely blends personal stories about the lawyers and judges into her analysis of their reasoning, arguments, and tactics. She also gives readers an interesting glance into the inner workings of the Court. Placing the dispute within the history of the Great Depression, she highlights the politics of the New Deal and describes the role of activist organizations, mainly the National Consumers League, in the struggle to improve the conditions of industrial workers.

After having fully covered the issues and precedent relevant to the dispute, Knowles turns to her analysis of the majority and dissenting opinions. Her decision early in the book to posture the challenge to the Court in *West Coast Hotel v. Parrish* as a question of whether to apply the rule from *Lochner* (liberty of contract) or the exception of *Muller* (health and protection of women) offered a good way to clearly explain the fluctuations of constitutional doctrine in the early 20th century. On the downside, it also treats *Lochner* as a given. That may have been accurate as a statement of the controlling precedent at the time. But Knowles' sparse treatment of *Lochner* and *Munn* misses an opportunity to place *West Coast Hotel* in the context of the broader history of the Court's jurisprudence in the *laissez faire* era.

This is revealed in her first comment about Hughes' majority opinion, where she states that he "did not deny that liberty of contract existed."[17] While it is possible to find language in the opinion to support Parrish's contention, I believe her conclusion misinterprets Hughes' intent. His full opinion, viewed within the context of the evolution of *laissez-faire* constitutionalism, is an unequivocal rejection of the doctrine of freedom of contract as a categorical right that restricted government authority to regulate business. This is evident in his first words on the topic.

> In each case the violation alleged by those attacking minimum wage regulation for women is derivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits deprivation of liberty without due process of law.[18]

Knowles' selective use of the majority opinion in *Lochner* gives the erroneous impression that liberty of contract was always considered to be a categorical right. In actuality, *Lochner* was the first important case to apply the liberty of contract doctrine. Even then, it was a 5-4 decision. Dissenting, Oliver Wendell Holmes rejected it outright. John Marshall Harlan accepted the possibility that a statute limiting a person's right to contract might violate the Fourteenth Amendment, but only if the statute was plainly and palpably, beyond all question outside the state's police powers. The *Lochner* doctrine dominated for only 33 years. It was controversial then and remains controversial today.

Other aspects of Knowles' analysis of the majority opinion are less debatable. Beginning with Hughes' observation that liberty is not absolute, she traces how he reversed the presumption that "liberty of contract is the rule and government regulation is the exception," which *Adkins* and earlier cases of the era had applied. In its place, Hughes held that a legislative act intended to protect the general welfare was presumed to be constitutional unless it is proved to be arbitrary or capricious.

After analyzing the opinions, Knowles turns to a chapter describing the impact of and reaction to the decision. In it, she points out that, while many people favored the outcome, some feminists, notably the National Woman's Party viewed it as "A tragic

setback for the advancement of women."[19] A leader in the movement for women's suffrage, the NWP viewed laws requiring minimum wages for women as perpetuating the unequal treatment of women.

She concludes with a nice epilogue to tell readers, "what happened to some of those characters after March 29, 1937, a time when most of them did indeed disappear into history."[20] Among those featured are the Cascadian Hotel and, of course, Elsie Parrish.

Making Minimum Wage is an excellent study of the debate over the constitutionality of minimum wage laws for women. It sheds new light on the circumstances, politics, and significance of *West Coast Hotel v. Parrish*. In the process, it illuminates the irony that to achieve the goal of assuring fairness for the working class, reformers of the era found it necessary to accept the idea that women are inferior. In the book, specialists will find something to debate. Non-specialists will find eye-opening facts. Everyone will learn more about the people involved. And some may wonder why in 2021 the medium income for women was still 83.1% of the median income for men.[21]

ENDNOTES

[1] *West Coast Hotel v. Parrish Co.*, 300 U.S. 379 (1937).

[2] *Lochner v. New York*, 198 U.S. 45 (1905).

[3] *Hammer v. Dagenhart*, 247 U.S. 251 (1918) is a textbook example.

[4] Barry Cushman, **Rethinking the New Deal Court: The Structure of a Constitutional Revolution** (New York: Oxford University Press, 1998).

[5] Helen J. Knowles, **Making Minimum Wage: Elsie Parrish versus the West Coast Hotel Company** (Norman: University of Oklahoma Press, 2021): 2–15.

[6] *West Coast Hotel*, 388.

[7] *Munn v. Illinois*, 94 U.S. 113 (1876); *Lochner v. New York*, 198 U.S. 45 (1905).

[8] *Holden v. Hardy*, 169 U.S. 366 (1898).

[9] *Muller v. Oregon*, 208 U.S. 412 (1908).

[10] *Ibid.*, 421; Knowles, 61.

[11] *Bunting v. Oregon*, 243 U.S. 426 (1917).

[12] Knowles, 63.

[13] *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

[14] Knowles, 97–98.

[15] *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936). The majority upheld a decision of the New York Court of Appeals.

[16] *Ernest Parrish et al. v. West Coast Hotel Company.*, 185 Wash 581 (1936); Knowles, 145–8.

[17] Knowles, 192–93.

[18] *West Coast Hotel*, 391.

[19] Knowles, 227.

[20] *Ibid.*, 236.

[21] https://www.bls.gov/opub/ted/2022/median-earnings-for-women-in-2021-were-83-1-percent-of-the-median-for-men.htm (accessed August 29, 2022).

The Judicial Bookshelf

Donald Grier Stephenson Jr.

Introduction: Salient Points from Recent Changes at the Supreme Court

On January 27, 2022, Justice Stephen G. Breyer officially notified President Joseph Biden of his intention to retire when the Court rose for its summer recess, "assuming that by then my successor has been nominated and confirmed."[1] The tenure of the 108th Justice had begun in August, 1994 after President Bill Clinton named him to fill the vacancy created by the retirement of Justice Harry A. Blackmun who had served since 1970.

Born in San Francisco in 1938, Breyer is a graduate of Stanford University as well as Oxford University where he was a Marshall Scholar prior to law school at Harvard. After clerking for Justice Arthur Goldberg, he was special counsel at the U.S. Senate Judiciary Committee in 1974–1975, and chief counsel to the committee in 1979–1980. It was in the latter position that Breyer and Senator Biden would probably have first worked closely together after Biden's appointment to the Judiciary Committee in 1977.[2] President Jimmy Carter then named Breyer to the Court of Appeals for the First Circuit in 1980. Thus, well-known and highly regarded by both Democrats and Republicans in the Senate, the nominee understandably encountered little resistance. On July 12, hearings convened for four days with confirmation, 87–9, following on July 29.

Both Justice Breyer's retirement[3] and President Biden's nod to Justice Breyer's former clerk Judge Ketanji Brown Jackson of the District of Columbia Court of Appeals as his successor illustrate five noteworthy points concerning appointments to the Supreme Court. First, because of the Constitution's stipulation for tenure "during good behavior," justices— like all Article III judges and in contrast to presidents, senators and representatives— serve terms of indeterminate length. Vacancies, therefore, are not only infrequent but occur intermittently. Thus, upon taking the oath of office, no new president is guaranteed the opportunity to fill a seat on the Court. President George W. Bush had two, as did President Clinton. President Ronald Reagan had four. President Jimmy Carter, however, had none. Yet early in the 20th century, William Howard Taft, a one-term president like Carter, had six. Even in the realm of Supreme Court vacancies, life can be unfair. For any president, therefore, a vacancy at the Court is not merely an event, but a gift.

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Second, partisanship has long played a role in the arrival of new justices. While a president's selection of a particular nominee is the product of multiple factors, among them is almost always is an individual's party identification—in the modern era whether the person is a Democrat or Republican. Moreover, this is no recent development. The practice dates from the beginning of government under the Constitution, as the party system was beginning to take shape. Indeed, the first exception to what has become almost a rule did not occur until 1863, when President Abraham Lincoln, a Republican, picked Stephen Field, a Democrat. Furthermore, the custom of choosing within one's party has persisted with only a handful of exceptions since Field's time. After World War II, for example, there appear to be only three: Democratic President Harry Truman's selection of Republican Harold Burton in 1945, Republican President Dwight Eisenhower's appointment of Democrat William Brennan in 1956, and Republican President Richard Nixon's choice of Democrat Lewis F. Powell in 1971. There have been no crossovers since.

Third, partisanship seems to be reflected as well with respect to departures from the Bench. Of the 19 retirements from the Court since 1945 that were not precipitated by a major health calamity—or sudden resignation, only six occurred in situations where the presumed party identification of the departing justice differed from the party identification of the president who then named a replacement.

Fourth, Justice Jackson's appointment reinforces the observation that there is now a nearly ironclad expectation that nominees for the Supreme Court will have seen service on one of the U.S. Courts of Appeals. Indeed, of the 19 appointments (counting William H. Rehnquist only once) to the Supreme Court between 1969 and the first half of 2022, all but four (Powell, Rehnquist, Sandra Day O'Connor, and Elena Kagan) reached the High Court from a federal court of appeals.[4]

This expectation of federal appeals court service has also meant that the career paths of those now sitting on the Court, as well as those who served in recent years, differ markedly from the backgrounds of justices who sat just a few decades ago. Consider, for example, those who decided *Brown v. Board of Education*.[5] That Court from 1954 was not populated mainly by those with prior judicial experience of any kind. Instead, one finds only one justice who reached the Court with any significant judicial experience, and he had also been a U.S. senator. In addition, one finds a governor who had also been vice-presidential candidate on his party's ticket, two other former senators, one regulatory agency chair, one law school professor, and two attorneys general one of whom had also been solicitor general.

Fifth, the date of Justice Jackson's nomination on February 25 combined with uneventful hearings and a favorable Senate vote 53–47 on April 7, 2022, resulted in what is a gap of historic proportion between her confirmation and her swearing-in on June 30.[6] Rarely, if ever, has a confirmed nominee had to sit so long on the sidelines before joining the Supreme Court.[7]

The First Chief Justice

Among the forty-six American presidents to date, not even Franklin D. Roosevelt's tally of nine appointments to the Supreme Court has surpassed George Washington's eleven.[8] Given that the government under the Articles of Confederation had no national tribunal, one suspects that there was great anticipation concerning the identity of these new judges for the nation, in particular the person who would head the Court. According to Charles Warren, the selection of a chief justice "was by far the most important and had given to the President the greatest concern. Rightly he felt that the man to head this first Court must be not only a great lawyer, but a great

statesman, a great executive and a great leader as well."[9] Washington's choice was John Jay of New York, the focus of **The First Chief Justice** by Mark C. Dillon,[10] who is Justice of the Appellate Division of the New York State Supreme Court, in the Second Judicial Department in Brooklyn. His compact, engaging, and carefully researched book will be of interest not only to students of the Court but to anyone interested in the colonial and early statehood history of New York. The volume is an entry in the SUNY series in American constitutionalism under the editorship of Robert J. Spitzer.

Among those in the founding generation, Jay's contributions were surely impressive. He was a delegate to the first Continental Congress, the state's first chief judge of the Supreme Court of Judicature, president of the second Continental Congress, minister plenipotentiary to Spain, secretary of foreign affairs under the Articles of Confederation, and negotiator of the Treaty of Paris with Great Britain. Born a decade after Jay, John Marshall considered him a "gentleman" who "[f]rom the commencement of the revolution... has filled a large space in the public mind."[11] Marshall's statement reflected Washington's own estimate expressed to Jay himself in 1789 that he possessed the "talents, knowledge and integrity" necessary to head "that department which must be considered as the keystone of our political fabric."[12]

At the outset Dillon explains his objective for the book by diminishing a reader's possible expectations. He offers neither a full-scale biography nor a law book. Neither does he intend "to generally recount [sic] American history at the time when Jay was on the national stage" or "discuss any new discoveries about people, places, or things more than two centuries after the fact." Instead, he notes, his book "is primarily focused on the cases that were handled by the United Sates Supreme Court during the time that John Jay was our nation's first chief justice, and the manner in which those cases reflect the broader domestic, legal, and international issues that were facing our young country during the earliest years of its founding."[13] Yet to explore Jay's role as chief justice and the work of the Court inescapably entails a close look at Jay himself so "a biography of Jay is wrapped round his years at the court." Accordingly, Dillon incorporates detail of "Jay's life, upbringing, education, politics, loyalties, career advancement, national service, and an understanding of what proverbially 'made him tick.'"[14] So, notwithstanding the author's initial disclaimer of any attempt at grand biography, the reader is nonetheless treated to considerable biographical detail, even if on a less fulsome scale.

Details of Jay's life are particularly highlighted in the book's first two chapters: "Formative Days in Colonial New York" and "Passing the Rubicon: A Key Man in the Birth of a Nation." It is in chapter one that one learns of Jay's early years as an attorney just as chapter two follows with details of his part in the American Revolution.

Even before independence had been formally declared, Jay along with Gouverneur Morris and Philip Livingston were appointed by New York's provincial congress to what Dillon describes as a "secret intelligence committee" that was to ferret out enemies of American independence. By June 1776,[15] they had uncovered evidence of a plot to kill or capture George Washington. Their work led to the arrest of New York mayor David Matthews for plotting with others to bribe provincial soldiers and members of General Washington's guard to join the British. The major was then found guilty of "treasonous practices" and locked up in jail in Litchfield, Connecticut. From this episode, Dillon surmises that "Jay's role in helping to protect Washington from potential insurrection was the type of bonding activity that Washington likely long remembered."[16]

The second chapter also recounts his efforts, in helping to assure ratification of the Constitution in New York, a state that, along with Virginia, was deemed an essential component of a successful new federal union.

A brief account of that campaign reminds the reader that Jay joined with James Madison and Alexander Hamilton in writing, under the pseudonym Publius, the 85 essays that became known as **The Federalist Papers**, a collection which, with great understatement Washington predicted would "merit the notice of posterity."[17] While the bulk of the essays were written by Madison and Hamilton, Jay authored numbers 2, 3, 4, 5, and 64. Numbers 3, 4, and 5 revealingly drew upon Jay's experience as they addressed the value of a stronger central government in dealing with foreign powers. Similarly, number 64 focused on the Senate's role in ratifying treaties. Dillon explains that Jay contributed none between numbers 5 and 64 because of serious illness in the winter of 1787. Notably, the author makes note of Jay's substantial pamphlet entitled "An Address to the People of New York" that was published in the spring of 1788 prior to the state's ratifying convention in Poughkeepsie in June. Unlike the **Federalist** essays, this piece of ratification literature is too often overlooked.[18]

Other biographical details are found in two key components of the book: illustrations and "Jay's Days." The former consists of no fewer than 44 grayscale images of Jay, family members, and various associates along with buildings and other objects from different stages of Jay's life. Among them on page 59 is the familiar Supreme Court portrait of Jay by Gilbert Stuart, where Jay is dressed in regalia he had received when awarded an honorary degree by Harvard College in 1790. (The same portrait appears in color as the front cover of the book.) One of the "Jay's Days" appears like a postscript at the end of each chapter. These add further information about an event, individual, or situation described in the chapter.

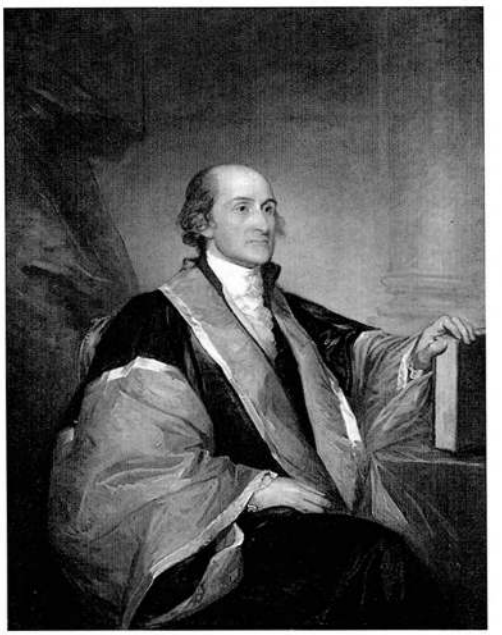
What is missing, but would have been a helpful and very easy addition is a chart depicting the structure of the judicial system in colonial and early statehood New York. Similarly, discussion in chapter three of the federal court system established by the Judiciary Act of 1789 would have been aided by a chart especially highlighting the circuit system. [Moreover, one questions the editorial decision to substitute "US" in place of "United States" or "U.S." throughout. Perhaps the publisher's rationale was mere convenience in that surely little page space or ink was actually saved. When it appears, the stark upper case "US" nearly jumps from the page, reminding one of the brand seared onto the backsides of Army mules during the early years of the Republic.]

The hardships and other deficiencies associated with the duties assigned to the first justices doubtless made it easy for Jay to make two significant career decisions: first to trade the chief justiceship for the governorship of the New York and then five years later to decline President John Adams's offer of reappointment as head of the Court upon Chief Justice Oliver Ellsworth's resignation in 1800. Indeed, after Adams informed Jay of nomination to his "old station" in a letter dated December 19, 1800, a day after the Senate had confirmed him, Jay wrote the president on January 2, 1801, that he had "left the Bench perfectly convinced that under a system so defective, it would not obtain the energy, weight and dignity which are essential to its affording due support to the National Government, nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess."[19]

Substantively Dillon's writing is enhanced by paragraph-length summaries, typically placed at or near the end of chapters. For example, as chapter two concludes Dillon refers to a pattern of public service that was taking shape in Jay's life that helps to account for the subtitle Dillon chose for his book: "John Jay and the Struggle of a New Nation."

> He was needed to undertake intelligence operations in furtherance of revolutionary activities in New York, and he did so. He was needed to write New York's constitution and

> sis so. He was needed by Governor [George] Clinton to attend the Second Continental Congress, and did so. After several months as president of the Congress, he was needed to represent the American states to Spain, a potentially key ally, and did so. After the British defeat at Yorktown, Jay was needed to help negotiate a formal peace treaty in Paris, and did so. Jay did not seek, but accepted, his designation by Congress as the American secretary for foreign affairs. When the nation needed to be rallied in favor of a new federal constitution, Jay contributed essays… . He likewise stepped forward in the successful effort to obtain New York's ratification of the U.S. Constitution. Jay had established himself as a "key man" whenever, wherever, his state or nation required his legal, political or diplomatic competency, and in each instance, Jay rose to the occasion. The pattern would continue in later years as well.[20]



In Mark Dillon's new biography of John Jay, he concludes that if Jay had accepted John Adams' reappointment as chief justice the Supreme Court would have taken a much more cautious and reserved approach to judicial power than it did under John Marshall.

Seven of the book's fourteen chapters center on cases the Court decided while Jay was chief justice. Perhaps the most significant of these is the subject of chapter six—"Sovereign Immunity and an Impetus for the 11th Amendment: *Chisholm* v. *Georgia* (1793)." While the case[21] has always been part of the canon of American constitutional law, Dillon insists that it has been undeservedly obscured by *Marbury* v. *Madison*,[22] which is "the first case that is typically read by law students in their introductory course on constitutional law."[23] However, the close review of *Chisholm* that the author provides suggests that on any course syllabus, the case should rather *precede Marbury*. Such a shift is not because of chronology—*Chisholm* precedes *Marbury* by a decade—but because in *Chisholm*, as in *Marbury*, the Court engaged in constitutional interpretation, even though unlike *Marbury* no statute was invalidated. Moreover, while *Marbury* can be understood as a successful attempt to avoid a political confrontation, *Chisholm* must be seen as the first demonstration of how easily the business of deciding cases can leave the Court stranded in turbulent waters.

As Judge Dillon reminds the reader, *Chisholm* involved clarification of a money-laden ambiguity that had persisted since the close of the Philadelphia Convention. Among other provisions, Section 2 of Article III a provided that the "judicial Power shall extend to … Controversies … between a State and Citizens of another State…". Given that the state governments still owed vast amounts of money to various persons and entities as a result of the Revolutionary War, those especially concerned about the status (and solvency) of state governments under the new plan of government were wary of

any provision that would permit the new federal courts to entertain suits against a state without its permission. Against that backdrop prominent supporters of ratification such as James Madison and John Marshall jumped into action to insist that the provision anticipated only situations where states were *plaintiffs*, not where they were *defendants*. "To what purpose," queried Alexander Hamilton, "would it be to authorize suits against States for the debts they owe? How could such recoveries be enforced? It is evident that it could not be done without waging war on the contracting State"—a situation the future Treasury secretary labeled "unwarrantable."[24] While it is hardly remarkable that the Convention's handiwork became the supreme law of the land with some of its passages subject to different interpretations, it seems particularly remarkable that it became operational containing a passage where the competing interpretations were not only gaping and momentous but where those differences had been flagged so soon.

The circumstances which triggered *Chisholm v. Georgia* began on October 31, 1777, when the Executive Council of Georgia authorized state commissioners Thomas Stone and Edward Davies to purchase much-needed supplies from Robert Farquhar, a merchant in Charleston, South Carolina. For this merchandise, Stone and Davies agreed to pay Farquhar $169,613.33 in continental currency or in indigo at Carolina prices, if currency was not available. Farquhar, however, never received payment. His claims were still pending when he was hit by the boom of a pilot boat headed for Savannah. A short time after his death, Alexander Chisholm, a Charleston merchant, was qualified as Farquhar's executor and began to press for payment of Farquhar's claim. When Georgia refused to pay, the executor brought suit against the state in the U.S. Circuit Court for the District of Georgia. Alleging its sovereign and independent status under the federal Constitution, Georgia answered that it could not be made a party to any suit by a South Carolina citizen. Judges James Iredell and Nathaniel Pendleton upheld, for different reasons, Georgia's objections.

In 1792, Chisholm filed suit in the Supreme Court, but Georgia failed to respond. When Georgia persisted in its refusal, the case was postponed until February 4, 1793. Again no one for the state appeared, and the justices issued another invitation. Still without a response, Attorney General Edmund Randolph, in his private capacity, argued for Chisholm. A decision for Chisholm came down on February 19 with Chief Justice Jay and Justices Blair, Cushing, and Wilson in the majority, and Justice Iredell in dissent.[25] As was typical for the pre-Marshall Court, opinions were filed seriatim, and in this instance reflected the gravity of the litigation. "This is a case of uncommon magnitude...," insisted Justice Wilson. "The question to be determined... may, perhaps, be ultimately resolved into one no less radical than this: 'do the people of the United States form a Nation?'"[26] "For my own part," wrote the Chief Justice,

> I am convinced that the sense in which I understand and have explained the words 'controversies between States and citizens of another State' is the true sense. The extension of the judiciary power of the United States to such controversies appears to me to be wise, because it is honest and because it is useful. It is honest because it provides for doing justice without respect of persons, and, by securing individual citizens as well as States in their respective rights, performs the promise which every free government makes to every free citizen of equal justice and protection. It is useful because it is honest; because it leaves not even the most obscure and friendless citizen without means of obtaining justice from a neighbouring State... .[27]

In Charles Warren's account, the "decision fell upon the country with a profound shock." Given the assurances offered during debates over ratification, both "the bar and the public in general appeared entirely unprepared for the doctrine upheld by the Court."[28] Strong and swift negative reaction moved Congress to action. A House resolution calling for amendment of the Constitution was filed the day of the decision, followed the next day by a supportive Senate resolution. What became the Eleventh Amendment was proposed by Congress on March 4, 1794, and ratification was completed in eleven months.[29] Although the amendment reversed the Court's reading of the Constitution, one element of this case should not be overlooked: nearly a decade before Chief Justice Marshall's opinion in *Marbury*, the Court's interpretation of the Constitution was apparently equated with the document itself.

Dillon devotes the concluding fourteenth chapter ("History's Verdict") to an appraisal of Jay. The author agrees with other scholars that Jay falls outside the "exclusive first tier of the nation's founding fathers" but nonetheless has "a secure place" at the top of the second tier.[30] Moreover, the author highlights an important point about Jay as Court leader. While it is commonplace to refer to Chief Justice Marshall's ability to unify the Court, Dillon notes Jay's ability to be a Court leader by comparing the work of the Court before and after Jay went abroad on a diplomatic mission following the February 1795 Term. Prior to Jay's departure, many of the decisions were unanimous or decided with a single dissent. Afterwards, that changed. Thus, "without John Jay's presence... [the justices] were divided in ways never previously seen at the court."[31]

Jay's opportunity to return as Chief leads Dillon to pose an intriguing question: "Would American jurisprudence have developed differently if John Jay had accepted President Adams's reappointment as chief justice?" His conclusion is that Jay's refusal probably made a decisive difference because Jay's record "at the court reflected a cautious and reserved approach to judicial power, deferential and cooperative with the other branches of government when possible. The same cannot be said of Marshall."[32] Moreover, had Jay, who lived until 1829 become chief justice in 1801 Marshall most assuredly would never have reached the center chair, especially in light of the changed national political winds after 1800.

The Long Reach of the Sixties

President Washington's recess appointment of John Rutledge as Jay's successor led to the first rejection by the United States Senate of a Supreme Court nominee. While most nominees to the Court since then have been confirmed in routine, unremarkable proceedings, some 37 have fallen short. Of this number a few were highly contentious, as happened with Judge Robert Bork in 1987. In the post-Bork era, even some successful nominees have had to endure unfriendly and occasionally even tempestuous hearings. Exploration of the origins of the rough and tumble experiences of some nominees since the 1960s is the objective of **The Long Reach of the Sixties** by Laura Kalman, professor of history at the University of California, Santa Barbara. Her book will have strong appeal to anyone with an interest in the Court, Robert Kennedy, Lyndon Johnson and Abe Fortas, as well as Richard Nixon and the associates of each.[33] The cast of central characters also includes Chief Justice Earl Warren, some associate justices plus congressional leaders, such as Richard Russell, Mike Mansfield, and Everett Dirksen. Her wide reach accounts for the book's subtitle: "LBJ, Nixon, and the Making of the Modern Supreme Court." With such a sweep, careful readers will find themselves making frequent use of the comprehensive index.

Throughout this engaging and extensively researched, volume Kalman,

who is also a biographer of Justice Abe Fortas,[34] demonstrates a solid understanding of history, political science, and the Court. Prospective readers, however, should be forewarned: **The Long Reach** is a long book in more ways than one. Within the volume's total of 468 pages, there are 331 pages of regular text that contain the seven chapters and epilogue. This material is followed by 100 pages of notes. While those numbers alone are hardly exceptional, what is notable is that those at Oxford University Press directing production chose to use an unusually small font for the chapters and an even smaller font for the extensive and valuable notes. The result is of course not only a smaller page count but also a product where reading is surely more difficult for the visually challenged. Happily, there is a Kindle edition available and with it the magic of choosing a larger font.

While she points to some analysts who attribute recent confirmation battles to lingering bruises and score-settling from the Bork episode, Kalman looks much deeper into the past. In her view, presidents Lyndon Johnson and Richard Nixon—both perhaps prototypical figures from the turbulent sixties—"created a new kind of presidential politics around nominations to the Supreme Court."[35]

The Johnson presidency witnessed two successful Supreme Court nominations (Abe Fortas and Thurgood Marshall) and two failed ones (Abe Fortas and Homer Thornberry). [Johnson's friend Thornberry was the president's replacement choice had Justice Fortas been confirmed as chief justice.[36]] With Nixon the tally was four successful appointments (Warren Burger, Harry Blackmun, Lewis F. Powell, and William H. Rehnquist) and two failed nominations (Clement Haynsworth and Harrold Carswell) with hearings for the latter pair occurring between the Burger and Blackmun nominations. In Kalman's view, the "quest to enlist the court[37] in consolidating presidential power provoked clashes that have had lasting consequences for the court's political significance and the selection and confirmation of Supreme Court justices that still resonate today."[38] Thus, as presidents attempted to conscript the Court as a way of advancing their presidencies, members of the Senate in turn asserted themselves with the result that nominations became more controversial.

Accordingly, just "as we evaluate the impact of presidential nominees on the court," she writes, "we need to examine the prospective justices in the context of the presidency."[39] Thus, a thesis of **The Long Reach** appears to be that presidents not only help shape the Court but through their nominees help shape their presidencies. While Kalman's focus is on the Johnson and Nixon years, the thesis invites probing whether the same phenomenon or something similar to it has appeared at other stages of American political history. Yet any other stage of the nation's past would have lacked what Kalman sees as a key catalyst in different ways for both Johnson and Nixon: the Warren Court.

That pair of words encapsulates much more than sixteen years on the calendar between 1953 and 1969 when former California governor Earl Warren was chief justice. Rather, the words "Warren Court" remain synonymous with judicial revolution. His tenure was one of the most active and remarkable in American history. Hardly an aspect of life went untouched by landmark decisions on race discrimination, legislative districting, criminal justice, religious freedom, privacy, and free speech.

Because of decisions of the Warren Court, neither Johnson nor Nixon could be indifferent to choosing nominees. Each recognized the difference a new justice might make on some part of public policy that was tied to presidential goals. For Johnson, the Court had to be enlisted in service of his Great Society. With Nixon, the Warren Court became his "quarry."[40] Not only did he use the Court to win election in 1968, but he then employed it to "unify, shape and

broaden the modern Republican Party." With expansive visions of the political chessboard and potential chess pieces, "LBJ and Nixon modeled for their successors how the president should and should not factor the court into the politics of the presidency."[41]

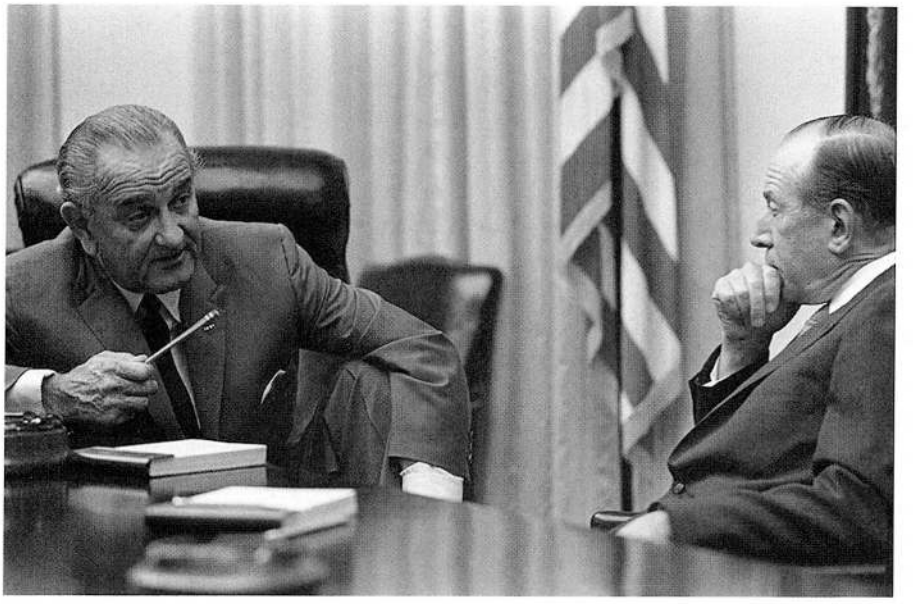
Accordingly, the story Kalman tells is a broad one, "placing the ideological contest over the court within the context of the struggle between the executive, judicial, and legislative branches of government, as well as interest group mobilization. The fights that followed fixed the image of the Warren Court as 'activist' and 'liberal' in one of the arenas where that image matters most, the contemporary Supreme Court appointments process."[42]

Given that nearly six decades have passed since the Johnson presidency, some readers may have forgotten that LBJ, unlike almost all of his predecessors, did not wait for vacancies to materialize at the Court. Rather he engineered them—two in fact. Wanting what Kalman characterizes as a "spy" at the High Court as well as someone to maintain the tradition of the "Jewish seat,"[43] Johnson in a game of what the author terms "musical chairs"[44] enticed Kennedy appointee Arthur Goldberg off the Bench and dispatched him to the United Nations. The empty seat enabled the president to turn to long-time friend, adviser, and helper Abe Fortas who, according to the author, "was one of the very few people who could reach the president by telephone just about anytime he wished."[45] Moreover, her book provides ample evidence that Johnson was hardly reticent about telephoning Fortas at any hour, not only before but after he went on the Court.

For his second appointment, LBJ created the "black seat"[46] by appointing Thurgood Marshall (solicitor general, former appeals court judge, and long-time civil rights attorney) to the seat vacated by Justice Tom Clark, an appointee of President Harry Truman in 1949. In a complex "throw daddy from the bench"[47] maneuver,[48] Clark was made to feel obliged to step down so that Johnson could place Clark's son Ramsey at the head of the Department of Justice. For Kalman, LBJ's moves were historic: no "president had so meddled with the court since Roosevelt tried to increase its size and pack it with liberal justices in 1937."[49]

Details of such goings-on—and more—by Johnson and also by Nixon abound in Kalman's book principally because of the skill with which she mined specific resources. To be sure, she routinely draws from the expected scholarly and journalistic sources and the "notorious Nixon recordings,"[50] but also from unexpected ones as well. The latter included some 640 hours of what she describes as President Johnson's most important telephone conversations. These were recorded in secret, although Kalman does not describe the mechanism for setting the recording device in motion—that is, whether it was voice activated or activated on a when-desired basis by Johnson. One supposes it was done by some variation of the latter, since the former would literally have recorded all calls, up to the capacity of the device and would have included even calls that Johnson did not wish to be recorded. Initially, the Johnson materials were not to be opened for study until 2023, some six years after **The Long Reach** actually appeared in print. However, through a fortuitous series of events and combination of circumstances that the author shares in her Preface, she was able to begin study and quarrying of the Johnson recordings in about 2008.

Access especially to the telephone conversations was central to her examination of the Johnson presidency because of LBJ's heavy daily reliance on the telephone for presidential business. Although Kalman explains that Johnson loathed wiretapping, he preferred having the recordings in place of a stenographer's notes "to ensure that promises made were kept."[51] For several reasons, she also believes that the recordings provide accurate insights into the president at work.



A key thesis in Laura Kalman's book, *The Long Reach of the Sixties*, is that presidents not only help shape the Court but through their nominees help shape their presidencies. Above is Lyndon B. Johnson and Associate Justice Abe Fortas, whom he appointed in 1965 but then failed to get elevated to chief justice three years later.

First, given his efforts in public to appear properly presidential, a different image surfaces from the recordings where he comes across as "earthily persuasive, mercurial, sometimes manic, often paranoid."[52]

Second, and related to the first, the conversations reveal a substantially different man from his letters and memoranda, which he rarely drafted himself. Third, "given the frequent outrageousness of LBJ's behavior on the tapes and the many instances on which he spoke of keeping them [the conversations] away from researchers, there seemed little possibility that the president crafted the performances to impress those who would write about him later."[53] Besides there are ample examples in what amount to on-the-record statements that conform to the style of speaking that one hears on the recordings. As he once emphasized about the necessity of loyalists in key positions, there "are two jobs in this man's government that you want only your mother to fill—and even her not on every day: Commissioner of Internal Revenue and Attorney General."[54]

The sheer volume of electronic and manuscript sources led Kalman to a significant point about increased Court consciousness by presidents in the 1960s and 1970s. "The vast quantity of documents related to the Supreme Court at the presidential libraries of Johnson and his successors, as compared to the Eisenhower and Kennedy Libraries, also suggested that as the court became more politicized in the mid-1960s, presidents became more conscious of its significance in American life and to their own survival. In this respect too, the archives testified to the long shadow cast by the 1960s and the Warren Court over the contemporary Supreme Court, history and memory."[55]

LBJ's remarkable and unexpected announcement in March 1968 that he would not seek reelection made the president a lame duck, but Chief Justice Warren's announcement on June 26 of his intention to retire opened up a rare opportunity. Not only would LBJ be able to fill the center chair but he would be doing so in an election year when the prospects for a Democratic presidential

victory had become dim. Indeed, as summer unfolded, it seemed that the situation had been almost scripted. Warren's retirement announcement had been followed the next day by announcement of the nomination of Fortas to take his place.

One of the strengths of **The Long Reach** is the light it sheds on a major non-event from this last year of the Johnson presidency: LBJ's failure to name someone for chief justice after a filibuster in the Senate led Fortas to withdraw his name from consideration.[56] Kalman's account, however, shows that what to outsiders seemed inaction at the White House following the Fortas debacle actually masked a multitude of efforts behind the scenes by Johnson and others that *something must be done.*

Doing nothing seemed not an option because Chief Justice Warren had already made it clear in a published interview with journalist Fred Graham of the *New York Times* that he would not rescind his decision to retire were the Senate not to confirm Fortas.[57] Thus, a series of options swirled through Johnson's mind and across his telephone line. One was to nominate former Justice Tom Clark. Another was to name Senator John Pastore, a liberal Republican from Rhode Island. Timing was an issue as well since Congress would be adjourning for the November elections. While a recess nomination was a possibility, Johnson had been on record as Senate majority leader in opposing them. The president could also call for a special session after the elections, or even wait until the new Congress convened in January.

Meanwhile, former Justice Goldberg made sure Johnson knew he would accept the nomination at either of those times. However, after a meeting with Goldberg, Johnson remained unpersuaded that the former justice was confirmable. He complained to Senator Mike Mansfield that Goldberg "just talks *all* the time. He wants to be Chief Justice of the Supreme Court and says you've got to be for him, and Dirksen's got to be for him, and everybody up there is going to be for him if I just got guts to name him."[58] Surely, for anyone privy to these machinations and calculations, there was something both comic and tragic in Johnson's latter-day consideration of two former justices whom he had nudged off the Bench.

Nonetheless, even though Johnson knew that Fortas considered Goldberg "a helluva operator,"[59] Richard Nixon was an operator too and was hardly idle. After the November elections, he sent word to Johnson that he would welcome the nomination of former New York governor Thomas Dewey who ironically had been urged on President Eisenhower for chief justice following Fred Vinson's death in 1953.[60] Nixon's enthusiasm for Dewey, however, did not extend to William Rogers who would become Nixon's first secretary of state.

Meanwhile, at this point Kalman reports that Goldberg became a more appealing choice either at a special session or later for the new Congress. Nixon, however, moved again, telephoning Warren on December 4 to ask that the Chief Justice swear him in at the inauguration and also that he remain on the Court through the end of the term. Caught by surprise, explains Kalman, Warren acquiesced to both requests. "'I tried to get hold of Abe right away and tell him', the embarrassed chief justice explained to LBJ, 'but he had gone to Puerto Rico'."[61] Nixon then effectively blocked any Goldberg nomination by publicly announcing that Warren had agreed to stay. January 1969 thus witnessed what some had thought unthinkable: a president from one party had left a nomination for the center chair to his successor from the other.

Concluding her account of this impactful drama Kalman suggests that the riddle of the Fortas defeat "was that the protean causation stew could signify anything its interpreters wished."[62] Nonetheless, in terms of the episode's impact on Supreme Court

confirmation politics she draws attention to Alexander Bickel's comment to a reporter in 1968 that "20 years from now the Fortas controversy may seem a precursor of what was in the offing."[63] Such a twenty-year leap from 1968 places one squarely in the backwash of Judge Bork's defeat.

The Rule of Five

In contrast to Kalman's analysis of a multitude of significant political events across two decades, Richard J. Lazarus, professor at Harvard Law School, has written **The Rule of Five**,[64] a tightly focused account of *Massachusetts* v. *Environmental Protection Agency*,[65] that the Court decided in 2007. Some readers of this *Journal* will recognize the title of the book as coming from a question Justice William J. Brennan reportedly would ask his new clerks each Term: "What is the most important rule of constitutional law?"[66] As various answers were put forward, Brennan would shake his head for each and then inform them that the most important rule for them to keep in mind during their year of work for him was the "rule of five." It took five votes from the Justices to secure a majority for an opinion of the Court. That rule of course applied not only to constitutional cases but to statutory matters as well.

For at least the past several decades, the case study has been a valuable part of the literature on the Supreme Court, and more broadly on the judicial process.[67] By probing and depicting the details of litigation from inception through decision (and often beyond), one is able to learn much about how judges and courts operate as well as the intricacies of a particular legal issue. The point is not that a particular case study demonstrates how judges and courts function in every instance. Rather, from the illumination offered by a series such studies, one may be able to make generalizations and draw conclusions about how the process ordinarily or typically unfolds, and about how judges and other actors in the process conduct themselves.

In virtually every respect, Lazarus' book ranks among the very best studies of Supreme Court decisions. In this lofty category, one thinks especially of **Gideon's Trumpet** (1964) by Anthony Lewis that has introduced thousands of students to the Supreme Court and constitutional law by way of an account of the impactful ruling in *Gideon v. Wainwright*.[68] Recently, Steven Luxenberg's **Separate** (2019) brought to life the Fuller Court's also impactful, if tragic, decision in *Plessy v. Ferguson*.[69] Without doubt, Lazarus has successfully provided in a single volume both the instructor's dream assignment for the classroom and an engaging poolside companion for the casual reader. Indeed, for this author, **The Rule of Five** has only a pair of minor defects: The absence of a timeline or chronology (which would be a major assist as a reader follows the unfolding of a truly exciting story)—and a bibliography separate from the sources cited in the 43 pages of notes.

According to Lazarus, *Massachusetts* remains "the most important environmental law case ever decided by the Court. The stakes were enormous. At issue was the legal authority and responsibility of the United States government to address the most pressing global environmental problem of our time—climate change."[70] Hence, the author's subtitle: "Making Climate History at the Supreme Court."

The story began when Joe Mendelson, a young public interest attorney working for the International Center for Technology Assessment—"a big name for a tiny, shoestring environmental organization no one had ever heard of"[71]—filed a petition with the Environmental Protection Agency (EPA) in October 1999. The objective was to nudge the EPA to use what Mendelson, the ICTA, and eventually Massachusetts and many other interested parties believed to be the agency's existing authority under the

Clean Air Act "to address climate change by regulating greenhouse gas emissions from new motor vehicles."[72]

When the EPA failed to act, legal action began in the U.S. Court of Appeals for the District of Columbia Circuit with three questions at issue: standing, the applicability of the Clean Air Act in this situation and the agency's discretion not to act. While that court's ruling 3–2 in favor of the EPA understandably disappointed Mendelson, it proved to be a boon for the reader in that it allowed Lazarus to explore decision-making procedures in the nation's second most important court. The appeals court ruling, however, prompted a vigorous debate among various individuals and groups as to the wisdom of an appeal, given the possible long-term consequences were the environmentalists not to prevail in the Supreme Court.

Nonetheless, a successful petition for certiorari led to a decision 5–4 for Massachusetts by a Bench, four of whose members (Chief Justice Roberts, and Justices Ginsburg, Scalia, and Thomas) had once sat on the same court of appeals. John Paul Stevens, as senior member of the majority, assigned the writing of the opinion of the Court to himself. Not only did the state have standing and the statute encompass regulation of the emissions in question but the agency was unjustified in delaying action on the basis of policy considerations.

The author's fast-moving account does not overlook the human element. The reader witnesses successes and failures and senses the accompanying thrills, apprehensions, joys and pains. Neither does the book obscure the displays of pride, arrogance, and conceit among the participants, nor does it suppress accounts of friendships formed, friendships strengthened, and friendships destroyed. These accounts appear all the livelier and even up close to the reader because the author inserts at appropriate points biographical profiles on nearly every important participant in the litigation, from start to finish.

Significantly, **The Rule of Five** is enhanced by its sources. They help to transform what otherwise might have been merely an attention-grabbing journalistic account of an important case into an important piece of scholarship. Aside from citations to the expected broadcast news reports, journal and newspaper articles, legal briefs, judicial opinions, and other court documents are citations to dozens of emails and interviews. Among the interviews, at least one of which was with Justice Stevens, the author explains that some were on the record, some were "on background" and a few were off the record. Additionally, Lazarus makes clear that no one from a justice's chambers was interviewed without permission from the particular justice.[73] Some notes plainly indicate information from an unnamed clerk or Court employee.

However, this book— written with the skill of a novelist—carries a risk for the reader: reading quickly. But to read this book quickly would be a mistake. A slow pace is advised given not only the complexity of the case and the many twists and turns of the narrative but also because of insights and glimpses of the persons, process, and places that seem to appear almost sporadically throughout the book's twenty numbered chapters. With a quick read much of value may be overlooked. For example, in chapter fourteen ("Seventy-Four Inches"),[74] which focuses on oral argument of the case at the Supreme Court, the author shares observations on the Building itself. "With no formal power to enforce its rulings, the Court must cultivate power through its prestige."[75] For this reason, Chief Justice Taft's "makeover of the Court building ...was designed in part to make everyone, including the Justices themselves, appreciate the importance of the Court's work." Taft's insistence on a unique home for the Court was in response to a dilemma. "How could a coequal branch of government be taken seriously if it was conducting its work in another branch's building

and if, when space got tight, the Justices were literally under the feet of the members of the other branch?"[76]

It is in the same chapter that one finds a revealing snippet on oral argument itself—drawn from Lazarus's personal experiences[77]—during which advocates may find that the bench's "friendly embrace" may "become suffocating." The justices are so close to the lectern that, given the limitations of peripheral vision, the advocate is unable to see all nine justices at the same time, so instead must turn from side to side to see the entire bench. Moreover, given the room's acoustics, one hears a question only through the "speakers high above the bench." As a result, counsel often has difficulty knowing which justice has asked a question. "Seasoned advocates, aware of the problem, prepare by memorizing the voices of the justice ahead of time. More experienced advocates also know to scan the bench for the subtle physical sign that a justice is about to ask a question: each one must lean forward ever so slightly to push the button on the microphone in front of them."[78] Such glimpses suggest that it will fall to another book to provide descriptions of the ways in which Covid-19 has changed the internal workings of the Court.

As he concludes the Epilogue, Lazarus points to the *Massachusetts* story as a reminder that "sometimes one committed person can make all the difference."[79] While the author presumably had Joe Mendelson in mind, a reader might add that the outcome of this case turned on the work of many committed people.

The Rise and Fall of Morris Ernst

The adjective "committed" is one word to describe the subject of an extensively researched and splendidly written biography by Samantha Barbas, professor of law at University at Buffalo School of Law: **The Rise and Fall of Morris Ernst**.[80] After finishing her book, most readers will probably agree with her that a "biography of Ernst is long overdue." They may also understand her observation that "writing his life has been no easy feat." That statement makes sense when one learns that his personal papers included 590 boxes of material, 21 books, and hundreds of articles and other writings "on topics ranging from the Supreme Court to obscenity to extrasensory perception."[81] Moreover, adding to her challenge was the fact that his correspondence is scattered across the collections of many individuals as well as the files of organizations such as the American Civil Liberties Union (ACLU). These challenges for the biographer in turn yielded huge amounts of information for the reader. However, given the quantity of material her book contains, the addition of a timeline or chronology, as suggested for Lazarus's case study, would also have been useful for this book as the reader follows her staging of an event-filled and consequential life. Also helpful would have been a bibliography separate from the sources cited in the 53 pages of notes.

The fact that Barbas was working with paper files (in typed, printed, or handwritten form) itself prompts a question as to challenges that will certainly face scholars a generation or two hence who might be examining prominent individuals of the early twenty-first century where so much of one's communications are in digital format. Aside from situations where preservation is prescribed by law or an organization's rules, one wonders how much of today's communications will be easily accessible by scholars.

Born into a German Jewish family in Uniontown, Alabama in 1888, Morris Ernst had a legal career based almost entirely in New York City where he died in 1976. In addition to a broad practice, he was general counsel for the ACLU from 1929 until 1954 during which he directed that organization's litigation endeavors, particularly those against censorship and other restraints on free speech. Cases that he argued before the Supreme Court include *Hague v. Congress*

of Industrial Organizations[82] (CIO) that remains a landmark ruling on freedom of assembly.[83] A frequent visitor to the White House of Franklin D. Roosevelt, Ernst was even advanced by some to fill the seat on the Supreme Court that went instead to Robert H. Jackson in 1941.[84] Much later he was active against Connecticut's birth control statute and, with Harriet Pilpel filed an amicus brief in *Poe v. Ullman*,[85] the precursor to *Griswold v. Connecticut*.[86]

Such accomplishments, however, were preceded by an unusual career path. Upon finishing Williams College in 1909, Ernst found that a degree in English opened few doors for upscale jobs in New York City and found himself instead in unexpected enterprises. "Thus it was that the future high-profile lawyer and civil liberties champion had an inauspicious start to his career—first managing a shirt factory and later selling cheap dining room sets in a Brooklyn furniture store."[87] It was during this time that he also attended evening classes at New York Law School, receiving the LL.B. degree in 1912.

Ernst's "rise" can be dated from his successful courtroom defense of James Joyce's **Ulysses** before Judge John M. Woolsey in the U.S. District Court for the Southern District of New York, after the U.S. attorney had deemed 260 passages in the book obscene.[88] Ernst—who had arranged with Random House president Bennett Cerf that his retainer would be augmented with five per cent of the royalties—effectively initiated publicity-generating legal action against the book by insisting that customs officials send the book to the U.S. attorney for "forfeiture, confiscation, and destruction" in accordance with the Tariff Act of 1930.[89] On appeal, Ernst prevailed again with a 3–2 decision in the Court of Appeals for the Second Circuit before Judges Augustus and Learned Hand and Martin Manton.[90] Solicitor General James Biggs declined to seek review in the Supreme Court.

Ernst's "fall" began in the 1940s when he "became consumed by a new cause: fighting Communism,"[91] especially within organizations to which he belonged. This effort in turn estranged him from much of the non-Communist American Left which did not perceive the dangers that troubled Ernst. An insecure man, he was given to celebrity worship.[92] Thus, just as he was captivated by Louis D. Brandeis, Felix Frankfurter and FDR, he was "duped"[93] by J. Edgar Hoover, director of the Federal Bureau of investigation. Thereafter, according to information made available only a year following his death,[94] Ernst became a promoter and defender of the FBI, serving as an informal public relations agent by deflecting criticism of the bureau with respect to violations of civil liberties. Presumably, it was this part of Ernst's life that provided Barbas with the subtitle for her book: "Free Speech Renegade."[95]

Nonetheless, in an appraisal of Ernst, Barbas insists that he was "a lovable man with many virtues and no shortage of flaws. He was generous and patient but at the same time vindictive and thin-skinned. He was warm and generous, with many friends, yet he could betray his colleagues without the slightest pain of conscience."[96] Finding him a man of "many quirks and successes," she believes that "tenacity may have been his most remarkable gift."[97]

As scholars assess the American experiment in constitutional government a half century or even a full century hence, they will look back to books on the Supreme Court, its justices, and counsel like those surveyed here. Such works of scholarship not only depict but contribute to an essential and ongoing process.

Donald Grier Stephenson is Charles A. Dana Professor of Government, Emeritus, Franklin & Marshall College.

THE BOOKS SURVEYED IN THIS ARTICLE ARE LISTED ALPHABETICALLY BY AUTHOR BELOW

BARBAS, SAMANTHA. *The Rise and Fall of Morris Ernst: Free Speech Renegade.*

(Chicago: University of Chicago Press, 2021). Pp. 420. ISBN: 978-0-7006-226-65804-9 (cloth).

DILLON, MARK C. *The First Chief Justice: John Jay and the Struggle of a New Nation*. (Albany: State University of New York Press, 2022). Pp. xiii, 319. ISBN: 978-1-4384-8785-4, (cloth).

KALMAN, LAURA. *The Long Reach of the Sixties: LBJ, Nixon, and the Making of the Contemporary Supreme Court*. (New York: Oxford University Press, 2017). Pp. xv, 468. ISBN: 978-0-19-995822-1 (cloth).

LAZARUS, RICHARD, J. *The Rule of Five: Making Climate History at the Supreme Court*. Cambridge, MA: Harvard University Press, 2020). Pp. 358. ISBN: 978-0-674-23812-1 (cloth).

ENDNOTES

[1] Letter from Justice Stephen Breyer to President Joeseph Biden, January 27, 2022. https://www.supremecourt.gov/publicinfo/press/Letter_to_President_January-27-2022.pdf, last accessed on March 30, 2022.Word of the impending retirement had leaked to several news outlets the day before.

[2] Garrison Nelson, with Clark H. Bensen. Comps., **Committees in the U. S. Congress, 1947-1992: Committee Jurisdictions and Member Rosters** (Washington: CQ Press, 1993), p. 182.

[3] On June 29, Justice Breyer notified President Biden that his retirement would officially begin at noon on June 30. See 2022-06-29_SGB_Letter.pdf (supremecourt.gov), last accessed June 29, 2022.

[4] Even the failed nominations of recent decades overwhelmingly involved sitting federal appeals judges. Among the eight (if one includes Judge Douglas Ginsburg) failed nominees since 1930, Harriet Miers, whom George W. Bush first nominated when Justice O'Connor retired, remains the only non-judge in that group.

[5] 347 U. S. 483 (1954).

[6] In a ceremony shortly after noon, Chief Justice Roberts administered the constitutional oath and Justice Breyer the judicial oath to Judge Jackson, as she became not only the 104th Associate Justice and the 116th Justice but also the first African-American woman to be a justice.

[7] On the question of timing, see "Authority of the President to Prospectively Appoint a Supreme Court Justice," Memorandum Opinion from Office of Legal Counsel for the Counsel to the President, April 6, 2022. https://www.justice.gov/olc/file/1494816, last accessed May 1, 2022.

[8] The figure for Roosevelt includes his elevation of Justice Harlan Fiske Stone to the chief justiceship; the figure for Washington includes John Rutledge twice, first as Associate Justice and later as Chief Justice. Although the latter nomination failed to achieve Senate approval, Rutledge is usually counted among the chief justices since he sat for a Term of Court with a recess appointment.

[9] Charles Warren, **The Supreme Court in United States History** rev. ed. (Boston: Little, Brown, and Co., 1926), vol. 1, 33.

[10] Mark C. Dillon, **The First Chief Justice** (2022), hereafter Dillon.

[11] John Marshall, **The Life of George Washington**, vol. 2 (2d ed., 1848), 169.

[12] Warren, **The Supreme Court in United States History**, vol. I, 36.

[13] Dillon, xi-xii.

[14] *Ibid.*

[15] Dillon notes that the provincial congress declared New York independent from Great Britain on July 9, 1776. *Id.*, 31.

[16] *Id.*, 29.

[17] *Id.*, 48.

[18] See https://oll.libertyfund.org/page/1787-jay-address-to-the-people-of-n-y-pamphlet, last accessed on April 12, 2022. This link is to the Online Library of Liberty.

[19] Warren, **The Supreme Court in United States History**, vol. 1, 773.

[20] Dillon, 49.

[21] 2 U. S. (2 Dallas) 419) (1793).

[22] 5 U. S. (1 Cranch137 (1803).

[23] Dillon, 113.

[24] *The Federalist*, No. 81.

[25] The case was decided with five, not six, justices due to Justice Thomas Johnson's resignation on January 16, 1793. Justice William Paterson, his replacement, did not join the Court until March.

[26] 2 U. S. at 453.

[27] 2 U. S. at 479.

[28] Warren, **The Supreme Court in United States History**, vol. 1, p96.

[29] "America's Founding Documents," https://www.archives.gov/founding-docs/amendments-11-27, last accessed May 18, 2022.

[30] Dillon, 251–252.

[31] *Ibid.*, 234.

[32] *Id.*, 244.

[33] Laura Kalman, **The Long Reach of the Sixties** (2017), hereafter Kalman.

[34] Laura Kalman, **Abe Fortas: A Biography** (New Haven: Yale University Press, 1990).

[35] Kalman, x.

[36] Thanks to an appointment by Johnson in 1965, Thornberry was a judge on the Court of Appeals for the Fifth Circuit. According to the author, Johnson was even closer to Thornberry than to Fortas. Kalman, 129.

[37] The author's preference in most instances is to use a lower case "c" rather than an upper case "C" when referring indirectly to the Supreme Court. However, with references to "Supreme Court," the beginning letters are capitalized.

[38] *Ibid.*, x.

[39] *Id.*

[40] *Id.*, xi.

[41] *Id.*, x–xi.

[42] *Id.*, xi.

[43] *Id.*, x.

[44] *Id.*, 33.

[45] *Id.*, 173.

[46] *Id.*, x.

[47] *Id.*, 87.

[48] See *id.*, 85–123.

[49] *Id.*, 33.

[50] *Id.*, xiv

[51] *Id.*, xii.

[52] *Id.*, xiii.

[53] *Id.*, xiii–xiv.

[54] *Id.*, 10.

[55] *Id.*, xiv.

[56] The occasion marked the first time a nomination for the Court had failed because of a filibuster.

[57] *Id.*, 171.

[58] *Id.*, 175, emphasis in the original.

[59] *Id.*, 176.

[60] James F. Simon, **Eisenhower vs. Warren** (New York, NY: Liveright, 2018), 140.

[61] **Kalman**, 176

[62] *Id.*, 178.

[63] *Id.*

[64] Richard J. Lazarus, **The Rule of Five** (2020), hereafter Lazarus.

[65] 549 U. S. 497 (2007).

[66] Lazarus, 181.

[67] For example, see Clement E. Vose, **Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases** (Berkeley, CA: University of California Press, 1959), and C. Herman Pritchett and Alan F. Westin, **The Third Branch of Government: 8 Cases in Constitutional Politics** (San Diego, CA: Harcourt, Brace & World, 1963).

[68] 372. U. S. 335 (1963).

[69] 163 U. S. 537 (1896).

[70] Lazarus, 1.

[71] *Id.*, 3.

[72] *Id.*, 19.

[73] *Id.*, 295.

[74] The number refers to the distance between the lectern and the bench in the Courtroom.

[75] *Id.*, 169.

[76] *Id.*, 169–170.

[77] *Id.*, 296.

[78] *Id.*, 180–181.

[79] *Id.*, 293.

[80] Samantha Barbas, **The Rise and Fall of Morris Ernst** (2021), hereafter Barbas. (Dating from 1887, the Buffalo institution where Professor Barbas teaches is the only law school in the State University of New York system.)

[81] Barbas, 5.

[82] 307 U. S. 496 (1939).

[83] Barbas notes at page 246 that despite winning the case with his co-counsel, the argument "was less than stellar" due in part to the bad manners of Justice James McReynolds, who expressed his "disgust by turning around in his chair and presenting his back to counsel the whole time."

[84] *Ibid.*, 272.

[85] 367 U. S. 497 (1961).

[86] 381 U. S. 479 (1965).

[87] Barbas, 26.

[88] *U. S. v. One Book Called "Ulysses,"* 5 F. Supp. 182 (S.D.N.Y.1933).

[89] Barbas, 158. Arranging for an American publisher to print the book was complex, as Barbas describes at pages 152–158.

[90] *United States v. One Book Entitled "Ulysses,"* 72 F.2d 705 (2d Cir. 1934).

[91] Barbas., 4.

[92] *Id.*, 269.

[93] *Id.*, 4.

[94] Barbas explains that the ACLU obtained the Ernst-Hoover correspondence through a request under the Freedom of information Act. Some members of the ACLU then damned Ernst as a "spy." *Id.*

[95] Perhaps further evidence of Ernst's "fall" is that he rates neither an entry, nor apparently even a mention in John R. Vile, ed. **Great American Lawyers: An Encyclopedia**, 2 vols. (Santa Barbara, CA: ABC-CLIO, 2001).

[96] Barbas, 5.

[97] *Ibid.*, 354.

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